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THE
LAW OF CRIMES

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THE LAW OF CRIMES

BY

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PREFACE TO THE SEVENTEENTH EDITION

THIS edition has been thoroughly revised and the commentary on some of the sections has been re-cast in the light of fresh decisions. Nearly five hundred new cases have been incorporated in the comments. Owing to the force of circumstances—viz. tremendous rise in the cost of printing paper and high charges of printing—the price of this edition has been unavoidably increased.

All amendments to the Code have been noted, and case-law has been scrupulously brought down to date.

October, 1948.

R.R.
D.K.T.

EXTRACTS FROM THE PREFACE TO THE THIRD EDITION

THE commentary under each section is divided into three Parts: first comes Comment; secondly, Cases; and thirdly, matter pertaining to Practice.

AS to COMMENT.—The object of a section as foreshadowed in the Notes of the authors of the Code, or in the two Reports of the Indian Law Commissioners, or in the Proceedings of the Legislative Council, has been fully stated. Wherever the scope of a section has been the subject of judicial criticism it has been carefully explained. Wherever the meaning or principle of a section is elucidated in a judicial pronouncement excerpts from it have been given. Every judicial interpretation or construction of a word, phrase or clause, has been given, as much as possible, in the *ipsissima verba* of Judges. For facility of reference, the words, expressions and clauses commented upon are capped with figures in the text and are repeated in the Comment as sub-headings with corresponding numbers.

AS to CASES.—The cases bearing on each section have been arranged into cognate groups, each group illustrating some clause.

AS to PRACTICE.—This part is sub-divided into two main headings: first comes Evidence; and, secondly, Procedure.

Under Evidence all points necessary for the prosecution to prove, in order to bring a charge home to the accused, are categorically stated; and questions relating to onus, mode of proof, and admissibility or non-admissibility of evidence are discussed.

Under Procedure fall the contents of the second schedule of the Code of Criminal Procedure; questions concerning Jurisdiction, Sanction, and measure of Punishment; references to Criminal Circulars issued for the guidance of subordinate Judiciary and Magistracy by all the High Courts, Chief Court, and Judicial Commissioners' Courts; and, lastly, forms of Charges for various offences.

—:o:—

EXTRACT FROM THE PREFACE TO THE NINTH EDITION

All Indian decisions, whether reported in the official or non-official series of law reports, have been incorporated in this work. Mr. Justice West observed in the Full Bench case of *Empress v. Moorga Chetty* (5 Bom. 338, 362) that "the framers of the Indian Penal Code regarding the English System as 'artificial', 'complicated', 'framed without the slightest reference to India', and very 'defective' declined to make it more than any local system the groundwork of the Code. Cases decided in England, therefore, must be received in India with a careful allowance for the great difference of the law in the two countries". The authors have, therefore, considered it unsafe to burden the Comment with English precedents where the Code differs from the criminal law of England. Such a course, instead of lightening the labours of those who seek for a clear interpretation of the provisions of the Code, merely creates unavoidable pitfalls. English cases have been, however, copiously referred to where the English criminal law is on all fours with the Indian Penal Code.

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EXPLANATIONS OF ABBREVIATIONS.

A. C.	.. Appeal Cases, Law Reports, from 1891—
A. H. C. G. R. (Cr.)	.. Allahabad High Court General Rules (Criminal), 1911.
A. & E.	.. Adolphus and Ellis, 1834—1840 ; New Series, 1841—1852.
A. I. R.	.. All India Reporter, from 1914—
A. L. J. R.	.. Allahabad Law Journal Reports, from 1904—
A. W. N.	.. Allahabad Weekly Notes, 1881—1906.
Agra	.. Agra High Court Reports, 1866—1868.
Alison	.. Alison's Criminal Law of Scotland.
All.	.. Indian Law Reports, Allahabad Series, from 1876—
All E. R.	.. All England Reports from 1936—
Appx.	.. Appendix.
App. Cas.	.. Appeal Cases, Law Reports, 1875—1890.
Archbold	.. Archbold's Criminal Law (30th Edn., 1938).
Austin	.. Austin's Jurisprudence.
Bacon	.. Bacon's Abridgment of the Law.
B. & A.	.. Barnwell and Alderson, 1817—1822, K.B.
Bac. Abr.	.. Bacon's Abridgment of the Law.
Beav.	.. Beaven's Reports, 1838—1866, Rolls.
Beng. L. R.	.. Bengal Law Reports, 1868—1875.
Bing.	.. Bingham's Cases, 1834—1840, C. P.
Bishop	.. Bishop's Criminal Law.
Blackstone	.. Blackstone's Commentaries on the Laws of England.
Bom.	.. Indian Law Reports, Bombay Series, from 1876—
B. H. C.	.. Bombay High Court, Reports, 1862—1875.
Bom. Cr. C.	.. Bombay High Court, Criminal Cases, from 1911—
Bom. Cr. Circu.	.. Bombay High Court Criminal Circulars, 1931.
Bom. L. R.	.. Bombay Law Reporter, from 1899—
Boul.	.. Boulnois' Reports, 1862—1875, Calcutta.
B. C. M.	.. Burma Court Manual, 1933.
B. & C.	.. Barnwell and Creswell, 1122—1830, K. B.
B. & S.	.. Best and Smith, 1861—1869, Q. B.
Burma L. R.	.. Burma Law Reports, 1895—1908.
B. L. J.	.. Burma Law Journal, 1922—1925.
Burr.	.. Burrow's Reports, 1757—1771, K. B.
Cal.	.. Indian Law Reports, Calcutta Series, from 1876—
Cald.	.. Caldecott's Settlement Cases.
C. L. J.	.. Calcutta Law Journal, from 1905—
C. L. R.	.. Calcutta Law Reports, 1878—1888.
C. P. L. R.	.. Central Provinces Law Reports, 1882—1905.
C. W. N.	.. Calcutta Weekly Notes, from 1896—
Camp.	.. Campbell's Reports, 1808—1816, N. P.
C. H. C. R. & O.	.. Calcutta High Court Rules and Circular Orders, 1910.
C. B.	.. Common Bench Reports, 1845—1856, C. P.
C. P. Cr. C.	.. Criminal Circulars, issued by the Judicial Commissioner of the Central Provinces and Berar, 1920.
C. P. D.	.. Common Pleas Division, Law Reports, 1875—1890.
C. & K.	.. Carrington and Kirwan, 1843—1850, N. P.
Car. & M.	.. Carrington and Marshman, 1840—1842, N. P.
C. & M.	.. Crompton and Meeson, 1832—1834, Exch.
C. & P.	.. Carrington and Payne, 1823—1841, N. P.
Cl. & F.	.. Clark and Finnelly, 1831—1846, N. P.
Coke	.. Coke's Reports, 1752—1816.
Collet	.. Collet's Comments on the Indian Penal Code.
Cox	.. Cox's Criminal Cases, from 1843—
Cr. App. R.	.. Criminal Appeal Reports, from 1908—
Cr. C.	.. Criminal Cases, 1920—1936.
Cr. & J.	.. Crompton and Jervis, 1830—1832.
Cr. L. J.	.. Criminal Law Journal of India, from 1904—
Cranch	.. Cranch's Reports, Supreme Court of the United States, 1800— 1815.
Cr. R.	.. Criminal Rulings of the Bombay High Court, 1862—1910.
Crim. P. C.	.. Criminal Procedure Code, 1898.
Cro. Car.	.. Croke's Reports in the reign of Charles I.
Cro. Eliz.	.. Croke's Reports in the reign of Elizabeth.
D. & B.	.. Dearsley and Bell, 1856—1858, Crown Cases.
D. & P.	.. Dearsley and Pearce's Crown Cases.
Day E. C.	.. Day's Election Cases.

Dears.	.. Dearsley's Crown Cases, 1852—1856.
Den. Cr. C.	.. Denison's Crown Cases 1844.
Doug.	.. Douglas's Reports, 1778—1784, K. B.
East	.. East's Reports, 1801—1812, K. B.
East P. C.	.. East's Pleas of the Crown.
E. & B.	.. Ellis and Blackburn, 1853—1858, Q. B.
Esp.	.. Espinasse's Reports, 1793—1797, N. P.
Exch.	.. Law Reports, Exchequer Division, 1875—1890.
F. B.	.. Full Bench.
F. C. R.	.. Federal Court Reports, from 1939—
F. & F.	.. Foster and Finlayson, 1858—1867, N. P.
First Report	.. Law Commissioners' First Report.
Foster	.. Foster's Crown Law.
Gaz. of Ind.	.. Proceedings of the Supreme Legislative Council, <i>The Gazette of India</i> , Part VI.
Hagg.	.. Haggard's Reports.
Hale P. C.	.. Hale's Pleas of the Crown.
Hare	.. Hare's Reports, 1841—1853.
Hawk, P. C.	.. Hawkin's Pleas of the Crown.
Hay	.. Hay's Reports, 1862—1863, Calcutta.
H. & C.	.. Hurlstone and Coltman, 1862—1865, Exch.
H. L.	.. House of Lords.
Hob.	.. Hobbart's Reports.
Hyde	.. Hyde's Reports, 1863—1864, Calcutta.
I. A.	.. Indian Appeals, from 1873—
I. R.	.. Irish Reports, from 1901—
Ibid.	.. Same as above.
Ilbert	.. Ilbert's Government of India.
Ind. Jur. N. S.	.. Indian Jurist, New Series, 1866—1867, Calcutta.
Ind. Jur. O. S.	.. Indian Jurist, Old Series, 1862, Calcutta.
J. P.	.. Justice of the Peace, from 1836—
Jeremy Bentham	.. Bentham's Works, Vols. 1—11.
K. B.	.. Law Reports, King's Bench, from 1901—
Kar.	.. Indian Law Reports, Karachi Series, from 1940—
Keb.	.. Keble's Reports, 1661—1679, K. B.
Kel.	.. Sir John Kelyng's Reports, 1673—1706, K. B.
L. B. R.	.. Lower Burma Rulings, 1901—1922.
L. H. C. R. & O.	.. Lahore High Court Rules and Orders, 1929, 1942.
L. J. C. P.	.. Law Journal, Common Pleas, from 1822—
.. Ex.	.. " " Exchequer.
.. M. C.	.. " " Magistrate's Cases.
.. Mat.	.. " " Matrimonial Cases.
.. P. M. & A.	.. " " Probate, Matrimonial and Admiralty.
.. Q. B.	.. " " Queen's Bench.
L.L. J.	.. Lahore Law Journal, 1920—1930.
L. R. C. P.	.. Law Reports, Common Pleas, 1866—1875.
.. C. C. R.	.. " " Crown Cases Reserved.
.. Ex.	.. " " Exchequer.
.. H. L.	.. " " House of Lords.
.. I. A.	.. " " Indian Appeals.
.. P.	.. " " Probate.
.. Q. B.	.. " " Queen's Bench.
L. & C.	.. Leigh and Cave's Crown Cases, 1861—1865.
L. T.	.. Law Times, 1845—1858.
L. T. N. S.	.. Law Times, New Series, from 1859—
L. W.	.. Law Weekly, Madras, from 1914—
Lah.	.. Indian Law Reports, Lahore Series, from 1920—
Ld. Raym.	.. Lord Raymond's Reports, 1694—1734, K. B. and C. P.
Leach	.. Leach's Crown Cases, 1730-1788.
Lee Warner	.. Lee Warner's Native States of India.
Lewin	.. Lewin's Crown Cases, 1882—1883.
Livingstone	.. Livingstone's System of Penal Code for Louisiana.
Lof.	.. Lofft's Reports, 1772—1774, K. B.
Luck.	.. Indian Law Reports, Lucknow Series, from 1926—
Mad.	.. Indian Law Reports, Madras Series, from 1876—
Mad. Jur.	.. Madras Jurist.
M. H. C.	.. Madras High Court Reports, 1862—1875.
M. H. C. R. P.	.. Madras High Court Rules of Practice, 1912.
M. L. J.	.. Madras Law Journal Reports, from 1891—
M. W. N.	.. Madras Weekly Notes, from 1910—
Marsh.	.. Marshall, 1813—1816, C. P.
Marsh.	.. Marshall, 1862—1863, Calcutta.
Maxwell	.. Maxwell on the Interpretation of Statutes, 8th Edn. 1937.
Mayne	.. Mayne's Criminal Law of India.
M. Dig.	.. Morley's Digest, Calcutta.

- M. & M.
 Mood. Cr. C.
 M. I. A.
 M. & Mal.
 M. & R.
 M. & Sel.
 M. & W.
 Mod.
 N. A. C.
 N. A. R.
 N. L. J.
 N. L. R.
 Nag.
 Note
 N. W. P.
 O. C.
 O. C. D.
 O. C. R.
 O. D.
 O. S. C.
 O. M. & H.
 O. W. N.
 P. C.
 P. C. R. & O.
 P. J. L. B.
 P. L. C.

 P. L. J.
 P. L. R.
 P. L. T.
 P. R.
 P. W. N.
 Palm.
 Parl. Rep.
 Pat.
 Paterson
 Perry O. C.
 Phillimore
 Phillips
 Price
 Q. B.
 Q. B. D.
 Ran.
 Ran.
 Rep., 1st.

 Rep., 2nd

 R. J. P. J.
 Russ. & Ry.
 Rob.
 Roscoe
 Russell
 S. D. S. S. C.
 S. J. L. B.
 S. L. R.
 Salk.
 Second Report
 Stephen
 Stephen Dig. Cr. L.
 Step. Com.
 Stokes
 Str.
 St. Tr.
 Sup.
 Sw. & Tr.
 Sty.
 Taunt.
 T. L. R.
 T. R.
 Tupper.
 Ubi Sup.
 Unrep. Cr. C.
- .. Morgan and Macpherson's Indian Penal Code.
 .. Moody's Crown Cases Reserved, 1824—1844.
 .. Moore's Indian Appeals, 1836—1873, P. C.
 .. Moody and Malkin's Reports, 1827—1830.
 .. Moody and Robinson, 1831—1844, N. P.
 .. Maule and Selwyn, 1813—1817, K. B.
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 .. N. W. P. High Court Reports, 1862—1875.
 .. Oudh Cases, 1898—1926.
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 .. Oudh Criminal Rules.
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 .. Oudh Select Cases.
 .. O'Malley & Hardcastle's Election Cases.
 .. Oudh Weekly Notes, from 1924—
 .. Privy Council.
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 .. Punjab Record, 1862—1919.
 .. Patna Weekly Notes, from 1936—
 .. Palmer's Reports, 1619—1669, K. B.
 .. Parliamentary Reports.
 .. Indian Law Reports, Patna Series, from 1922—
 .. Paterson on the Liberty of the Subject.
 .. Perry's Oriental Cases, 1843—1845.
 .. Phillimore on the International Law.
 .. Phillip's Comparative Criminal Jurisprudence.
 .. Price's Reports, 1814—1824, Exch.
 .. Law Reports, Queen's Bench, from 1891—
 .. Queen's Bench Division, Law Reports, 1875—1890.
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 sioners, 1846.

 .. Second Report on the Penal Code by the Indian Law Commis-
 sioners, 1847.

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 III of 1901, s. 46, 423.
 —, s. 142, 574.
 —, s. 143, 574.
 —, s. 146, 574.
 —, s. 147, 414, 416.
 —, s. 193, 417.
 —, s. 234, 423.
 I of 1904, s. 25, 101.
 IV of 1910, s. 60(a) to (i), 1403.
 —, s. 63, 1403.
 IV of 1912, s. 33, 382.

Act (U. P.)—

- II of 1916, s. 84, 383.
 X of 1922, s. 89, 383.

The Punjab Legislature.

Act—

- XVII of 1887, s. 414.
 I of 1898, s. 23, 101.
 II of 1900, s. 19, 1403.
 II of 1903, s. 43(3), 382.
 I of 1914, s. 61(1), (a) (c), 1404.
 —, (2) (a) (b) (c), 1404.
 VI of 1918, s. 39, 489.
 VIII of 1929, 929.
 I of 1936, 408.
 VII of 1941, 657.
 XII of 1941, 614.

Burma Legislature.

Act—

- I of 1898, s. 25, 101.
 III of 1898, s. 142(o), 614.
 XIII of 1898, s. 1.
 —, s. 3 (b), 953.
 —, s. 4, 819.
 —, (3)(b), 762, 788, 828, 962,
 963, 966, 968, 974, 977, 980,
 1100, 1290.
 —, Sch. II, 762, 953, 955, 962,
 965, 968, 974, 977, 980,
 1100, 1290.
 I of 1899, 250.
 —, s. 10, 1404.
 —, s. 11, 139, 1404.
 —, s. 12, 139, 1404.
 —, s. 13, 1404.
 IV of 1899, 1393.
 —, s. 30, 1404.
 —, s. 31, 1404.
 —, s. 42, 1404.
 IV of 1902, s. 55(b), 1404.
 IV of 1907, s. 43D, 105.
 I of 1909, s. 15, 105.
 I of 1915, s. 11(3), 53.
 II of 1917, s. 9, 1404.
 —, s. 10, 1404.
 —, s. 13, 1404.
 —, s. 15, 1404.
 V of 1917, s. 21, 614.
 —, s. 30, 1404.
 —, s. 31, 1404.
 —, s. 32, 1404.
 —, s. 33, 1404.
 —, s. 34, 1404.
 —, s. 46, 133, 139.
 VIII of 1927, s. 3, 91, 816.
 III of 1930, s. 15, 87.
 —, s. 25(1), 890.
 III of 1936, 408.
 IV of 1940, s. 1, 971, 972.

Bihar and Orissa.

Act—

- XXXII of 1855, s. 10, 1404.
 —, s. 17, 1404.
 II of 1915, s. 47, 1404.
 —, s. 55, 1404.
 II of 1919, 629.

Central Provinces.

Act—

XVII of 1881, s. 137, 423.
 _____, s. 141, 423.
 IX of 1883, 49.
 XXIV of 1899, s. 19(2), 382.
 XI of 1898, 49.
 VI of 1908, 1084.
 I of 1914, s. 24, 101.
 II of 1915, s. 34 (a) to (h), 1404.
 _____, s. 36, 1404.
 II of 1917, s. 219, 458.
 II of 1919, 629.
 IX of 1928, 91.
 X of 1928, s. 26, 166, 757.
 _____, s. 29, 166.
 XIX of 1936, 408.

Assam.

Act—

II of 1915, s. 28, 101.
 I of 1920, 1393.
 IV of 1932, 629.
 III of 1934, 1365.
 _____, s. 2A, 1366.
 _____, s. 2B, 1366.
 _____, s. 30(1), 1366.
 _____, s. 30(2), 1369.

N. W. F. P.

Act—

X of 1837, 408.
 III of 1937, s. 2, 901.
 VIII of 1938, 408.
 III of 1941, s. 2, 878, 879, 880, 894.

R E P E A L S A N D A M E N D M E N T S .

S. 5 repealed in part by	Act XIV of 1870 (Schedule).
Ss. 34, 40, 56, 131, 194, 195, 222, 223 and 207 amended and ss. 121A, 124A, 225A, 294A, and 304A added by	Act XXVII of 1870, ss. 1-12.
S. 230 amended by	Act XIX of 1872, s. 1.
Ss. 178 and 181 amended by	Act X of 1873, s. 15.
<i>Illustration (a)</i> to s. 19 amended as to N. W. Provinces by	Act XII of 1881, s. 2.
Ss. 40, 64, 67, 71, 73, 214, 309, 335, 410, and 435, amended by	Act VIII of 1881, ss. 1-10.
<i>Illustrations</i> to s. 214 repealed by	Act X of 1882 (Schedule).
Ss. 40, 64, 75, 216, and 255A, amended and s. 225B added by	Act X of 1886, ss. 21-24.
S. 138A added by	Act XIV of 1887, s. 29.
Ss. 162 and 163 amended by	Act XVIII of 1887, s. 18.
S. 28 amended by	Act I of 1889, s. 9.
Ss. 478 and 489 amended by	Act IV of 1889, s. 3.
<i>Explanation 1</i> to s. 193 repealed in part by	Act XIII of 1889 (Schedule).
Ss. 194 and 195 amended by	Act IX of 1890, s. 149.
S. 375 amended by	Act X of 1891, s. 1.
Ss. 1, 2, 4, 15 and 410 repealed in part, and <i>Illustration (c)</i> to s. 307 amended by	Act XII of 1891 (Schedule).
Ss. 177, 203 and 212 amended and ss. 216A and 216B added by	Act III of 1894, ss. 5-8.
Ss. 182 and 294 amended and ss. 263A and 447A added by	Act III of 1895, ss. 1-4.
S. 230 amended by	Act VI of 1896, s. 1.
S. 4 substituted by	Act IV of 1898, s. 2.
S. 108A added by	Act IV of 1898, s. 3.
S. 124A substituted by	Act IV of 1898, s. 4.
S. 153A added by	Act IV of 1898, s. 5.
S. 505 inserted by	Act IV of 1898, s. 6.
Ss. 489A, 489B, 489C, 489D added by	Act XII of 1899, s. 2.
S. 75 substituted by	Act III of 1910, s. 2.
Chap. VA added by	Act VIII of 1913, s. 3.
Chap. IXA added by	Act XXXIX of 1920, s. 2.
Ss. 61 and 62 repealed by and ss. 121, 121A and 122 amended by	Act XVI of 1921, ss. 2, 3, 4.
S. 366 amended by and ss. 366A and 366B inserted by	Act XX of 1923, ss. 2, 3.
Ss. 372 and 373 amended by	Act V of 1924, s. 2.
Ss. 372 and 373 amended and <i>Explanations I and II</i> to s. 372 and s. 373 added by	Act XVIII of 1924, ss. 2, 3, 4.
Ss. 490 and 492 repealed by	Act III of 1925.
Ss. 292 and 293 substituted by	Act VIII of 1925, ss. 2, 3.
Ss. 375 and 376 amended by	Act XXXIX of 1925, ss. 2, 3, 4.
Ss. 5, 21, <i>Heading</i> to Chap. VII, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140 and 505 amended by	Act X of 1927.
S. 295A inserted by	Act XXV of 1927.
S. 40 amended by	Act VIII of 1930.
Ss. 131 and 139 amended by	Act XIV of 1932, (Schedule), and Act XXXV of 1934, s. 2 and Schedule.
S. 138A repealed by	Act XXXV of 1934, s. 2 and Schedule.
S. 5 amended by	Act XXXV of 1934, s. 2 and Schedule.
S. 505, cl. (a), amended by	Act XXXV of 1934, s. 2 and Schedule.
Ss. 1, 2, 3, 5, 14, 21, 54, 55, 75, 121A, 124, 124A, 141, 161, 162, 163, 271 and 294A amended by	Government of India (Adaptation of Indian Laws) Order, 1937.
Ss. 15, 16 and 18 omitted by	
S. 55A added by	Act XXII of 1939, s. 2.
S. 176 amended by	Act IV of 1940, s. 2.
S. 4 amended by	Act II of 1941, s. 12.
S. 478 substituted by	Act II of 1941, s. 13.
S. 480 amended by	Act VIII of 1942, ss. 2, 3.
S. 52A added by	Act VIII of 1942, s. 3.
S. 216B repealed by	Act VIII of 1942, s. 3.
S. 489E added by	Act VI of 1943, s. 2.

THE LAW OF CRIMES

THE INDIAN PENAL CODE (ACT XLV OF 1860).

[Received the assent of the Governor-General on October 6, 1860.]

CHAPTER I.

INTRODUCTION.

Preamble. WHEREAS it is expedient to provide a general Penal Code for British India; It is enacted as follows:—

Title and extent of operation of the Code. 1. This Act shall be called the Indian Penal Code, and shall take effect throughout British India.¹

COMMENT.

The Indian Penal Code was drafted by the first Indian Law Commission of which Mr. (afterwards Lord) Macaulay was the President and Macleod, Anderson and Millet were the Commissioners. They drew not only upon English and Indian laws and regulations but also upon Livingstone's Louisiana Code and the Code Napoleon. The draft Code was submitted to the Governor-General of India in Council in 1837. It underwent further revision at the hands of Sir Barnes Peacock, Sir J. W. Colville and several others, and it was completed in 1850. It was presented to the Legislative Council in 1856 and was passed on October 6, 1860.

Under the Mogul rule the Mahomedan law was used in the administration of criminal justice to the exclusion of Hindu law. The Quran was the repository of both civil and criminal law. In interpreting the words of the Quran the Kazis (Judges) turned to the decisions of pious Muslim kings and eminent Muslim jurists of the past.

Prior to 1860, the English criminal law, as modified by several Acts, was administered in the Presidency-towns of Bombay, Calcutta and Madras.¹ In the mofussil the Courts were principally guided by the Mahomedan criminal law, the glaring defects of which were partly removed by Regulations of the Local Governments. In 1827, the system of administration of justice in the Presidency of Bombay was thoroughly revised and from that time the law which the criminal Courts administered was set forth in a Regulation.² But in the other two sister Presidencies the Mahomedan criminal law was in force till the Indian Penal Code came into operation.

The criminal law of India has been codified in the Penal Code and the Criminal Procedure Code; the former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence, and the Court is not entitled to invoke the common law of England in such matters at all.³ The

¹ 9 Geo. IV, c. 74; Acts VII and XIX of 1837; Act XXXI of 1838; Acts XXII and XXXI of 1839; Acts VII and X of 1844; Act XVI of 1852.

² XIV of 1827.

³ Gopal Naidu, (1922) 46 Mad. 605, F.B.; Damapala, (1936) 14 Ran. 666, F.B.

Penal Code is the substantive law and the Criminal Procedure Code, the adjective law. Section 5 of the latter Code says : "All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained."

Title.—The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. The title is given to the Act solely for the purpose of facility of reference. It is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title. It is not legitimate to use it for the purpose of ascertaining the scope of the Act. Its object is identification and not description.⁴ It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful Judge, "The title of an Act of Parliament is no part of the law, but it may tend to shew the object of the Legislature"⁵, and Chitty, J.,⁶ observed that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act.⁷ The title of a statute does not go for much in construing it; but it is not to be absolutely disregarded.⁸

Preamble.—The preamble shows that the Code was intended to be a general Penal Code for British India, but it contains no specific repeal of the penal laws then in force. This was intentional, as it was considered possible that some offences might have been omitted which it would not be intended to exempt from penal consequences.⁹

The preamble of an Act sets forth the reason for the particular Act of the Legislature and foreshadows what is intended to be effected by the Act. It is a key to open the minds of the framers of the Act. It may be referred to for the purpose of clearing up any ambiguity,¹⁰ or to fix the meaning of words which may have more than one, or to keep the effect of the act within its real scope whenever the enacting part is in any of these respects open to doubt.^{10(a)} It is to the preamble, more especially, that we are to look for the reason, or spirit, of every statute; rehearsing this as it ordinarily does; the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature, in making, and passing, the statute itself.¹¹ But a preamble cannot cut down the meaning of an enactment.¹² It cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms. But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are fairly capable of more than one meaning.¹³ The preamble cannot restrict or extend the enacting part when the language and scope of the Act are not open to doubt.^{13(a)}

The preamble is omitted from the Code, so far as Burma, by the Government of Burma (Adaptation of Laws) Order, 1937. Throughout the Code, unless otherwise provided, for "British India" "British Burma" is substituted by the same Order.

Date of operation of the Code.—The Indian Penal Code came into operation on the 1st day of January 1862. Originally it was to take effect on the 1st day of May 1861, but this date was subsequently changed¹⁴ as it was thought it would not be right to allow the Code, which altered the whole criminal law of the country, to take effect before it was translated and published for the information of the people, and before the Indian Judges and officers had ample time thoroughly to understand it.

⁴ Per Lord Moulton in *Vacher & Sons, Limited v. London Society of Compositors*, [1913] A. C. 107, 128, 129; *Sage v. Eicholz*, [1919] 2 K. B. 171, 176.

⁵ Per Wightman, J., in *Johnson v. Upham*, (1859) 2 E. & B. 250, 263.

⁶ *East and West India Dock Company v. Shaw, Savill and Albion Company*, (1888) 39 Ch. D. 524, 531.

⁷ Per Lord Macnaghten in *Fenton v. Thorley and Co., Limited*, [1908] A. C. 443, 447; *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, (1936) 64 C. L. J. 212, [1936] AIR(C) 593.

⁸ *Kenrick & Co. v. Lawrence & Co.*, (1890) 25 Q. B. D. 99, 104.

⁹ *Legal Remembrancer v. Matilal Ghose*,

(1913) 41 Cal. 173, 211, S.B.

¹⁰ *Secretary of State v. Vasudeo*, (1928) 30 Bom. L. R. 1494, 1498, 53 Bom. 97.

^{10(a)} *Allen v. Allen*, [1946] Kar. 1.

¹¹ *Brett v. Brett*, (1826) 3 Add. 210, 216, 162 Eng. Rep. 456, 458.

¹² *Secretary of State v. Sannidhiraju Subbarayudu*, (1931) 34 Bom. L. R. 500, 55 Mad. 268, 59 I. A. 56.

¹³ *Powell v. Kempton Park Racecourse Company*, [1899] A. C. 143, 185; *Amrut v. Mst. Thagan*, [1938] Nag. 115; *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, sup.; *Savitri Devi v. Dwarka Prasad*, [1939] All. 275; *Om Prakash Mehta*, [1947] Nag. 579.

^{13(a)} *Sardar Singh*, (1944) 25 Lah. 55.

¹⁴ Act VI of 1861 changed the date.

Offences committed prior to the operation of the Code.—Such offences are still punishable under the old Acts and Regulations.¹⁵

The Penal Code has been applied to offences committed before its operation in the Punjab by the Punjab Laws Act (IV of 1872), s. 39, and in Ajmer-Merwara by the Ajmer Laws Regulation (III of 1877), s. 29.

1. **'British India.'**—These words were substituted for "the whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Vic., c. 106" by the Government of India (Adaptation of Indian Laws) Order, 1937. According to the General Clauses Act¹⁶, 'British India' shall mean all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India. Thus the Penal Code does not extend to the Indian States and to the tributary Mehals of Mohurbhun¹⁷ and Kheonjur.¹⁸

Section 1 of 21 & 22 Vic., c. 106, which has been repealed by the Government of India Act, 1915 (5 & 6 Geo. V, c. 61), enacted: "The Government of territories now in the possession or under the Government of the East India Company, and all powers in relation to Government vested in or exercised by the said Company, in trust for Her Majesty, shall cease to be vested in or exercised by the said Company, and all territories in the possession or under the Government of the said Company, and all rights vested in or which if this Act had not been passed might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty, and be exercised in Her name; and for the purposes of this Act *India* shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid."

The Code has been extended to outlying parts of British India (a) by notification under the Scheduled Districts Act, 1874, and (b) by Regulations under 33 & 34 Vic., c. 3.¹⁹

The Settlement of Prince of Wales' Island,

Singapore and Malacca.²⁰ Nicobar Islands.²¹

The Sonthal Parganas.²²

The Arakan Hill District.²³

The United Provinces Tarai Districts.²⁴

The Districts of Hazaribagh, Lahordaga (now called Ranchi District) and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singbhum.²⁵

The Island of Perim.¹

Laccadive Islands.²

Zanzibar.³

Somaliland.⁴

Uganda.⁴

British Baluchistan.⁵

Angul and the Khondmals.⁶

With modifications in the Chittagong and Kachin Hill tracts.⁷

The Chin Hills.⁸

Upper Burma generally, except the Shan States.⁹

The Lushai Hills.¹⁰

The Pargana of Manpur in Central India.¹¹

The Cantonment of Deesa.¹²

Coast and Island of the Persian Gulf and the Gulf of Oman.¹³

¹⁵ *Mukha*, (1878) 1 All. 599; contra, *Dil-jour Misser*, (1877) 2 Cal. 225, F.B.

¹⁶ X of 1897, s. 3(7).

¹⁷ *Keshub Mohajan*, (1882) 8 Cal. 985, F.B.; *Hursee Mahapatro v. Dinobundo Patro*, (1881) 7 Cal. 523; *Bhuta Santal v. Dama Santal*, (1915) 20 C. W. N. 62, 17 Cr. L. J. 128, [1917] AIR(C) 612 (2).

¹⁸ *Bichitrarund Dass v. Bhugbut Perai*, (1889) 16 Cal. 667.

¹⁹ Repealed by the Government of India Act, 1915. Section 180 of this Act says that such repeal will not affect the validity of any regulations issued.

²⁰ Act V of 1867.

²¹ G. I., 30th October 1869. Notification No. 4918 of 27th October 1869.

²² Reg. III of 1872 as amended by Reg. III of 1899.

²³ Reg. IX of 1874, s. 3.

²⁴ Act XIV of 1874, s. 3 (a). G. I., 1876, Part I, p. 505.

²⁵ *Ibid.*, p. 504.

¹ Government Notification, dated the 13th February 1884; *Mangal Tekchand*, (1886)

10 Bom. 258.

² *Cheria Koya*, (1890) 13 Mad. 353; The Laccadive Islands and Minicoy Reg. I of 1913.

³ Zanzibar Order in Council, 1914, G. I., Part I, p. 946; *Bom. Govt. Gaz.*, 1914, Part I, p. 1039. See *Dossaji Gulam Hussein*, (1878) 3 Bom. 334.

⁴ Order in Council, 1897.

⁵ Reg. II of 1913.

⁶ Reg. III of 1913.

⁷ Reg. I of 1895, s. 3.

⁸ Reg. V of 1896.

⁹ Burma Laws Act, XIII of 1898, s. 4 (1) and Sch. 1.

¹⁰ Act XIV of 1872, s. 5, G. I. 1898, Part II, p. 345.

¹¹ *Ibid.*, ss. 3 and 5A, G. I., 1899, Part II, p. 419.

¹² Notification No. 5287, dated 30th July 1906, *Bom. Govt. Gaz.* Part I, p. 938.

¹³ The Persian Coast and Islands Order in Council, 1907, s. 7, Notification No. 4375, dated 7th May 1907, *Bom. Govt. Gaz.*, Part I, p. 1056.

Abyssinia.¹⁴
Muskat.¹⁵

Bahrein.¹⁶
The territories of the Shaikh of Kuwait.¹⁷

On the frontier of Sind the Penal Code is superseded by Regulation V of 1872 and Regulation III of 1892¹⁸ so far as these Regulations are inconsistent with the provisions of the Code.

The Code has been extended, or declared applicable, to Indian States or parts thereof by notification in the *Gazette of India* or by local laws made with the sanction of the Governor-General in Council. It has been extended to—

- I. 1. The Hyderabad Assigned District (otherwise known as Berar), including the Cantonments of Akola, Amraoti and Elichpur.
2. The Civil and Military Station of Bangalore.¹⁹
3. Rajputana, the Paraganas of Jodgarh Dewiar, Saroth, Chang Kotkarana, and the Station of Abu.
4. The Hyderabad Residency Bazaars.
5. The Kathiawar Agency.²⁰
6. The Surat Agency.
7. Kolhapur Civil Station.
8. Kasumpti (Keonthal).
9. Frontier tracts, Dera Ghazi Khan and Dera Ismail Khan.
10. The Baluchistan Agency Territories.
11. The Satara Jagirs (partially).
12. Part of the Nanewan Assigned Tract, near Bhamo in Upper Burma.
13. The territories of H. H. the Maharajah of Jammu and Kashmir, for purpose of jurisdiction in certain cases.

II. The following British Cantonments in Indian States :—

1. Secunderabad, Deesa, Deolali, Bhuj, Baroda, Mhow, Nimach, Nowgong, Agar, Gunah, Sehore, Sutna, Sirdarpore.
2. The Hyderabad Contingent Stations of Aurangabad, Jalna, Hingoli, Raichur and Bolarum, Mominabad.

III. Such parts of the Railways as pass through Indian States.²¹

Amendment.—After the word “effect” there were the words “on and from the first day of January, 1862”; and the section ended with the words “except the Settlement of Prince of Wales’ Island, Singapore, and Malacca.” These words were omitted by the Repealing and Amending Act (XII of 1891), Sch. I.

After the word “throughout” there were the words “the whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Victoria, Chapter 106, entitled ‘An act for the better government of India’”. These words were omitted and the words “British India” were substituted by the Government of India (Adaptation of Indian Laws) Order, 1937. In Burma the words from “and shall take effect” to the end of the section were omitted by the Government of Burma (Adaptation of Laws) Order, 1937.

PRACTICE.

Jurisdiction.—By the terms of the Statute 24 & 25 Vic., c. 104 (now re-enacted in the Government of India Act, 1935, s. 223), the exercise of jurisdiction in any part of His Majesty’s Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. An exercise of legislative authority by the Governor-General in Council, whereby any

¹⁴ The Abyssinia Order in Council, G. I., Part I, pp. 295-320.

¹⁵ The Muskat Order in Council, 1914, G. I., Part I, pp. 899-915.

¹⁶ Bahrein Order in Council, 1913, G. I., Part I, pp. 231-246.

¹⁷ The Kuwait Order in Council, 1925.

¹⁸ *Vide* the Bombay Code, Vol. I, pp. 119 and 277 (4th Edn.).

¹⁹ See *Hayes*, (1888) 12 Mad. 39, in which it was held that the Civil and Military Station of Bangalore was not British territory, but a part of the Mysore State, but the Indian criminal law was in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879.

²⁰ See *Abdul Latib valad Abdul Rahiman*, (1885) 10 Bom. 186, where it is held that the

Civil Station at Rajkot is not part of British India within the meaning of Statute 21 & 22 Vic., c. 106. This case is followed in *Chimanlal*, (1912) 14 Bom. L. R. 876, 37 Bom. 152, where it is held, dissenting from *Triccam Panachand v. The B. B. & C. I. Rly., Co.*, (1885) 9 Bom. 244, that the Civil Station at Wadhwan is not part of British India. *Quetta* does not form part of British India (*Devki Nandan*, (1940) 41 Cr. L. J. 857, [1940] AIR (Pesh.) 30). British Baluchistan is part of British India but the Baluchistan Agency Territories are not (*Karimbaksh*, [1941] Kar. 247, F.B.).

²¹ As to the railways passing through the territories of Indian States see notifications Nos. 202 I-B., 203 I-B., 204 I-B., 205 I-B., 206 I-B., 207 I-B., 208 I-B., 209 I-B., and 210 I-B. in the *Gazette of India*, dated June 17, 1939, Part I-A, pp. 92-100.

place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the above statute, and by the Letters Patent issued under that statute.²²

As regards the jurisdiction of British Courts on railways in Indian States the Courts ought to ascertain whether the jurisdiction granted relates only to offences committed on the railway or in any way connected with its administration or whether the jurisdiction is general criminal jurisdiction irrespective of the place where the offence is committed. If the jurisdiction ceded is not general criminal jurisdiction, then a person who has committed an offence in British territory cannot be arrested at a station on a railway line passing through an Indian State.²³

2. Every person¹ shall be liable to punishment under this Code and not otherwise² for every act or omission³ contrary to the provisions thereof,⁴ of which he shall be guilty within British India.

Punishment of offences committed within British India.

COMMENT.

This section deals with the intra-territorial operation of the Code. It makes the Code universal in its application to all parts of British India. But in the case of certain districts,²⁴ the local Government to which any such district is annexed may, with the sanction of the Governor-General in Council, notify that the Code is not in force in such district.

Prosecution could be instituted under the Code at any time after the offence is committed. *Nullum tempus occurrit regi* (lapse of time does not bar the right of the Crown).

1. 'Every person.'—Every person is made liable to punishment, without distinction of nation, rank, caste or creed, provided the offence with which he is charged has been committed in some part of British India.

The Law Commissioners in their address²⁵ observe: "Your Lordship in Council will see that we have not proposed to except from the operation of this Code any of the ancient sovereign houses of India residing within the Company's territories. Whether any such exception ought to be made is a question which, without a more accurate knowledge than we possess of existing treaties, of the sense in which those treaties have been understood, of the history of negotiations, of the temper and of the power of particular families, and of the feeling of the body of the people towards those families, we could not venture to decide. We will only beg permission most respectfully to observe that every such exception is an evil; that it is an evil that any man should be above the law; that it is a still greater evil that the public should be taught to regard as a high and enviable distinction the privilege of being above the law; that the longer such privileges are suffered to last, the more difficult it is to take them away; that there can scarcely ever be a fairer opportunity for taking them away than at the time when the Government promulgates a new Code binding alike on persons of different races and religions; and that we greatly doubt whether any consideration, except that of public faith solemnly pledged, deserves to be weighed against the advantages of equal justice".

A foreigner who enters the British territories and thus accepts the protection of British laws virtually gives an assurance of his fidelity and obedience to them and submits himself to their operation. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act not being an offence in his own country.¹ The Greek residents of Zanzibar, having been, by international action, placed under British protection, were held liable to the British criminal law in force at Zanzibar. The Court further decided that it was competent to the Crown to exercise jurisdiction

²² *Burah*, (1878) 5 I. A. 178, 4 Cal. 172.

²³ See *Muhammad Yusuf-ud-Idn.*, (1897) 24 I. A. 137, 25 Cal. 20; *Radha Kishen*, (1920) 1 Lah. 406. See *Vinayak D. Savarkar*, (1910) 13 Bom. L. R. 296, 304, 35 Bom. 225.

²⁴ Scheduled districts mentioned in Act XIV of 1874.

²⁵ Draft Penal Code, p. xx.

¹ *Esop*, (1836) 7 C. & P. 456. Ignorance of law may be considered in mitigation of punishment: *ibid.*; *Jitendranath Ghosh v. The Chief Secretary to the Government of Bengal*, (1932) 60 Cal. 364.

in one foreign State over the subjects of another foreign State, that under Her Majesty's Order in Council the provisions referring to British subjects were applicable to foreigners enjoying British protection in so far as by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty has jurisdiction at Zanzibar in relation to such persons; and that the accused, being a British protected person within the meaning of s. 4 (h) of the Order, was amenable to the jurisdiction of the Consular Court.²

Under this section every person is liable to punishment for an act which is an offence under the Penal Code; but the criminal Courts have no jurisdiction to try certain persons even if they have transgressed the provisions of the Code. Following are the recognized exceptions :—

Exceptions.—Statutory bar to the trial of certain high dignitaries of the State.—No proceedings shall lie in, and no process shall issue from, any Court in India against the Governor-General, the Governor of a Province, or the Secretary of State, whether in personal capacity or otherwise.³ Except with the sanction of His Majesty in Council, no proceedings shall lie in any Court against them in respect of any thing done or omitted to be done by any of them during his term of office in performance of the duties thereof.⁴ Offences committed by them shall be inquired of, heard, tried and determined in the Court of King's Bench in London⁵ under the special procedure laid down in certain statutes.⁶ Under several statutes public servants are protected against prosecution for acts done in pursuance thereof.⁷ Under the Government of India Act, 1935, the exemption is confined to the Governor-General, Governor of a Province, the Secretary of State or His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States,⁸ and to the Governor of Burma.⁹

The following persons are always exempted from the jurisdiction of the criminal Courts of every country :—

1. **Sovereign.**—The Sovereign can do no wrong, and is, therefore, not liable to punishment. Blackstone¹⁰ says : “...no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power : authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it : but who, says Finch, shall command the king ? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary : for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the Pope, the independence of the kingdom would be no more : and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.”

2. **Foreign Sovereigns.**—The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.... One sovereign being in no respect amenable to another and being bound by obligations of the highest character

² *Rego Montopoulo*, (1895) 19 Bom. 741.

³ Government of India Act, 1935 (25 & 26 Geo. V, c. 42), s. 306.

⁴ *Ibid.*

⁵ 11 Will. IV, c. 12; 18 Geo. III, c. 63, s. 39; 21 Geo. III, c. 70, ss. 4, 5.

⁶ 24 Geo. III, c. 25, ss. 645-8; 26 Geo. III, c. 57, ss. 1-28.

⁷ Vide s. 132 of the Criminal Procedure Code (Act V of 1898); s. 16 of the Glanders and Farcy Act (XIII of 1899); s. 24 of the Ancient Monuments Preservation Act (VII of 1904); s. 16 of the Dourine Act (V of 1910); s. 56 of the Indian Electricity Act (IX of 1910); s. 28 of the Cantonments Act (XV of 1910);

s. 58 of the Indian Factories Act (XII of 1911); s. 14 of the Indian Airships Act (XVII of 1911); s. 97 of the Indian Lunacy Act (IV of 1912); s. 11 of the Defence of India (Criminal Law Amendment) Act (IV of 1915); s. 2 of the Indemnity Act (XXVII of 1919); s. 47 of the Indian Income-tax Act (XI of 1922); s. 49 of the Indian Mines Act (IV of 1923); s. 14 of the Indian Naval Armament Act (VII of 1923); and s. 24 of the Bombay Nurses, Midwives and Health Visitors Registration Act (Bom. VII of 1935).

⁸ 25 & 26 Geo. V, c. 42, s. 306.

⁹ *Ibid.*, s. 470.

¹⁰ Vol. I, (1829), p. 242.

not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.¹¹ The real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.¹²

Indian Princes.—The offences committed by Indian Princes in British India are usually tried by a commission appointed by the Government of India. The commissioners submit their report to the Government which passes final orders. There is no appeal to any tribunal.¹³

3. Ambassadors.—The immunity of an ambassador from the jurisdiction of the Courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.¹⁴ "He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country".¹⁵ If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him, or avow himself the accomplice of his crimes. But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder.¹⁶ For a direct attempt against the life of the sovereign, an ambassador or one of his suite would directly be punishable by the State.¹⁷

Diplomatic privilege does not impart immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.¹⁸

4. Alien enemies.—In respect of acts of war alien enemies cannot be tried by criminal Courts. Aliens, "who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by martial law."¹⁹ If an alien enemy commits a crime unconnected with war, e.g., theft, he would be triable by ordinary criminal Courts.

5. Foreign army.—When armies or regiments of a State are by consent on the soil of a foreign State they are exempted from the jurisdiction of the State on whose soil they are.

6. Warships.—Men-of-war of a State in foreign waters are exempt from the jurisdiction of the State within whose territorial jurisdiction they are. On the question of jurisdiction two theories have been propounded. "One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There

¹¹ *Schooner Exchange v. M'Faddon*, (1812) 7 Cranch 116, 136, 137.

¹² *The Parliament Belge*, (1880) 5 P. D. 197, 207; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149.

¹³ *Maharajah Madhava Singh v. Secretary of State for India in Council*, (1904) 31 I. A. 239, 32 Cal. 1, 6 Bom. L. R. 263.

¹⁴ Per Brett, L. J., in *The Parliament Belge*, (1880) 5 P. D. 197, 207. See also the Diplomatic Privileges Act, 1708, (7 Anne, c. 12).

¹⁵ Per Lord Campbell, C. J., in *Magdalena*

Steam Navigation Company v. Martin, (1859) 2 E. & E. 94, 111. See also *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352.

¹⁶ Blackstone, Vol. 1, (1829), p. 253. See also Phillimore's *International Law*, Vol. 11, p. 202 (3rd Edn.); Hall's *International Law*, 8th Edn., p. 223.

¹⁷ Hale P. C., pp. 97, 99.

¹⁸ *Dickenson v. Del Solar*, [1930] 1 K. B. 376; *A. B.*, [1941] 1 K. B. 454.

¹⁹ 1 Hawk. P. C., c. 2, s. 6.

will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic Courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective ex-territoriality but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs".²⁰ The Privy Council has considered the latter theory as the correct conclusion, and has rejected the doctrine of ex-territoriality which regards the public ship "as a floating portion of the flag-State."²¹ "The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships, and the naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled".²²

Corporation.—The words 'every person' in this section, in spite of s. 11, mean natural persons, and do not include juridical persons, such as corporations. A crime, if committed by such a body, is, as a rule, only punishable as committed by such members of it as took part in the act. Under s. 6 of the Indian Merchandise Marks Act, a corporation can be prosecuted and convicted, because a corporation through its agents can entertain an intention to apply a false trade description to goods.²³ An officer of a company made a false return under the Motor Fuel Rationing Order, 1941. On the prosecution of the company and the officer it was contended that the offences charged required for their commission an act of will or state of mind which a body corporate could not have. It was held that the knowledge and intention of its servants were to be imputed to the body corporate.²⁴

Liability of master for acts of his servant.—The section says 'every person' will be guilty under this section for an act or omission contrary to the provisions of the Code. If a servant alone commits an offence his master may also be guilty under provisions relating to abetment,²⁵ or under certain other sections of the Code which impose liability on the master even though he may be entirely ignorant of his acts, e.g., s. 154. But the question very often arises whether a master is liable for criminal acts of his servant done without his knowledge but in the course of his employment. So far as civil liability goes it is a recognized principle that a master is liable for all tortious acts of his servant done in the course of his employment. A master, however, is not criminally responsible for the unauthorized acts of his servant. He only is criminally punishable, who immediately does the act, or permits it to be done.¹ While *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.² The condition of mind of a servant or agent is not imputed to the master or principal so as to make him criminally liable. A master is not criminally liable merely because

²⁰ Per Lord Atkin in *Chung Chi Cheung*, [1939] A. C. 160, 167.

²¹ *Ibid.*, pp. 167, 174.

²² *Ibid.*, p. 175.

²³ *Dhanraj Mills Ltd.*, (1943) 45 Bom. L. R. 300, 44 Cr. L. J. 574, [1943] AIR (B) 182.

²⁴ *Director P. P. v. Kent Contractors*, [1944] 1 A. E. R. 119.

²⁵ *Maung Nwe v. Maung Po Hla*, [1937] Ran. 246.

¹ Hale P. C. 114; *Allen*, (1835) 7 C. & P. 153; *Woodgate v. Knatchbull*, (1787) 2 T. R. 148; *Dyer v. Munday*, [1895] 1 Q. B. 742; *Mohamad Khan*, (1937) 39 Cr. L. J. 700, [1938] AIR (N) 365.

² *Mousell Brothers v. London and North Western Railway*, [1917] 2 K. B. 836, 845; *Allen v. Whitehead*, [1930] 1 K. B. 211, 220. Followed in *Mahomed Bashir*, (1945) 48 Bom. L. R. 46, [1946] Bom. 173.

his servant or agent commits a negligent or malicious or fraudulent Act. But in the limited class of cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of a servant or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders.³ But a master cannot be so made liable, if the statute provides for liability for permitting or causing a particular act, unless it is shown that such act was done with the master's knowledge and assent, express or implied.⁴

The following are the exceptions to the principle that a master is not criminally liable for the acts of his servant.

1. **Statutory liability.**—A statute may impose criminal liability upon the master as regards the acts or omissions of his servants. But in all such cases the question is whether upon the true construction of the statute in question the master is intended to be made criminally responsible for acts done by his servants in contravention of the statute, where such acts are done within the scope or in the course of their employment.⁵ The master is relieved from criminal responsibility where he proves that he acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the statute. Similarly, if a servant does that for which he is not employed,⁶ or if he acts for his own personal benefit,⁷ the master will not be liable.

License cases form a class by themselves in which the master is generally held responsible.

Licenses to keep ale-houses are granted only to persons of good personal character, and it is obvious that the object of so restricting the grant of licenses will be defeated if the licensed persons can, by delegating the control and management of the house to other persons who are altogether unfit to keep it, free themselves from the responsibility for the manner in which the house is conducted.⁸ Personal knowledge in the licensed person of the acts of his servants is not always necessary; otherwise enactments granting licenses to good persons would be of no effect. Where the servant of a licensed victualler knowingly supplied liquor to a constable on duty, without the authority of his superior officer as required by a statute, it was held that the licensed victualler was liable to be convicted under 35 & 36 Vic., c. 94, s. 16, sub-s. (2), although he had not knowledge of the act of his servant.⁹ In the case of license-holders it has been again and again decided that the responsibility should be upon the licensee for acts done by an employee within the scope of his authority although contrary to the licensee's orders.¹⁰ The same principle is followed in India. Where, therefore, the manager of a licensed vendor of arms, ammunition and military stores, sold certain military stores without previously ascertaining that the buyer was legally authorized to possess the same, it

³ Halsbury's Laws of England, 2nd Edn., Vol. IX, pp. 12, 13. Approved and followed in *Varaj Lal*, (1924) 51 Cal. 948, 951. See also *Suffer Ally Khan v. Gislam Hyder Khan*, (1866) 6 W. R. (Cr.) 60; *Harish Chandra Bagla*, [1945] All. 540.

⁴ *Varaj Lal*, *ibid.*; *Shantaram*, (1932) 34 Bom. L. R. 897, 33 Cr. L. J. 746 [1932] AIR (B) 474.

⁵ *Coppen v. Moore* (No. 2), [1898] 2 Q. B. 306, 313. See *Chundi Churn Mookerjee*, (1883) 9 Cal. 849, which establishes the non-liability of the master under s. 22 of the Indian Ports Act (XII of 1876), on the ground that the provisions of that section were not meant to apply to masters. In *A. M. Jeevanji*, (1907) 9 Bom. L. R. 967, 31 Bom. 611, it was held that under sub-s. (1) of s. 111 of the Indian Emigration Act (XXI of 1888) the Legislature intended to make the master liable for his servant's acts. See also *Haji Shaikh Mahomed*, (1907) 9 Bom. L. R. 1059, 32 Bom. 10; *Jaffar Haji*, (1908) 10 Bom. L. R. 1052, 9 Cr. L. J. 182. In *Zavvar Husain*, (1923) 21 A. L. J. R. 481, 24 Cr. L. J. 705, [1923] AIR (A) 592, the accused was convicted for possessing cocaine

which was in the actual legal possession of another but over which he had control or dominion. In *Harjivan Valji*, (1925) 28 Bom. L. R. 115, 50 Bom. 174, the accused was convicted for the act of a lorry driver who evaded to pay octroi duty. See *Maung Ba Cho*, (1934) 12 Ran. 300; *Ismail Mahomed*, [1941] R. L. R. 536.

⁶ *Boyle v. Smith*, [1906] 1 K. B. 432. See *Behari Lal*, (1911) 34 All. 146, where the servant's act in taking unauthorised tolls was outside the scope of his employment, and the master was held not responsible. See *Uttam Chand*, (1911) 39 Cal. 344.

⁷ *Anglo-American Oil Company, Limited v. Manning*, [1908] 1 K. B. 536. See also *Somerset v. Hart*, (1884) 12 Q. B. D. 360.

⁸ *Massey v. Morris*, [1894] 2 Q. B. 412, 414. See also *Brooks v. Mason*, [1902] 2 K. B. 743; *Emery v. Nollath*, [1903] 2 K. B. 264.

⁹ *Mullins v. Collins*, (1874) L. R. 9 Q. B. 292; *Allen v. Whitehead*, [1930] 1 K. B. 211.

¹⁰ *Commissioners of Police v. Cartman*, [1896] 1 Q. B. 655. See *Bosely v. Davies*, (1875) 1 Q. B. D. 84.

was held that the licensee was liable to punishment under s. 22 of the Arms Act (XI of 1878) though the goods were not sold with his knowledge and consent.¹¹ Similarly, where the servant of a licensed vendor of opium sold opium to a boy under the age of fourteen years the licensed vendor was held liable under s. 9 of the Opium Act (I of 1878).¹² The accused held a license for the manufacture of explosives, one of the conditions of which was that the explosives should be manufactured in a tent or lightly constructed building quite apart from the dwelling house. The deceased was employed by the accused to work in such a house exclusively appropriated for the purpose. On the day in question, while the accused was attending to another business of his, the deceased and her assistant went to his dwelling house to drink water, and on their own initiative took the materials there and commenced to pound them in that house with pestles having iron rings, which they picked up in that house. The result was an explosion which killed the woman and caused injuries to her assistant. The accused was tried for a breach of the condition in his license. It was held that he was liable for the act of the deceased, which, though unauthorized by him, was yet done by her within the general scope of her employment.¹³ Where a person obtained a license to proceed in a bus with music for distributing handbills and the license specifically excluded certain thoroughfares but the licensee's servant drove the bus through prohibited streets, it was held that the licensee was as much liable as the servant who drove the bus.¹⁴ Where the accused had obtained from Government a grant of lands for cultivation containing teak trees under a license granted under the Burma Forest Act and the accused's servant unlawfully felled certain teak trees and unlawfully impressed green timber trees with certain marks contrary to the terms of the license, it was held that as the Forest Act cast an absolute duty upon the licensee that no tree should be felled or impressed with marks except in strict conformity with the terms of the license, the accused was liable for the acts of his servant.¹⁵

Statutes passed for the benefit of public health and sanitation are construed in the same way as licensing Acts.¹⁶ Similar is the case with statutes dealing with revenue matters.¹⁷

2. Public nuisance.—The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by acts of his agents, in carrying on the works, though done by them without his knowledge and contrary to his general orders.¹⁸ If persons for their own advantage employ servants to conduct works, they must be answerable for what is done by the servants even though they are personally ignorant of the way in which the work is carried on and though there is a departure in the way in which it was understood to be carried on.¹⁹

The Calcutta High Court has held that a principal is not criminally answerable for the acts of his agent. Where the user of premises gives rise to a nuisance, the person liable is the occupier for the time being, whoever he may be. The proprietor, if not living on the premises, might be liable for abetment. The English cases above referred to were held to be of no authority on the construction of the provisions of the Penal Code.²⁰

3. Neglect of duty.—If a person neglects the performance of an act, which is likely to cause danger to others, and entrusts it to unskilful hands he will be in certain cases criminally liable. Where an engineer, employed to manage a steam-engine engaged to draw up miners from a coal pit, left the engine in the charge of an ignorant boy, who told him that he was unable to manage it, and in the absence of the engineer

¹¹ *Tyebali*, (1900) 2 Bom. L. R. 52, 24 Bom. 423.

¹² *Babu Lal*, (1912) 34 All. 319.

¹³ *Mahadevappa*, (1926) 29 Bom. L. R. 153, 51 Bom. 352.

¹⁴ *Cunniah & Co.*, (1927) 51 Mad. 341.

¹⁵ *Maung Ba Cho*, (1934) 12 Ran. 300.

¹⁶ *Brown v. Foot*, (1892) 66 L. T. 649, under Sale of Food and Drugs Act, 1875 (38 & 39 Vic., c. 63), followed in *Sew Karan v. Corporation of Calcutta*, (1912) 39 Cal. 682; *Collman v. Mills*, [1897] 1 Q. B. 396, under the Public Health Act, (54 & 55 Vic. c. 76, s. 142 (2)); *Hannaford v. May*, [1935] 2 K. B. 385.

¹⁷ *Att. Gen. v. Siddon*, (1830) 1 Cr. & J. 220. Where a trader harbours and conceals smuggled goods, he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, and the act be done by the servant upon the exigency of the occasion, when the goods are discovered: *Att. Gen. v. Siddon*, *ibid*.

¹⁸ *Stephens*, (1866) L. R. 1 Q. B. 702.

¹⁹ *Medley*, (1834) 6 C. & P. 292.

²⁰ *Bibhuti Bhusan Biswas v. Bhuban Ram*, (1918) 46 Cal. 515.

a man was drawn up, who was killed from the want of skill in the boy to manage the engine, it was held that the engineer was guilty of manslaughter.²¹ Similarly, where a master employed a servant to use alum in loaves, the unrestrained use of that drug was noxious, and did not restrain him in the use of it, it was held that the master would be answerable if the servant used it in excess because he did not apply proper precautions against its misuse.²² But if a skilful person is employed, the employer will not be liable in the absence of express malice.²³

The liability of a proprietor of a newspaper for acts of the editor in allowing libellous matter to be published is restricted by Statute 6 & 7 Vic., c. 96, s. 7.²⁴ Before the passing of the statute the proprietor was considered *prima facie* answerable for what appeared in his paper, but this presumption arising from mere proprietorship was rebuttable.²⁵ If the master as well as the servant are made liable under a statute for a certain course of conduct the servant alone will be responsible for an act done in contravention of the statute.¹ But the master may be liable unless he shows good faith. Thus, the provisions of s. 2, sub-s. (2), of the Merchandise Marks Act, 1887 (50 & 51 Vic., c. 78), which make it an offence to sell goods to which a forged trade-mark or false trade-description is applied, make a master criminally liable for acts done by his servants in contravention of the section.² It was held, similarly, where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance on the part of the licensed person.³

2. 'And not otherwise.'—These words repeal all former laws for the punishment of any offence which is made punishable by the Code. On the strength of this section the Calcutta High Court has held that English common law cannot be followed to enlarge the scope of the exceptions to s. 499 of the Penal Code, which should be regarded as exhaustive.⁴ The rules of the common law of England or the legal maxims embodying certain judicial principles, however wholesome they may be, cannot be engrafted upon the Penal Code.⁵ The Law Commissioners⁶ say: "We do not advise the general repeal of the penal laws now existing in the Territories for which we have recommended the enactment of the Code. We think it will be more expedient to provide only that no man shall be tried or punished (except by a Court Martial) for any facts which constitute any offence defined in the Code, otherwise than according to its provisions." Acts or omissions made penal by any other statute but not by the Code will be governed by that statute. See s. 5, *infra*, as to the laws not affected by the Penal Code.

3. 'Act or omission.'—See s. 33, *infra*.

4. 'Contrary to the provisions thereof.'—In *Barendra Kumar Ghosh v. The King-Emperor*⁷ the Privy Council observed: "That the criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code; that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects; and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though commonplaces, considerations which it is important never to forget. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law." A codifying statute like the Indian Penal Code does not exclude reference to earlier case-law on the subjects covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions; but matter outside

²¹ *Lowe*, (1850) 3 C & K. 123.

²² *Dixon*, (1814) 3 M. & S. 11.

²³ *Srish Chandra Sircar*, (1918) 17 A. L. J. R. 843, 20 Cr. L. J. 299, [1919] AIR (A) 385.

²⁴ *Holbrook*, (1878) 4 Q. B. D. 42.

²⁵ *Gutch Fisher*, (1829) 1 M. & Mal. 433.

¹ *Massey v. Morris*, [1894] 2 Q. B. 412.

² *Coppen v. Moore* (No. 2), [1898] 2 Q. B. 306.

³ *Bond v. Evans*, (1888) 21 Q. B. D. 249;

Redgate v. Haynes, (1876) 1 Q. B. D. 89. See *Somerset v. Hart*, (1884) 12 Q. B. D. 260, where under similar circumstances the master was held not liable because he was not in charge of the premises.

⁴ *Kari Singh*, (1912) 40 Cal. 433.

⁵ *Goti Prasad Gupta*, (1931) 43 All. 642.

⁶ Com.'s 2nd Rep., ss. 536-538, and (1866) 3 M. H. C. App. xi.

⁷ (1924) 52 I. A. 40, 55, 27 Bom. L. R. 148, 161, 52 Cal. 197, 215.

of the statute cannot be invoked not by way of construing its provisions but of adding something to it which is admittedly not to be found within it.⁸

It is not an offence to do an act in anticipation of a statute or enactment which would make that act an offence.⁹

Principles of interpretation.—"All penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instruments".¹⁰ Criminal enactments are not to be extended by construction. When an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the legislature includes the offence in question, and makes it criminal.¹¹ Nothing is to be regarded as within the meaning of the statute which is not within the letter—which is not clearly and intelligibly described in the very words of the statute itself.¹² Also in the interpretation of Acts the elementary rule is to give full and accurate effect to every word used in them.¹³ The Courts, in the exposition of penal statutes, are not to narrow the construction. They are to look to the words in the first instance, and where the words are plain, they are to decide on them. If the words be doubtful, they are then to have recourse to the subject-matter; but at all events it is only a secondary rule.¹⁴ The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.¹⁵

The proper course to adopt in construing an Act "is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of

⁸ *Tiruvengada Muddali v. Tripurasundari Ammal*, (1926) 49 Mad. 728, 735, 736, F.B.

⁹ *Baron Von Dincklage*, [1941] 2 M. L. J. 748, (1941) 54 L. W. 521, [1942] M. W. N. 41, (1941) 43 Cr. L. J. 395, [1942] AIR (M) 182.

¹⁰ Per James, L. J., in *Dyke v. Elliot: The "Gauntlet"*, (1872) L. R. 4 P. C. 184, 191. See also *Lord Huntingtower v. Gardiner*, (1823) 1 B. & C. 297, 299; *Jogendrachandra Ray v. The Superintendent of the Dum Dum Special Jail*, (1933) 60 Cal. 742; *L. M. Wakhare*, [1945] Nag. 382.

¹¹ Per Willes, J., in *Britt v. Robinson*, (1870) L. R. 5 C. P. 503, 513, 514.

¹² *Kola Lalang*, (1881) 8 Cal. 214; *Musammatt Kesar*, (1918) 4 P. L. J. 74, 20 Cr. L. J. 161, [1919] AIR (P) 27, F.B.

¹³ *Mirchia*, (1896) 18 All. 364, 365.

¹⁴ *The Inhabitants of Hodnett*, (1786) 1 T. R. 96, 101.

¹⁵ Per Lord Davey in *Gokul Mandar v. Pudmanund Singh*, (1902) 29 I. A. 196, 29 Cal. 707, 715, 4 Bom. L. R. 793, 796.

the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground".¹⁶ In the same case Lord Halsbury said: "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed".¹⁷ If it is wrong to assume that in codifying existing law, the Legislature intended to leave it unaltered unless that intention is expressly stated, it would be more and not less wrong to assume that in introducing a foreign law into a country the Legislature intended to introduce the whole of it unless the contrary is expressly stated.¹⁸ In the construction of codes the language of the statute and its natural meaning must be first examined, uninfluenced by any consideration of the previous law on the point, and an interpretation cannot be placed on the plain language of a statute inconsistent therewith on the supposed policy of the Legislature not to depart from the English law on the subject.¹⁹ But it is incorrect to suppose that, in construing Acts of the Indian Legislature, the natural meaning of the words of the sections should be given effect to always, regardless of their origin and history, and regardless of previous decisions and especially of decisions other than those of Indian Courts.²⁰ When the language used by the Legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice but should adopt that construction which appears to be most in accord with convenience, reason and justice.²¹ Where two meanings are possible, that which is more favourable to the subject is to be taken.²²

The object of the legislature must be ascertained from within the four corners of the Act. It is not open to the Court to speculate as to what the legislature probably meant, and then do violence to the language of the enactment in order to give effect to the presumed intention.²³ Where the words of a section in a statute are plain, the Court must give effect to them, and the Court is not justified in depriving the words of their only proper meaning in order to give effect to some intention which the Court imputes to the legislature from other provisions of the Act. Such a course can only be justified where a literal construction of the section is inconsistent with the meaning of the statute as a whole.²⁴ It is the duty of a Court to attempt to find the intention of the legislature, and to give effect to that intention. The more literal construction ought not to prevail, if it is opposed to the intention of the legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention would be better effectuated.²⁵ But if such a method of interpretation leads to manifest anomalies and is calculated to defeat the professed and declared intention of the legislature it is open to the Courts to give the go-by to the rule mentioned above and to so interpret the words used as to give effect to the intention of the legislature.¹ A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair, he is entitled, and indeed bound, to assume that the legislature did not intend such a construction to be adopted, and to try to find some more rational meaning to which

¹⁶ Per Lord Herschell in *Bank of England v. Vagliano Bros.*, [1891] A. C. 107, 144; *Norendra Nath Sircar v. Kamalbasini Dasi*, (1896) 23 I. A. 18, 23 Cal. 563.

¹⁷ *Ibid.*, p. 120.

¹⁸ *Kari Singh*, (1912) 40 Cal. 433.

¹⁹ *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal. 388, s. B.

²⁰ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhaju Majhi*, (1920) 57 Cal. 1062.

²¹ *Rundan Lal*, (1931) 12 Lah. 623; *Goloke Behary Takal*, (1937) 66 C. L. J. 225, 39 Cr. L. J. 161, [1938] AIR (C) 51.

²² *Bhai Lal Chand*, (1942) 44 P. L. R. 429.

²³ *Chhotatal Amerchand*, (1936) 38 Bom. L. R. 1164, 1178, [1937] Bom. 183, F.B.

²⁴ *Revappa v. Babu*, (1938) 40 Bom. L. R. 1275.

²⁵ *Govind v. Shrinivas*, (1936) 39 Bom. L. R. 548, [1937] Bom. 655, F.B.

¹ *Chaturbhuj v. Manji Ram*, [1938] All. 702.

the words are sensible.² A statute should be interpreted according to the plain meaning of the words and should not be given a wider meaning than what the words used would actually denote.³ Although it may, perhaps, be legitimate to call history in aid to shew what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight.⁴ In construing an Act the Court must always have regard to the scheme of the Act as appearing from a perusal of the language of the whole enactment.⁵

A penal statute should, when its language is ambiguous, be construed in the manner most favourable to the liberties of the subject, especially so when it is of an exceptional character.⁶ Statutes which encroach on the rights of the subject whether as regards person or property are subject to a strict construction in this sense, and they should be interpreted if possible so as to respect such rights.⁷ Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.⁸

A general statute is to be construed as not repealing by mere implication a particular one, that is, one directed to a special object or a special class of objects.⁹

The following principles, as laid down in Maxwell,¹⁰ will generally govern the construction of penal laws:—

The paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object...it is for the Legislature, not the Court, to define a crime and ordain its punishment. It is unquestionably a reasonable expectation that, when the former intends the infliction of suffering, or an encroachment on natural liberty or rights, or the grant of exceptional exemptions, powers, and privileges, it will not leave its intention to be gathered by mere doubtful inference, or convey it in "cloudy and dark words" only, but will manifest it with reasonable clearness. The rule of strict construction does not, indeed, require or sanction that suspicious scrutiny of the words, or those hostile conclusions from their ambiguity or from what is left unexpressed, which characterise the judicial interpretation of affidavits in support of *ex parte* applications, or of magistrates' convictions, where the ambiguity goes to the jurisdiction. Nor does it allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested, to withdraw from the operation of the statute a case which falls both within its scope and the fair sense of its language. This would be to defeat, not to promote, the object of the Legislature; to misread the statute and misunderstand its purpose. A Court is not at liberty to put a limitation on general words which is not called for by the sense, or the objects, or the mischiefs of the enactment, and no construction is admissible which would sanction a fraudulent evasion of an Act. But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language. To determine that a case is within the intention of a statute, its language must authorize the Court to say so, but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a Court to extend them. It is immaterial, for this purpose, whether the

² *Somabhai Govindbhai*, (1938) 40 Bom. L. R. 1082, [1939] Bom. 48, F.B.

³ *Rameshwar Prasad*, (1931) 27 N. L. R. 270, 32 Cr. L. J. 1266, [1931] AIR (N) 177.

⁴ *West Riding of Yorkshire County Council*, [1906] 2 K. B. 676, 716; *Henrietta Muir Edwards v. Attorney-General for Canada*, [1930] A. C. 124, 134.

⁵ *Waman Patil*, (1937) 39 Bom. L. R. 1065, 1068, [1938] Bom. 58, F.B.

⁶ *Bhista bin Madanna*, (1876) 1 Bom. 308,

311; *Des Raj*, (1930) 12 Lah. 26.

⁷ *Bombay Namdeo Co-operative Agency Ltd. v. Virbhaval*, (1936) 39 Bom. L. R. 189.

⁸ *Dewan Singh*, (1935) 37 Cr. L. J. 474, [1936] AIR (N) 55.

⁹ *Rannun*, (1926) 7 Lah. 84.

¹⁰ On the Interpretation of Statutes (9th Edn.), Ch. X, pp. 267, 269, 270, 275, 278, 279, 288. See Craies on Statute Law (4th Edn.), p. 449 et seq. See also Blackstone's Commentaries on the Laws of England (4th Edn.), Vol. I, p. 62.

proceeding prescribed for the enforcement of the penal law be criminal or civil.

The degree of strictness applied to the construction of a penal statute depended in great measure on the severity of the statute. Where it merely imposed a pecuniary penalty, it was construed less strictly than where the rule was invoked *in favorem vitæ*....

A strict construction requires, at least, that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute... As illustrative of the rule of strict construction, it has been said that while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws may not...

The general principle... is well exemplified by comparing the manner in which an omission which, it was inferable from the text, was the result of accident, has been generally dealt with in penal and in remedial Acts.

The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the Legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy....

The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the Legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty, and this tendency is still evinced in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful inferences. The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject; and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.

The phrase 'intention of the Legislature' is, says Lord Watson in *Saloman v. Salomon & Co.*¹¹, "a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." It is well settled that the intention of the Legislature must be gathered from the language used to express it... No doubt where the language of an enactment is capable of bearing more than one meaning or where if construed literally it would lead to absurd results, it is proper that the Court should ascertain the true intention by acquainting itself with the law which existed before the Act was passed and what was the mischief which was thereby intended to be remedied.¹² "In construing an Act of Parliament the Court always has to ascertain the intention of the legislature from the language of the whole enactment, and it sometimes becomes necessary to do a certain amount of violence to the language in which a particular passage is couched in

¹¹ [1897] A. C. 22, 38.

¹² Per Lawrence, L. J., in *Huntton Co. v. Kolynos (Incorporated)*, [1980] 1 Ch. 528,

558; *Eastman Photographic Materials Company v. Controllor-General of Patents, Designs, and Trade-marks*, [1898] A. C. 571.

order to give effect to the intention to be gathered from the enactment as a whole".¹³ Where the words used themselves declare the intention of the Legislature, it is inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interest of the prosecution or the accused. Where the meaning of words used in a statute is plain it is not the duty of the Courts to busy themselves with supposed intentions of the Legislature in framing the statute.¹⁴ When the grammatical meaning of a section is clear and unique that alone must be applied unless that meaning leads to an impossible, that is, an unworkable construction, in which case the Court should consider what variation will do the least violence to the grammatical meaning and still make the provision work. The grammatical meaning cannot be departed from simply because it leads to a very unjust conclusion.¹⁵ Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, ... a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.¹⁶

The Legislature is presumed to enact prospectively and not retrospectively. While this principle is of general application, it is followed with particular strictness in reference to penal statutes.¹⁷ If an offence is committed under a section of the Code which is amended before the conviction of the accused takes place, the provisions of the section as they existed prior to the amendment will apply to the case. It is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a criminal Court.¹⁸

Reports of Indian Law Commissioners.—Reference is permissible to these reports.¹⁹

Proceedings of Legislative Council.—Reference to these is not permissible,²⁰ but in England these are referred to.²¹

Reports of Select Committees of Legislative Council.—The Privy Council has disapproved any reference to these reports,²² but in England they are referred to.²³ They have been referred to by the Madras High Court in a case²⁴ even after the Privy Council decision.

Statements of Objects and Reasons.—The Privy Council has disapproved any reference to these,²⁵ but they were referred to by the Bombay High Court in a case²⁶ decided after the Privy Council decision; and the Allahabad High Court too has held that reference can legitimately be made to these for the purpose of interpreting a statute where there is ambiguity.¹ The Lahore High Court has held that either the statement of Objects and Reasons which accompanies a draft Bill when it is first introduced in the

¹³ Per Beaumont, C. J., in *Vaijappa*, (1935) 37 Bom. L. R. 739, 744, 60 Bom. 55, F.B.; *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, (1936) 64 C. L. J. 212, [1936] AIR (C) 593.

¹⁴ *Narayana Swami*, (1939) 66 I. A. 66, 41 Bom. L. R. 428, 18 Pat. 234.

¹⁵ *Hiralal v. Parasramrao*, [1941] Nag. 581.

¹⁶ Maxwell on the Interpretation of Statutes, (9th edn.), p. 236; *Mahomed Jewa v. Wilson*, (1911) 4 B. L. T. 83, 12 Cr. L. J. 246.

¹⁷ *Pars Ram*, (1930) 32 Cr. L. J. 700, (1930) 32 P. L. R. 71, [1931] AIR (La) 145; *Hiralal v. Parasramrao*, [1941] Nag. 581; *Dantes*, (1940) 42 Bom. L. R. 791, [1941] Bom. 401.

¹⁸ *Shwe Hla U*, [1941] R. L. R. 58.

¹⁹ *Mew*, (1862) 81 L. J. (Bankcy.) 87;

Shaik Moosa v. Shaik Essa, (1884) 8 Bom. 241; *Chunilal Mancharam v. Manishankar Atmaram*, (1893) 18 Bom. 616, 625; *Ghulet*, (1884) 7 All. 44; *Romesh Chunder Sanyal v. Hiru Mondal*, (1890) 17 Cal. 852. Contra, *Tarucknath Sircar v. Prosono Coomar Ghose*, (1873) 19 W. R. 48, 53.

²⁰ *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 125, 128; *Administrator-General of Begnal v. Prem Lal Mullick*, (1895) 22 I. A. 107, 22 Cal. 788; *Krishna Ayyangar v. Nallaperumal Pillai*, (1919) 47 I. A. 33, 43 Mad. 550, 22 Bom.

L. R. 568; *Dina Nath v. Raja Sati Prasad*, (1922) 36 C. L. J. 220, [1923] AIR (C) 74; *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, (1936) 64 C. L. J. 212, [1936] AIR (C) 593.

²¹ *Mew*, (1862) 81 L. J. (Bankcy.) 87; *Hebbert v. Purchas*, (1870-71) L. R. 3 P. C. 605, 648, 649; *Bishop of Oxford*, (1879) 4 Q. B. D. 525, 535.

²² *Administrator-General of Bengal v. Prem Lal Mullick*, (1895) 22 I. A. 107, 22 Cal. 788; *Krishna Ayyangar v. Nallaperumal Pillai*, (1919) 47 I. A. 33, 43 Mad. 550, 22 Bom. L. R. 568; *Dina Nath v. Raja Sati Prasad*, (1922) 36 C. L. J. 220, [1923] AIR (C) 74; *Tamijannessa Khatun v. Purna Chandra Chakravarty*, (1927) 47 C. L. J. 66, [1927] AIR (C) 821.

²³ *Drummond v. Drummond*, (1866) L. R. 2 Ch. App. 32, 45.

²⁴ *Assan v. Pathumma*, (1899) 22 Mad. 494, 504.

²⁵ *Chunilal Mancharam v. Manishankar Atmaram*, (1893) 18 Bom. 616. See also *Shaik Moosa v. Shaik Essa*, (1884) 8 Bom. 241, 247. But see *Ratansi Hirji*, (1927) 31 Bom. L. R. 581, 586, 53 Bom. 627, which says 'it is not open to refer to them.'

¹ *Mahant Shantanand Gir v. Mahant Basudevanand Gir*, (1930) 52 All. 619, F.B.

Legislative body, cannot be referred to in the interpretation of an Act, for they are not part of the Act as passed by the Legislature.² Subsequently it has held that when the language of a statute is clear it is not permissible to refer to any extraneous matter such as Statements of Objects and Reasons to find out what the real intention of the legislature was.^{2a}

Debates in Legislature.—Such debates cannot be referred to in the interpretation of an Act, for they are not part of the Act as passed by the Legislature.³

Headings.—The headings of different portions of a statute can be referred to to determine the sense of any doubtful expression in a section ranged under any particular heading.⁴ They cannot control the plain meaning of the words of the enactment, though they may, in some cases, be looked at in the light of preambles if there is any ambiguity in the meaning of the sections on which they can throw light.⁵ General words in the heading of a group of sections cannot be construed as limiting the effect of plain words in a section contained in that group.⁶ In cases of doubt Courts may be guided by the position in an Act of a particular section. Headings and marginal notes are inserted in a statute only after a bill has become law. They are not voted on or passed by Parliament.⁷

Marginal notes.—The Privy Council has ruled that the marginal notes to the sections of an Act cannot be referred to for the purpose of construing the Act.⁸ There is no justification for restricting the contents of a section by its marginal notes.^{8a} They are no part of the Act.⁹ A marginal note is merely an abstract of the clause intended to catch the eye.¹⁰ In a Full Bench case the Allahabad High Court has held that marginal notes to sections of an act can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to by the Legislature.¹¹ Where a possibility of ambiguity may arise by the words of a section, a marginal note can be used to clear it.¹²

Provisos.—In construing a section full and natural meaning should be given to a proviso if any.¹³ The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. Where the language of the main enactment is clear and unambiguous a proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.¹⁴ Where a section contains a proviso there is no rule that the first part, which may be described as the enacting part, is to be construed without reference to the proviso. The section must be construed as a whole, each portion throwing light on the rest.¹⁵

Illustrations.—The Indian Law Commissioners observed: "These illustrations will, we trust, greatly facilitate the understanding of the law, and will at the same

² *Harkishen Lal*, (1936) 18 Lah. 69, s.b.

^{2(a)} *Sardar Singh v. Relu*, (1944) 25 Lah. 555, F.B.

³ *Harkishen Lal*, (1936) 18 Lah. 69, s.b.

⁴ *Hammersmith &c. Railway Co. v. Brand*, (1869) L. R. 4 H. L. 171; *Union Steamship Company of New Zealand v. Melbourne Harbour Trust Commissioners*, (1884) L. R. 9 App. Cas. 865, 869; *Official Assignee, Bombay v. Chinniram Motilal*, (1932) 34 Bom. L. R. 1615, 1622, 1627; *Ismail Sayadsaheb*, (1933) 35 Bom. L. R. 886, 57 Bom. 537, F.B.

⁵ *Hare*, [1934] 1 K. B. 354, 355; *Ramkrishna v. Bapurao*, (1937) 40 Bom. L. R. 390; *Savitri Devi v. Dwarka Prasad*, [1939] All. 275.

⁶ *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205.

⁷ *Hare*, [1934] 1 K. B. 354, 355.

⁸ *Thakurain Bairaj Kunwar v. Rae Jagatpal Singh*, (1904) 31 I. A. 132, 143, 26 All. 393, 11 Bom. L. R. 516; *Vinayek*, (1899) 1 Bom. L. R. 645, 646, 24 Bom. 120, 122; *Mahomed*, (1900) 2 Bom. L. R. 918; *Jamnadas v. Damodaradas*, (1926) 29 Bom. L. R. 418; *Sholapur Spinning Co., Ltd., v. Pandharinath*, (1928) 30 Bom. L. R. 893, 897, [1928] A.I.R. (B) 341; *Dharwar Urban Bank Ltd. v. Krishnarao*, (1936) 39 Bom. L. R.

203, [1937] Bom. 293; *Sheikh Chamman*, (1919) 1 P. L. T. 11, 21 Cr. L. J. 143, [1920] A. I. R. (P) 526.

^{8(a)} *Sadashiv Narayan Bhalerao*, (1947) 49 Bom. L. R. 526, 74 I. A. 89.

⁹ *Dukhi Mullah v. Halway*, (1895) 23 Cal. 55, 59; *Claydon v. Green*, (1868) L. R. 3 C. P. 511; *Sutton v. Sutton*, (1882) 22 Ch. D. 511; *Ram Lal*, (1927) 3 Luck. 244; *Sadashiv Narayan Bhalerao*, (1947) 49 Bom. L. R. 526, 74 I. A. 89.

¹⁰ *Attorney-General v. Great Eastern Railway Co.*, (1879) 11 Ch. C. 449, 465.

¹¹ *Ram Saran Das v. Bhagwat Prasad*, (1928) 51 All. 411, F.B.; *Ismail Sayadsaheb*, (1933) 35 Bom. L. R. 886, 57 Bom. 537, F.B.; *Secretary of State v. Bombay Municipality (No. I)*, (1935) 37 Bom. L. R. 499, 59 Bom. 681; *Ramkrishna v. Bapurao*, (1937) 40 Bom. L. R. 390, [1938] A.I.R. (B) 284; *Abdul Hakim v. Fazul Miya*, (1934) 62 Cal. 266.

¹² *Fulabhai Joshi*, (1940) 42 Bom. L. R. 857, [1940] Bom. 709; *Megh Raj v. Allah Rakhia*, (1941) 43 P. L. R. 226.

¹³ *Alangamonjori Dabee v. Sonamoni Dabee*, (1882) 8 Cal. 637.

¹⁴ *M. & S. M. R. v. Bezvada Municipality*, (1944) 47 Bom. L. R. 537, 61 I. A. 113.

¹⁵ *Jennings v. Kelly*, [1940] A. C. 206.

time often serve as a defence of the law. In our definitions we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning, and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a few students after long application. Yet such definitions are found, and must be found, in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them, he will give a smoother and more attractive appearance to his workmanship; but in that case he flinches from a duty which he ought to perform, and which somebody must perform. If this necessary but most disagreeable work be not performed by the law giver once for all, it must be constantly performed in a rude and imperfect manner by every judge in the empire, and will probably be performed by no two judges in the same way. We have therefore thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a Code."¹⁶

"The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded, and may sometimes show him that a phrase which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases. In the study of geometry it is constantly found that a theorem which, read by itself, conveyed no distinct meaning to the mind, becomes perfectly clear as soon as the reader casts his eye over the statement of the individual case taken for the purpose of demonstration. Our illustrations, we trust, will in a similar manner facilitate the study of the law."¹⁷

The Privy Council has laid down that illustrations to an Indian statute are to be taken as part of the statute.¹⁸ The function of an illustration is to show how the principle already enunciated in the section of the enactment to which the illustration is appended is to be applied, or how the particular facts of the case supposed by the illustration come under the principle.¹⁹ Illustrations cannot have the effect of modifying the language of the section which alone forms the enactment.²⁰ They furnish some indication of the presumable intention of the Legislature. They are not binding when inconsistent with the language of the section.²¹ They ought not to be construed as limiting the right given by the section.²² They cannot control the general words of a section.²³ They may be useful so far as they explain the meaning of the section, but must never be allowed to control its plain meaning, especially when the effect would be to curtail a right, which it would, in its ordinary sense, confer.²⁴

Punctuation.—The Privy Council has held that in reading an Act of the Legislature the Court takes no notice of commas.²⁵

5. 'Within British India'.—If the offence is committed outside British India it is not punishable under the Penal Code,¹ unless it has been made so by means of special provisions such as ss. 3, 4, 108A, etc., of the Penal Code. Thus, a subject

¹⁶ Draft Penal Code, p. xiv (Prefatory address of the Indian Law Commissioners).

¹⁷ *Ibid.*, p. xv.

¹⁸ *Lala Balla Mal v. Ahad Shah*, (1918) 21 Bom. L. R. 558, P.C.; *Ram Lal*, (1927) 3 Luck. 244; *Krishnadas v. Dwarkadas*, (1936) 38 Bom. L. R. 829, [1937] Bom. 679; *Seth Sri Nath v. Kedar Nath Puri*, (1936) 13 Luck. 1.

¹⁹ *Saadat Kamel Hanum v. Attorney-General for Palestine*, [1939] A. C. 508.

²⁰ *Bengal Nagpur Railway Company, Limited v. Ruttanji*, (1937) 40 Bom. L. R. 746, 65 I. A. 66, [1938] 2 Cal. 72.

²¹ *Fakrapa*, (1890) 15 Bom. 491, 496; *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal. 390; S.B.; *Nga Mya*, (1915) 8 L. B. R. 306, 311, 17 Cr. L. J. 49, [1916] AIR (LB) 144, F. B.

²² *Govind Pillai v. Thayammal*, (1904) 28 Mad. 57.

²³ *Spratt (No. 3)*, (1927) 30 Bom. L. R. 315, 29 Cr. L. J. 320, [1928] AIR (B) 78;

Ambaji, (1928) 30 Bom. L. R. 380, 382, 52 Bom. 257; *Satya Priya Ghosal v. Gobinda Mohun Roy Chowdhury*, (1909) 14 C. W. N. 414.

²⁴ *Koylash Chunder Ghose v. Sonatum Chung Barooie*, (1881) 7 Cal. 132, 135; *Mahomed Syedol Arifin v. Yeoh Ooi Gark*, (1916) 43 I. A. 256, 19 Bom. L. R. 157; *Maruti v. Bankatlal*, (1933) 35 Bom. L. R. 576; *Hemchandra Naskar v. Narendranath Basu*, (1933) 61 Cal. 148.

²⁵ *Pugh v. Ashutosh Sen*, (1928) 31 Bom. L. R. 702, 8 Pat. 516, 56 I. A. 93; *Indian Cotton Company Ltd. v. Huri Poonjoo*, (1930) 38 Bom. L. R. 1222, [1937] Bom. 763. *Contra*, *Taylor v. Bleach*, (1914) 17 Bom. L. R. 56, 39 Bom. 182; *The Secretary of State for India v. Kalekhan*, (1912) 12 M. L. T. 224.

¹ See *Moorga Chetty*, (1881) 5 Bom. 338, F.B. Act VIII of 1882, s. 9, was passed to nullify the effect of this decision in respect of stolen property.

of a Native State, who is guilty of retaining stolen property within the Native State, is not liable to be punished under the Code.²

By the terms of the Statute 24 & 25 Vic., c. 104, the exercise of jurisdiction in any part of His Majesty's Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. An exercise of legislative authority by the Governor-General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the Statute 24 & 25 Vic., c. 104 (now s. 109 of 5 & 6 Geo. V, c. 61), and by the Letters Patent issued under that statute.³

The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.⁴ All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over his own subjects, Her Majesty and the Imperial Legislature have no power whatever.⁵

Territorial jurisdiction.—The general territorial jurisdiction of a State extends into the sea as far as a cannon shot will reach, which is usually calculated to be a marine league, or three miles. The territories, strictly speaking, of a State include, therefore, not only the compass of land, in the ordinary acceptance of the term, belonging to such State, but also that portion of the sea lying along and washing its coast, which is commonly called its "maritime territory." It is by the assent of nations that the three-mile belt of sea has been brought under the dominion of every State. In the *Franconia* case⁶ the question arose whether the British Courts had jurisdiction over a foreigner in command of a foreign ship, who, whilst passing within three miles of English shores, ran into a British ship and caused loss of life. It was held by seven out of thirteen Judges that in the absence of statutory enactment the Central Criminal Court had no power to try such an offence. This decision led to the passing of the Territorial Waters Jurisdiction Act,⁷ which has been extended to India.

Where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction. A French ship, the *Lotus*, collided, upon the high seas, with a Turkish ship which sank with loss of life of eight Turkish subjects. The French navigating officer, being later within Turkish territory, was arrested and tried for manslaughter by a Turkish Court, convicted and punished. The majority of the Judges of the Permanent Court of International Justice held that the Turkish jurisdiction could be supported on a territorial basis.⁸

Prior to the decision in the *Franconia* case and before the enactment of the Territorial Waters Jurisdiction Act (41 & 42 Vic., c. 73), the Bombay High Court had held that an offence committed on the high seas but within three miles from the coast of British India was punishable under the Penal Code as being committed within the territorial limits of British India. In this case certain of the inhabitants of a village sallied out in boats and pulled up and removed a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by the villagers of a neighbouring village and it was held that the local criminal Court had jurisdiction over the offenders, and that the Penal Code was the substantive law applicable to the case.⁹

Section 2 of the Territorial Waters Jurisdiction Act (41 & 42 Vic., c. 73), says: "An offence committed by a person, whether he is or is not a subject of Her Majesty

² *Gunna*, (1926) 48 All. 687; *Kirpal Singh* (1887) 9 All. 523.

³ *Burah*, (1878) 5 I. A. 178, 4 Cal. 172.

⁴ *Jefferys v. Boosey*, (1854) 4 H. L. C. 815.

⁵ *Macleod v. Attorney-General for New South Wales*, [1891] A. C. 455, 458.

⁶ *Or Keyn*, (1876) L. R. 2 Ex. D. 63. See *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A. C. 153,

174; *Secretary of State for India v. Chelikani Rama Rao*, (1916) 43 I. A. 192, 39 Mad. 617, 18 Bom. L. R. 1007. See Oppenheim's International Law, Vol. I, p. 393 (4th Edn.).

⁷ 41 & 42 Vic., c. 73.

⁸ *Lotus* case, (1927) S. J. 770, 165 L. T. 421, *Law Quarterly Review*, Vol. XLIV, p. 154.

⁹ *Kastya Rama*, (1871) 8 B. H. C. (Cr. C.) 68.

on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly."

"'Offence,' as used in this Act, means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England" (s. 7). "The jurisdiction of the Admiral', as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer" (*ibid.*). "'The territorial waters of Her Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions" (*ibid.*).

"Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted" (s. 8).

It has been acknowledged by all nations that the Courts of a State have jurisdiction over its ports and harbours, the mouths of its rivers, and its land-locked bays. This principle has been followed in an old Bombay case.¹⁰ A foreigner committing an offence in any such place will be amenable to the jurisdiction of British Courts, whether or not his act amounted to an offence in his country. The accused was indicted for an unnatural offence, committed on board of an East India ship, lying in St. Katherine's Docks. It was argued that he was a native of Bagdad where his act would not have amounted to an offence. But the Court held that that was not a legal defence.¹¹

Amendment.—After the word "territories" there was the clause "on or after the said day of January, 1862," but it was omitted by Act XII of 1891, Schedule I. After the word "within" there were the words "the said territories." These were omitted and the words "British India" were substituted by the Government of India (Adaptation of Indian Laws) Order, 1937. In Burma the words "British Burma" were substituted by the Government of Burma (Adaptation of Laws) Order, 1937.

PRACTICE.

Jurisdiction.—Where it is doubtful whether the offence is committed in British or foreign territory, the question of jurisdiction cannot be fully determined unless the Magistrate proceeds with the investigation and states what in his opinion is proved by the evidence of the witnesses.¹²

¹⁰ *Essub Ibrahim*, (1845) Perry's Oriental Cases 577. See arguments in *De Sylva*, (1909) 11 Bom. L. R. 221, 32 Bom. 380.

¹¹ *Esop*, (1836) 7 C. & P. 456.

¹² *Motee Chand v. Mohendronath Halidar*, (1868) 9 W. R. (Cr.) 29.

3. Any person liable, by any Indian law,¹ to be tried for an offence committed beyond British India shall be dealt with according to the provisions of this Code for any act² committed beyond British India in the same manner as if such act had been committed within British India.

COMMENT.

This section only applies to the case of a person who, at the time of committing the offence charged, was amenable to British Courts.¹³ This and the following section relate to the extra-territorial operation of the Code.

1. 'By any Indian law.'—These words restrict the operation of the section to the cases specified in the Indian Extradition Act¹⁴ and ss. 186 and 188 of the Criminal Procedure Code. If an Indian commits an act in England which is not an offence in that country (e.g. adultery) but is punishable under the Penal Code, he may be prosecuted in India. A Native Indian subject of His Majesty, being a soldier in the Indian Army, committed a murder in Cyprus while on service in such army, and was charged with this offence at Agra. It was held that he might be dealt with in respect of such offence by the Criminal Court at Agra.¹⁵

The first statute dealing with offences committed beyond British India was the Offenders in Foreign States Act (I of 1849). It consolidated several Regulations dealing with the same subject-matter. Then came the Foreign Jurisdiction and Extradition Act (XI of 1872) which dealt with offences committed in Indian States. This Act was repealed by Act XXI of 1879. In the Criminal Procedure Code of 1882, the sections dealing with such offences in the Foreign Jurisdiction Act were incorporated as ss. 188 and 189. The Foreign Jurisdiction Act and the Extradition Act of 1879 were consolidated in 1903 as the Extradition Act (XI of 1903).

Legislative powers.—These are now governed by the Government of India Act, 1935, Part V. The legislative powers of the Indian Legislatures, Central and Provincial, which are all non-sovereign law-making bodies, arise from definite Parliamentary enactments. The powers are wide and plenary, but the authority they exercise is as completely subordinate to, and as much dependent upon, Acts of Parliament as is the power of any other body, which is a creature of a statute, to make bye-laws. When any particular case comes before the Courts, whether civil or criminal, in which the rights and liabilities of any party are affected by any legislation of an Indian Legislature, the Courts may have to determine with a view to the particular case whether such legislation was or was not within the legal powers of the Council. The Court however cannot declare invalid, annul or make void a law so passed, but if it is found *ultra vires* or unconstitutional they will refuse to give effect to it and treat it as void or invalid or having no legal existence.¹⁶

When an Act of the Government of India is outside the scope of the powers derived from an Act of Parliament, the High Court has power to declare such an enactment *ultra vires* and of no force and effect.¹⁷ The Bombay High Court had decided that the power of superintendence which the High Court had over Courts subject to its appellate jurisdiction, under s. 107 of the Government of India Act, 1915, could not be taken away by the Governor-General under ss. 71 and 72 of the Act which empowered him to make regulations and ordinances.¹⁸ The effect of the *ratio* in *Balkrishna's* case is negated by the Government of India Act, 1935, which provides: 'Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.'¹⁹

¹³ *Pirtai*, (1873) 10 B. H. C. (Cr. C.) 356 ; *Roda*, (1889) P. R. No. 30 of 1889; *Ibrahim*, (1893) P. R. No. 7 of 1894.

¹⁴ XV of 1903.

¹⁵ *Sarmukh Singh*, (1879) 2 All. 218, F.B.

¹⁶ *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, (1936) 64 C. L. J. 212,

230, 231, [1936] AIR (C) 593.

¹⁷ *Parmeshwar Ahir*, (1918) 3 P. L. J. 537, 19 Cr. L. J. 281, [1918] AIR (P) 155, F.B.

¹⁸ *Balkrishna Phansalkar*, (1932) 34 Bom. L. R. 1523, 1528, 57 Bom. 93, 96, F.B.

¹⁹ Government of India Act, 1935 (25 & 26 Geo. V, c. 42), ss. 224 (2), 403 (2).

2. 'Act.'—It includes omission as well (s. 32, *infra*).

Amendment.—The word "Indian" after "any" was added, and the words "passed by the Governor-General of India in Council" after the word "law" were omitted, by the Governor-General of India (Adaptation of Indian Laws) Order, 1937. After the words "offence committed beyond" there were the words "the limits of the said territories" and after the words "act committed beyond" there were the words "the said territories." Those words were omitted and the words "British India" were substituted by the same Order. In Burma the words "British Burma" were substituted for "the said territories" and the words "in force in British Burma" were substituted for "passed by the Governor-General of India in Council" by the Government of Burma (Adaptation of Laws) Order, 1937.

Extension of
Code to extra-ter-
ritorial offences.

4. The provisions of this Code apply also to any offence committed by—

(1) any Native Indian subject¹ of Her Majesty in any place without and beyond British India;²

(2) any other British subject within the territories of any Native Prince or Chief in India ;

(3) any servant of the Queen,³ whether a British subject or not, within the territories of any Native Prince or Chief in India ;

(4) any person on any ship or aircraft registered in British India wherever it may be.

Explanation.—In this section the word "offence" includes every act committed outside British India which, if committed in British India, would be punishable under this Code.

ILLUSTRATIONS.

(a) A, a coolie, who is a Native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.

(b) B, a European, British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.

(c) C, a foreigner, who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found.

(d) D, a British subject living in Indore, instigates E to commit a murder in Bombay. D is guilty of abetting murder.

COMMENT.

Object.—This section shows the extent to which the Code now applies to offences committed outside British India. When the Indian Penal Code was passed, Parliament had only conferred on the Indian Legislature the power of dealing with extra-territorial offences where the offence was committed by a servant of Government. But since 1860 Parliament has conferred various extra-territorial powers on the Indian Legislature. It is right and convenient that in the case of a Code like the Indian Penal Code, the extent of its extra-territorial operation should appear on the face of the Code itself.²⁰

Clauses (1), (2) and (3) were enacted by Act IV of 1898. Clause (4) has been added by the Offences on Ships and Aircraft Act (IV of 1940).

Where an offence has been committed in British territory the nationality of the offender does not, of itself, prevent him from being subject to the law of British India and the jurisdiction of British Indian Courts, and the locality of the offence is unimportant. But when the offence has been committed beyond the limits of British India

²⁰ G. I., 1897, Part VI, p. 237.

it becomes necessary to ascertain whether the accused is or is not (a) a Native Indian subject of His Majesty, or (b) a British subject, or (c) a servant of the Crown.

Clause 1.—Under this clause Native Indian subjects of His Majesty the King-Emperor are triable in British India for offences committed by them at any place out of British India.

1. ‘Native Indian subject.’—These words mean only native subjects *de jure* and not *de facto*. Occasional residences in British territory cannot be taken to render a person who is not *de jure* a subject, a subject for the purpose of criminal jurisdiction being exercised over him for an act committed in a foreign territory, which, if committed within British territory, would have been an offence cognizable by British Courts.²¹ The term ‘Native Indian subject of His Majesty’ does not include ‘servants of His Majesty.’ It has been so held by the Bombay High Court in a case in which the accused was a talati in the British territory but his family belonged to a village in the Baroda State and he was born there. His services were lent by the British Government to the Cambay State. While serving there he took bribes and was convicted by the First Class Magistrate of Ahmedabad within whose jurisdiction he was found and arrested. It was held that the accused was not a ‘Native Indian subject of His Majesty’ within the meaning of s. 188 of the Code of Criminal Procedure, and that as ‘servant of the Queen’ the Magistrate had no jurisdiction to try him for an offence committed in a foreign State.²²

The legislative authority of the Government of India is expressly declared to extend to all Native Indian subjects of His Majesty, without and beyond as well as within British India, by s. 65(I) (c) of the Government of India Act, 1915.²³

2. ‘British India.’—The General Clauses Act²⁴ says that ‘British India’ shall mean all territories and places within His Majesty’s dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India.²⁴

The word ‘India’ means British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may declare to be part of India.²⁵

Clause 2.—Under this clause any European British subject who commits an offence within the territories of any Indian Prince or Chief in India is triable in British India. If such a person commits an offence within the French or Portuguese territory in India he cannot be tried in British India.

Clause 3.—This clause gives jurisdiction to try servants of His Majesty, whether British or Indian, for offences committed by them in the territories of any Indian Prince or Chief in India.

3. ‘Servant of the Queen.’—See s. 14, *infra*. The legislative authority of the Government of India is expressly declared to extend to “all Servants of the Government of India within the Dominions of Princes and States in Alliance with Her Majesty”.¹ The servant may be a Native Indian subject or a European British subject or a foreigner. A person, who is not a British subject, is not ordinarily bound by the law of British India and is not subject to the jurisdiction of its Courts in respect of an act done by him outside British India. But an exception is created in the case of a servant of the Crown in respect of offences committed by him in the territories of any Indian Prince. For such offences, a servant of the Crown, whether he is a British subject or not, is liable to be tried in British India.

Clause 4.—This clause has been introduced so as to extend the operation of the Code to offences committed outside British India (a) by foreigners, and (b) by British subjects other than Indian British subjects, on aircrafts and ships registered in British India.^{1a}

²¹ *Fakir*, (1884) P. R. No. 1 of 1885.

²² *Natawarat*, (1891) 16 Bom. 178.

²³ 5 & 6 Geo. V, c. 61.

²⁴ Act X of 1897, s. 3 (7); the Interpretation Act, 52 & 53 Vic., c. 63, s. 18 (4).

²⁵ The General Clauses Act, s. 3 (27); the Interpretation Act, s. 18 (5).

¹ 24 & 25 Vic., c. 67, s. 22.

^{1a} See Statement of Objects and Reasons, G. I., dated 10-2-40, Part V, p. 79.

Crimes committed outside British India.—Where an offence is committed beyond the limits of British India but the offender is found within its limits two contingencies arise :—

(I) The offender may be given up for trial in the country where the offence was committed (*extradition*).

(II) The offender may be tried in British India (*extra-territorial* or *ex-territorial jurisdiction*).

(1) **Extradition.**—Extradition means the surrender of a fugitive offender by one State to another in which the offender is liable to be punished or has been convicted. The law of extradition is founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice.² The procedure for securing the extradition from British India depends upon the scene of an offence. The scene of the offence committed outside British India may be—

(1) Any of the Indian States in which the Crown Representative has a power and jurisdiction through a Political Agent ;

(2) a Foreign State ; or

(3) Some British possession.

(1) Before the passing of the Foreign Jurisdiction and Extradition Act (XXI of 1879), extradition, as between the British Government and some of the Indian States, was governed by virtue of special treaties.³ "But such treaties have become obsolete owing to the passing of the above Act which afforded a much quicker remedy." Many of the Indian States have by subsequent agreements given up their rights under treaties after the Act came into operation. This Act has been substituted by the Indian Extradition Act, XV of 1903. Chapter III of this Act lays down the procedure for surrender of fugitive criminals to States other than Foreign States. The procedure varies according as there is or is not an extradition treaty with the State concerned. If there is such a treaty the procedure in Chapter III must be followed subject to the provisions of the treaty (*vide s. 18*). If there is no treaty, the procedure laid down in Chapter III will prevail. The Indian States come under the class of States dealt with in Chapter III and the procedure laid down in that Chapter will apply to them, except in so far as it may have been modified or superseded by the provisions of a treaty (if any) with the State concerned. Section 7 says : "Where an extradition offence [i.e. any such offence as is described in the first schedule of the Indian Extradition Act] has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any State not being a Foreign State, and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency-town, to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly".⁴ The Political Agent is not empowered by this Act to demand the extradition of a European British subject. Such a person will be dealt with under s. 188 of the Code of Criminal Procedure. Such requisition must come through the Political Agent for such State if there is any.

Magistrates in British India may issue warrants to arrest persons having committed offences in Indian States on such information or complaint and on such evidence as would justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction, and surrender them to the States within whose limits the offences are committed even without a requisition (s. 10).

² Per Lord Russell, C. J., in *Arton*, [1896] Q. B. 108.

³ See Aitchison's *Treaties and Sunnuds*, and Lee Warner's *Native States of India*, p. 337.

⁴ A District Magistrate who is addressed with a view to execution of a warrant issued

by a Political Agent of a Native State under this section must act in pursuance of such warrant and has no authority to ascertain whether a *prima facie* case exists against the accused or not : *Gyan Chand*, (1903) P. R. No. 8 of 1909.

(2) Where the scene of offence is some Foreign State (i.e. a State to which, for the time being, the English Extradition Acts, 1870⁵ and 1873⁶ apply) the fugitive criminal may, if the Central Government thinks fit and the offence is one of the offences mentioned in the first schedule of the Indian Extradition Act (XV of 1903) and is not of a political character, be surrendered on a requisition.⁷

In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.⁸

If the foreign State is not of the above description, then there is no Act, or provision in any Act, for the giving up of a foreign subject, found in British India, who has committed a crime in that State. Since the passing of the Extradition Acts 1870 to 1895⁹ Great Britain has entered into extradition treaties with various foreign States (mostly in Europe and America) embodying their provisions by Orders in Council. Such are the Portuguese Treaty Act (IV of 1880) and the Treaty with France (1909).¹⁰ The East Indian possessions of France having been excluded from the Extradition Treaty of 1876, and not being States or parts of a State to which the Extradition Acts of 1870 & 1873 apply, are held to be not a foreign State within the meaning of the Indian Extradition Act. In a Calcutta case an accused who had taken shelter in British India after committing an offence at Chandernagore was extradited in virtue of the Treaty with France of 1850.¹¹ Similarly, the Government of India delivered up to the Government of Pondicherry a British Indian subject who had committed theft within the French territory.¹² In the case of some foreign Asiatic States, usage, sufferance or acquiescence has given ex-territorial jurisdiction to British Courts.

The procedure for surrender of fugitive criminals to Foreign States is laid down in Chapter II of the Indian Extradition Act which has been declared a part of the English Extradition Act, 1870 (33 & 34 Vic., c. 52) by an Order in Council dated March 7, 1904.

(3) The question of the surrender of fugitive offenders between the various possessions of the King Emperor is governed by the Fugitive Offenders Act, 1881.¹³ Where a person accused of having committed an offence specified in s. 9 of this Act, or s. 19(d) of the Indian Extradition Act (viz., treason, or any other offence punishable with rigorous imprisonment for a term of twelve months or more, or with any greater punishment) in one part of His Majesty's dominions has left that part, such person, if found in another part of His Majesty's dominions, shall be liable to be apprehended and returned in manner provided by the Fugitive Offenders Act to the part from which he is a fugitive. Section 32 of the Fugitive Offenders Act provides that if the legislature of a British possession passes any Act or Ordinance for the purpose of carrying into effect its provisions, an Order in Council may be made that such Act or Ordinance shall be recognised and given effect to throughout His Majesty's dominions and on the high seas. In the case of British India, this power has been exercised by the Order in Council dated March 7, 1904, recognizing Chapter IV of the Indian Extradition Act, 1903, and declaring that it should be given effect to throughout His Majesty's dominions and on the high seas, as if it were part of the Fugitive Offenders Act. When a fugitive offender has fled into British India from some other British possession and he is to be surrendered, the law applicable will be the Fugitive Offenders Act, 1881, read with Chapter IV of the Indian Extradition Act.

(II) **Extra-territorial jurisdiction.**—The British Indian Courts are empowered to try offences committed out of British India either on (A) Land; or (B) High Seas.

⁵ 33 & 34 Vic., c. 52.

⁶ 36 & 37 Vic., c. 60.

⁷ The Indian Extradition Act, s. 3. See the procedure laid down in this section.

⁸ Per Cave, J., in *Meunier*, [1894] 2 Q. B. 415, 419. See also Stephen's *History of the Criminal Law of England*, Vol. II, pp. 65-70.

⁹ 53 & 59 Vic., c. 33, s. 2.

¹⁰ Extradition (France and Tunis) Order in Council, 1909, *Bom. Govt. Gazette*, 1910,

Part I, p. 55.

¹¹ *Rahamat Ali*, (1919) 47 Cal. 37. In a subsequent case this case has been dissented from, see *Cullington*, (1920) 48 Cal. 328. The Madras High Court has doubted whether the latter case is correctly decided and has agreed with the former case: *Muthu Reddi*, (1930) 53 Mad. 1023.

¹² *Muthu Reddi*, (1930) 53 Mad. 1023.

¹³ 44 & 45 Vic., c. 69. See the Appendix where this statute is set out fully.

(A) **Land.**—By virtue of ss. 3 and 4 of the Penal Code, and s. 188 of the Code of Criminal Procedure, local Courts can take cognizance of offences committed beyond the territories of British India. Several Acts of Parliament also confer similar jurisdiction. The High Courts are empowered by their Charters to try European British subjects and servants of the King for offences committed in the territories of Indian Princes.¹⁴ If the offender is a British Indian subject then he may be tried no matter where he commits the act which is an offence under the Code (*vide* the Explanation). The act alleged to have been done must amount to an offence punishable under the Code.¹⁵ Where the Court is dealing with an act committed outside British India by an Indian subject which would be an offence punishable under the Code if it has been committed in British India, this section, as it now exists, constitutes the act an offence, and it can be dealt with under s. 188 of the Criminal Procedure Code.¹⁶

Section 188 of the Criminal Procedure Code provides :—

“When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or when any British subject commits an offence in the territories of any Native Prince or Chief in India, or when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found :

Provided that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India :¹⁷ and, where there is no Political Agent, the sanction of the Provincial Government shall be required.”

The first part of this section refers to offences said to have been committed in any territory and not to offences committed on the high seas.¹⁸

The word ‘found’ in the section must be taken to mean, not where a person is discovered, but where he is actually present.¹⁹ A man brought into a place against his will can be said to be found there.²⁰ In the Nasik Conspiracy case the question arose whether the Special Tribunal had power to try one of the accused who had escaped at Marseilles from the custody of police-officers, charged with the duty of bringing him from London to Bombay, but was re-arrested there and brought to Bombay and committed for trial by the Special Magistrate at Nasik. It was held that where the accused was in the country and was charged with an offence under the Penal Code it would not avail him to say that he was brought there illegally from a foreign country.²¹ Where a foreign subject, though irregularly arrested in his own country, has been validly surrendered by the authorities of that country to the trying Court in British India, the proceedings are perfectly regular and in order. The State of Jind ceded full powers to the British Government over lands in the State occupied by the Southern Punjab Railway. The accused charged with a murder committed in a train of the said railway while running through Jind, was arrested by the British Indian Police in a part of the State not ceded but subsequently he was formally extradited and handed over to the authorities of the Rohtak District who placed him for trial before the Court of the Deputy Commissioner, Rohtak, which was the Court having criminal jurisdiction over the railway lands in Jind. It was held that the trial was perfectly in order and was in no way vitiated by any illegality in the accused’s arrest.²²

Cases.—Where certificate granted under s. 188 of Criminal Procedure Code.—A Native Indian subject of His Majesty committed theft in the territory of a

¹⁴ *Chill*, (1871) 8 B. H. C. (Cr. C.) 92; *Watkins*, (1865) 2 M. H. C. 444.

¹⁵ *Rambharthi Hirabharthi*, (1923) 25 Bom. L. R. 772, 47 Bom. 907.

¹⁶ *Narayan Mahale*, (1935) 37 Bom. L. R. 885, 59 Bom. 745.

¹⁷ *Bapu Daldi*, (1882) 5 Mad. 23.

¹⁸ *Phillip*, (1917) 19 Bom. L. R. 527, 41 Bom. 667.

¹⁹ *Maganlal*, (1882) 6 Bom. 622; *Bande Ali*, (1927) 29 Cr. L. J. 68, 4 O. W. N. 1121, [1927] AIR (O) 627.

²⁰ *Lopez*, (1858) 7 Cox 431, 27 L. J. (M. C.) 48.

²¹ *Vinayak Damodar Savarkar*, (1910) 13 Bom. L. R. 296, 304, 35 Bom. 225, 228; *Wheeler*, (1928) 29 Cr. L. J. 1089, [1928] AIR (S) 161; *P. L. Jaitly v. Hon’ble Sir Iqbal Ahmad*, (1945) 20 Luck. 442. See *Shew Bux*, (1901) 7 Burma L. R. 83, 86, in which the Chief Court of Burma took a different view of the Privy Council decision in *Muhammad Yusuf-ud-din*, (1897) 24 I. A. 137, 25 Cal. 20, referred to in *Savarkar’s* case.

²² *Parbhu*, (1944) 48 C. W. N. 493, [1944] M. W. N. 502, [1944] A. L. J. R. 385, (1944) 46 Bom. L. R., P.C., *V. D. Savarkar’s* case approved.

Native State, and was discovered in the territory of another Native State, and from there brought down or came of his own accord to Ahmedabad. A certificate was granted by the Political Agent that the offence ought to be inquired into in British India. It was held that the Sessions Court at Ahmedabad was competent to try the accused.²³

Where no certificate obtained under s. 188 of Criminal Procedure Code.—

A minor girl (under sixteen years) was taken by the accused from Sholapur to Tuljapur (foreign territory), and there dedicated to the goddess Amba, with intent or knowing it to be likely that she would be used for purposes of prostitution. The accused was convicted of an offence under s. 372 by the District Magistrate of Sholapur. It was held that as the offence of the disposal of the minor took place out of British India, the Magistrate had no jurisdiction to try the offence in the absence of a certificate of the Political Agent or the sanction of the Local Government as required by s. 188, Criminal Procedure Code.²⁴ A bullock was stolen in British Indian territory. Two months after the theft it was sold by the accused in the Idar State territory. The accused was convicted under s. 411. It was held that he could not be so convicted in the absence of a certificate from the Political Agent under s. 188 of the Criminal Procedure Code.²⁵ Where a District Magistrate instituted criminal proceedings in British India against a Native Indian subject, in respect of certain offences committed by him in French territory, without a certificate under s. 188, Criminal Procedure Code, 1882, it was held that although the Magistrate was the Political Agent who might have certified under that section, the proceedings were void for want of such certificate.¹ The Allahabad High Court has similarly held that the absence of the certificate of the Political Agent is an absolute bar to the trial.²

The accused enticed away a married girl, under sixteen years, from the house of her father, where she was temporarily staying, in the territory of the Maharaja of Kashmir. The girl was made to leave her home on a deceitful message, and was subsequently persuaded to go away with the accused. The accused induced her to file a petition at Gujarat, in the British territory, to the effect that she was without a guardian and was going to settle there to practise prostitution. He also rented a shop for her to carry on the said profession. No certificate was obtained from the Political Agent, but no objection was taken on behalf of the accused in the lower Court. The former Chief Court of the Punjab held (1) that, as the girl was induced to leave her home in consequence of a deceitful message and persuaded to go away with the accused, who actually seduced her with an intent to illicit intercourse, the offence committed was covered by s. 366 of the Code; (2) that the objection to the defect arising from the want of a certificate was made too late and the trial of the case without a certificate was, therefore, an irregularity which was cured by s. 537, Criminal Procedure Code, no prejudice having been alleged or proved.³

Subsequent annexation or transfer of the territory where the offence is committed.—A person, after having committed dacoity attended with murder, absconded to Bhootan, which was subsequently annexed by the British Government. It was held that he could be tried and convicted for the offence by the British Courts.⁴ Similarly, where certain persons were charged with committing an offence at a place in British India and committed to a Court of Session and the place where the offence was committed became part of a Native State subsequently, it was held that the British Courts were not deprived of jurisdiction inasmuch as at the time of the transfer of the place where the offence had been committed the accused were in British India in custody in point of law, of a Court of competent jurisdiction.⁵

²³ *Maganlal*, (1882) 6 Bom. 622.

²⁴ *Baku Tukaram*, (1899) 1 Bom. L. R. 678, 24 Bom. 287; *Sirdar Meru v. Jethabhai Amirbhai*, (1906) 8 Bom. L. R. 513, 4 Cr. L. J. 54. *Daya Bhima*, (1888) 13 Bom. 147, considered to be not good law in *Narayan Mahale*, (1935) 37 Bom. L. R. 885, 59 Bom. 745, in view of the repeal of the Foreign Jurisdiction and Extradition Act, 1879.

²⁵ *Sana Mathur*, (1929) 32 Bom. L. R. 98, 54 Bom. 171.

¹ *Kathaperumal*, (1889) 13 Mad. 423; *Bapu*

Daldi, (1882) 5 Mad. 23; *Ram Prasad Guru*, (1929) 11 P. L. T. 483, 31 Cr. L. J. 364, [1930] AIR (P) 501.

² *Ram Sundar*, (1896) 19 All. 109.

³ *Fateh Din*, (1901) P. R. No. 4 of 1902, F.B. See also *Mahamadbuksh Karimbuksh*, (1906) 8 Bom. L. R. 507, 4 Cr. L. J. 49.

⁴ *Roopa*, (1865) 2 W. R. (Cr.) 49.

⁵ *Ram Naresh Singh*, (1911) 34 All. 118. See *Mahabir*, (1911) 33 All. 578; *Sahab Din*, (1911) 8 A. L. J. R. 705, 12 Cr. L. J. 470; *Ganga*, (1912) 34 All. 451.

Breach of contract under Act XIII of 1859.—The accused, having contracted in a foreign territory to labour for the complainant in the British territory, broke his contract. He was arrested in the foreign territory, brought into the British territory and tried there. It was held that the British Court had no jurisdiction, "both the contract and the breach having taken place in foreign territory".⁶ The accused, having received an advance of money from the complainant, contracted to labour for him in a foreign territory. The accused broke the contract, for which he was prosecuted in British India. It was held that the British Court could not entertain the case.⁷

Jurisdiction over European British subjects in Indian States.—Criminal law and procedure of British India is applicable to British subjects in the territories outside British India in which jurisdiction is exercised by the Governor-General in Council.⁸ In exercise of the powers conferred by s. 190, sub-s. (1), of the Government of India Act, 1915 (5 & 6 Geo. V, c. 61), the Governor-General in Council has issued the following notification.

I. The Governor-General in Council is pleased to direct that original and appellate criminal jurisdiction over European British subjects of His Majesty for the time being within the territories of the States of India named below shall, until the Governor-General in Council otherwise orders, be exercised by the High Courts of Judicature established at Fort William in Bengal, Madras, Bombay, Allahabad, Patna, Lahore and Nagpur respectively, as follows⁹ :—

By the High Court of Judicature at Fort William in Bengal in—

Nepal. Sikkim.
The States in the political control of the Government of Bengal.
The States in the political control of the Chief Commissioner of Assam.

By the High Court of Judicature at Madras in—

Mysore. Banganapalle.
Pudukkottai. Sandur.
The portions of the Kalahandi State occupied by the Raipur-Vizianagaram section of the Bengal-Nagpur Railway.

By the High Court of Judicature at Bombay in¹⁰—

[Baroda and States within the political charge of the Agent to the Governor General for the Gujarat States and the Resident at Baroda.
Gwalior and Khaniadana, other than the portions of those States occupied by the Great Indian Peninsula Railway, Midland section (including the Scindia State Railway), north of Lalitpur.
The States in Central India other than those in the Bundelkhand Agency and the State of Rewa.
The States in Rajputana, excluding the portions of the Bharatpur State occupied by the Agra-Delhi Chord Railway and by the Cawnpore-Achnera section of the Rajputana Malwa Railway.
The States within the political charge of the Agent to the Governor General in the States of Western India.
The States within the political charge of the Agent to the Governor General for the Deccan States and Resident at Kolhapur.
The district of Abu.]

By the High Court of Judicature at Allahabad in—

The States in Central India in the Baghelkhand Agency (including the Alampur Pargana of Indore) and the State of Rewa :—

BAGHELKHAND.

Baraundha.
Bhaisaunda.
Jaso.
Kamta Rajaula.
Kothi.
Maihar.
Nagod.
Pahar.

BUNDELKHAND.

Ajaigarh.
Alipura.
Banka Pahari.
Baoni.
Beri.
Bihat.
Bijawar.
Bijna.

Garrauli.
Gaurihar.
Jigni.
Lughasi.
Naigawan Rebai.
Orchha.
Panna.
Samthar.

⁶ *Siddha v. Biligiri*, (1884) 7 Mad. 354.

⁷ *Gregory v. Vadakasi Kangani*, (1886) 10 Mad. 21.

⁸ Notification No. 1863-I A, dated May 13, 1904, *G.I.*, 1904, Part I, p. 365.

⁹ Notification No. 580-D, dated January 26, 1917, *G.I.*, 1917, Part I, p. 141, as amended by Notification No. 878-IB, dated March 19,

1921, *G.I.*, Part I, p. 438, Notification No. 149-I, dated April 1, 1933, *G.I.*, Part I, p. 247, and Notification No. 38-IB, dated January 6, 1936, *G.I.*, 1936, Extraordinary, p. 60.

¹⁰ Notification No. 149-I, dated April 1, 1933, *G.I.*, Part I, p. 247, as amended by Notification No. 38-I-B, *G.I.*, 1936, Extraordinary, p. 60.

BAGHELKHAND

Paldeo.
Rewa.
Sohawal.
Taraon.

BUNDELKHAND

Charkhari.
Chhatarpur.
Datia.
Dhurwai.

Sarila.
Tori-Fatehpur.
The Alampur Pargana of
Indore.

[The portions of the Gwalior Khaniadhana States occupied by the Great Indian Peninsula Railway, Midland section (including the Scindia State Railway), north of Lalitpur.]¹¹

The portions of the Bharatpur State occupied by the Agra-Delhi Chord Railway and by the Cawnpore-Achnera section of the Rajputana-Malwa Railway.

The portion of the Patna State occupied by the Raipur-Vizianagaram section of the Bengal-Nagpur Railway.

The States in the political control of the Government of the United Provinces of Agra and Oudh.....¹²

By the High Court of Judicature at Patna in—

The States in the political control of the Government of Bihar and Orissa, excluding the portions of the Kalahandi and Patna States occupied by the Raipur-Vizianagaram section of the Bengal-Nagpur Railway.

Provided that all proceedings pending at the date of this notification shall be carried on as if this notification had not been issued.

By the High Court of Judicature at Lahore¹³ in—

Jammu and Kashmir.—Kalat.

Las Bela.

The territories administered by the Agent to the Governor General in Baluchistan as such Agent.

[The States in the political control of the Government of the Punjab.

The States within the political charge of the Agent to the Governor General, Punjab States.]¹⁴

The territories administered by the Agent to the Governor General, North-West Frontier Province, as such Agent.

By the High Court of Judicature at Nagpur¹⁵ in—

The States of Baster, Changbhakar, Chhuikhadan, Jashpur, Kanker, Kawardha, Khairagarh, Korea, Nandgada, Raigarh, Sakti, Sarangarh, Surguja and Udaipur within the political charge of the Agent to the Governor General, Eastern States.

The States of Makrai within the political charge of the Political Agent, Bhopal. Hyderabad.

II. The Governor-General in Council is pleased to direct that until further orders, original and appellate criminal jurisdiction shall be exercised...by the High Court of Judicature at Allahabad over European British subjects of His Majesty, being Christians, resident in the parganas of Todgarh, Dewair, Saroth, Chang and Kot Carana in Merwara.¹⁶

Acts done within British as well as foreign territory.—A person who is a British subject is liable to be tried by the Courts of this country for acts done by him, partly within and partly without the British territories, provided the acts amount together to an offence under the Code.¹⁷

(B) High Seas.—Admiralty jurisdiction.—The jurisdiction to try offences committed on the high seas is known as admiralty jurisdiction. It is founded on the principle that a ship on the High seas is a floating island belonging to the nation whose flag she is flying. It extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows, and where great ships go. It makes no difference whether the ship is made fast to the bottom of the river by anchor and cable, or to its side by ropes from the quay.¹⁸ The admiralty jurisdiction extends over British ships although they may be at a spot where the municipal authorities of a foreign country might exercise concurrent jurisdiction, if invoked. Ever since the time of Richard II, this jurisdiction has extended to where great ships go as part of their voyage for the purposes of trading, and to all persons, whether British subjects, or foreigners, who happen to be on board such ships, so as to be entitled to the protec-

¹¹ Notification No. 878-I, B., dated March 15, 1921, *G. I.*, 1921, Part I, p. 488.

¹² Omitted by Notification No. 59-I, dated January 21, 1924, *G. I.*, 1924, Part I, p. 83.

¹³ Added by Notification No. 90-I, B. S., dated April 1, 1919, *G. I.*, 1919, Extraordinary, p. 305.

¹⁴ Added by Notification No. 149-I, dated April 1, 1933, *G. I.*, 1933, Part I, p. 247.

¹⁵ Added by Notification No. 38-I, B., dated January 6, 1936, *G. I.*, Extraordinary, p. 60.

¹⁶ Notification No. 581-D, dated January 26, 1917, *G. I.*, 1917, Part I, p. 142, as amended by Notification No. 80-I, dated October 15, 1923, *G. I.*, 1923, Part I, p. 1349.

¹⁷ *Moulvie Ahmudoolah*, (1865) 2 W. R. (Cr.) 60.

¹⁸ *Anderson*, (1868) L. R. 1 C. C. R. 161.

tion of English law.¹⁹ It makes no difference whether the offender comes voluntarily on board the British ship or is brought and detained there against his will; nor whether he comes voluntarily within the jurisdiction of the particular Court by which he is tried, or is brought within that jurisdiction against his will.²⁰ If the ship is a British ship and sailing under the British flag the Court will have jurisdiction, and no proof of the register of the vessel is necessary.²¹ It is sufficient to show orally that she belongs to British owners, and carries the British flag.²² If a ship is registered as a British ship and sailing under the British flag, but the owner is not a natural-born British subject, the admiralty jurisdiction will not extend to offences committed on board such ship.²³ If the owner is a British subject the jurisdiction will extend to all offences committed thereon, whether the offenders be British subjects or foreigners. If a foreigner inflicts a blow on another foreigner in a foreign vessel on the high seas, and the person so struck in a few days afterwards lands in England and dies there, the homicide is not cognizable by English Courts.²⁴

As to the limits of the admiralty jurisdiction, East, in his treatise on the Pleas of the Crown,²⁵ says that this jurisdiction does not extend to any river, creek, or port within the body of a county. "The only difficulty which ever occurs is with respect to what shall be considered as the line of demarcation between the county and the high sea. Upon the open sea-shore it is past dispute that the common law and the admiralty have alternate jurisdiction between high and low water mark. But in harbours or below the bridges in great rivers near the sea, which are partly inclosed by the land, the question is often more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain that the admiral can have no jurisdiction in any rivers or arms or creeks of the sea within the bodies of counties, though within the flux and reflux of the tide: except in the particular instances before shewn, of mayhem and homicide done in great rivers beneath the bridges near the sea; which depend on the stat. 15 Ric. 2, c. 3. In general, it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, *where persons can see from one side to the other*. *Ld. Hale*, in his treatise *De Jure Maris*, says, 'That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county.' *Hawkins*, however, considers the line more accurately confined by other authorities to such parts of the sea where a man standing on the side of the land *may see what is done on the other*." When the haven, creek or river, is within the body of a county the common law tribunals have a concurrent jurisdiction in case of murder.¹

With regard to the seashore, the ordinary criminal Courts and the Court of Admiralty have concurrent jurisdiction between high and low water-mark.²

Cases.—The accused, an English sailor, stole three chests of tea out of a British vessel, when it was lying in a river in China. It was urged that as the vessel was twenty or thirty miles from the sea, the offence was not committed on the high seas. It was held that the offence was committed within the admiralty jurisdiction.³ An American, serving on board a British ship, caused the death of another American, serving on the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went. It was held that the ship was within the admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court.⁴ A foreigner, having committed larceny in England, was followed to Hamburg by an English police-officer, who arrested him without a warrant, and brought him against his will on board an English steamer trading between Hamburg and London, and there kept him in custody in order that he might be tried for the larceny

¹⁹ *Anderson*, (1868) L. R. 1 C. C. R. 161; *Carr*, (1882) 10 Q. B. D. 76, 86; *Lesley*, (1860) 29 L. J. (M. C.) 97.

²⁰ *Lopez*, (1858) 7 Cox 431, 27 L. J. (M. C.) 48.

²¹ *Seberg*, (1870) L. R. 1 C. C. R. 264; Merchant Shipping Act, 1894, (57 & 58 Vic., c. 60), s. 106.

²² *Frank Allen*, (1866) 10 Cox 405.

²³ *Bjornsen*, (1865) 10 Cox 74.

²⁴ *Lewis*, (1857) 26 L. J. (M. C.) 104, 7 Cox 277.

²⁵ Vol. II, pp. 803, 804.

¹ *Bruce*, (1812) Russ. & Ry. 243, 2 Leach 1093.

² 3 Coke 113.

³ *Thomas Allen*, (1837) 1 Mood. C. C. 494.

⁴ *Anderson*, (1868) L. R. 1 C. C. R. 161.

in England. During the voyage, whilst the steamer was on the high seas, he shot the officer out of malice prepense and not with a view to escape. It was held that he was guilty of murder within the admiralty jurisdiction.⁵ Certain bonds were stolen from a British ship, whilst she was lying afloat in the river at Rotterdam, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide, and where large vessels usually lay. It did not appear who the thief was or under what circumstances he was on board the ship. It was held that the larceny took place within the admiralty jurisdiction.⁶

The accused and the deceased were foreigners, and the latter died at Liverpool from injuries inflicted by the accused on board a foreign ship on the high seas. It was held that the offence was not cognizable by English Courts.⁷ It was held, similarly, where an alien enemy, who had been a prisoner of war, and was acting as a mariner on board an English merchant ship, killed an Englishman.⁸ Where the officers and crew of a foreign vessel which was unlawfully captured as a slave-ship killed their capturers who were English, it was held that the English Courts had no jurisdiction to try them for murder.⁹

Jurisdiction of Indian High Courts.—The admiralty jurisdiction of the High Courts of Calcutta, Bombay and Madras is the same as that of the late Supreme Courts. The admiralty jurisdiction was conferred on the Supreme Courts by their respective Charters and by 33 Geo. III, c. 52, s. 156, and 53 Geo. III, c. 155, s. 110. The jurisdiction of the Supreme Court of Bombay was that of the High Court of Admiralty in England, as it stood on the 8th December, 1928, the date of the Letters Patent creating that Court. Its jurisdiction in Vice-Admiralty was created by commission from the High Court of Admiralty in England, dated the 21st August 1843. It has been held that the jurisdiction of the Bombay High Court on its admiralty side is the same as that exercised in the Court of Admiralty in England prior to the passing of 3 & 4 Vic., c. 65, and 24 Vic., c. 10, both of which enlarged the admiralty jurisdiction of the Court of Admiralty in England but which did not apply to India.¹⁰ The Act for establishing High Courts in India¹¹ (24 & 25 Vic., c. 104, s. 9) provided that the High Courts of Calcutta, Bombay and Madras shall exercise all such Admiralty and Vice-Admiralty jurisdiction as may be vested in them by Letters Patent establishing them. The original Letters Patent of the Bombay High Court (1862) ordained that the High Court "shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions, arising in India, as is now vested in any Commissioner" appointed under 39 & 40 Geo. III, c. 79, s. 25 (s. 31). The Amended Letters Patent of 1865 confirmed this jurisdiction (s. 32). The Letters Patent of the Calcutta, the Madras, the Patna and the Rangoon High Courts are also to the same effect.

Under the Colonial Courts of Admiralty (India) Act (XVI of 1891), s. 1, the High Courts at Calcutta, Bombay and Madras; the Court of the Recorder of Rangoon; the Court of the Resident at Aden; and the District Court of Karachi are declared to be Colonial Courts of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890.¹² The above-mentioned Courts are therefore empowered to exercise the same jurisdiction as is vested in the Admiralty Court of England.

Offences committed on the high seas could not be tried, at first, by ordinary criminal Courts. They were only dealt with by the Admiralty Court. But now by virtue of the Admiralty Offences Act, 1849 (12 & 13 Vic., c. 96) and the Merchant Shipping Act, 1894 (57 & 58 Vic., c. 60) such offences are triable in England as well as in

⁵ *Lopez*, (1858) 7 Cox 431, 27 L. J. (M. C.) 48.

⁶ *Carr*, (1882) 10 Q. B. D. 76.

⁷ *Lewis*, (1857) 26 L. J. (M. C.) 104, 7 Cox 277; *Mattos*, (1836) 7 C. & P. 458.

⁸ *Depardo*, (1807) 1 Taunt. 26.

⁹ *Serva*, (1845) 1 Cox 292.

¹⁰ "*The Asia*", (1868) 5 B. H. C. (O. C. J.)

64; *Bardot v. The Augusta*, (1873) 10 B. H. C. 110. In the second case it is further held that 26 & 27 Vic., c. 24, did not apply to India. See, contra, *The Portugal*, (1870) 6 Beng. L. R. 328, 330, 331.

¹¹ Repealed by the Government of India Act, 1915. See s. 106. See also, s. 223 of the Government of India Act, 1935.

¹² 58 & 54 Vic., c. 27.

India by ordinary criminal Courts, as if they were committed within the local jurisdiction of those Courts. Section 686 of the Merchant Shipping Act says: "(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed. (2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849" (12 & 13 Vic., c. 96). For the purpose of giving jurisdiction under the Merchant Shipping Act, every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be (s. 684). Where any district within which any court, justice of the peace, or other magistrate, has jurisdiction either under this Act or under any other Act or at common law for any purpose whatever is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such court, justice, or magistrate, shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the court, justice, or magistrate (s. 685). Section 687 declares the offences committed by British seamen at foreign ports to be within the admiralty jurisdiction. It says: "All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England."

By ss. 1 and 56 of 9 Geo. IV, c. 74, a special jurisdiction was conferred on the Supreme Courts and it has now passed to the High Courts. These provisions have not been repealed.

Presidency Magistrates' jurisdiction in admiralty cases.—The Bombay High Court has held that a Presidency Magistrate has authority to convict a person of an offence under the Penal Code, it having been committed in a British ship during her voyage on the high seas. The Chief Officer of a ship was charged with criminal breach of trust as a servant with respect to the passage money he received from a pilgrim during the voyage. It was held that the Presidency Magistrate could try him, and that the charge should be framed in reference to the Penal Code, and that in case of conviction the punishment should be awarded under the Code.¹³ The Calcutta High Court has dissented from this view. It has held that the High Court of Calcutta has jurisdiction, in its Original Criminal Side, under ss. 684 and 686 of the Merchant Shipping Act (57 & 58 Vic., c. 60), to try a native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas, who is brought to Calcutta under custody, notwithstanding that the vessel touched, after the commission of the offence, at intermediate ports in the course of the voyage. The offence should be tried, and the charge framed, under the English law, but the procedure at the trial and the sentence must be regulated by the law of India.¹⁴

Jurisdiction of mofussil Courts.—The jurisdiction to try offences committed on the high seas was first conferred on the mofussil Courts by s. 1 of 23 & 24 Vic.,

¹³ *Chief Officer of Mushtari*, (1901) 3 Bom. L. R. 253, 25 Bom. 636.

¹⁴ *Salimullah*, (1912) 39 Cal. 487; *The Superintendent and Remembrancer of Legal*

Affairs, Bengal v. Raisalee, (1932) 60 Cal. 44. In this case the accused surrendered himself before the Court.

c. 88, which extended the provisions of the Admiralty Offences Act, 1849 (12 & 13 Vic., c. 96) to British India.

Section 1 of the Admiralty Offences Act provides : "If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place shall be brought for trial to any colony, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such persons so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony."

Section 3 provides : "Where any person shall die in any colony of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or at any place out of such colony, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in such colony in the same manner in all respects as if such offence had been wholly committed in that colony ; and that if any person in any colony shall be charged with any such offence as aforesaid in respect of the death of any person who having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the sea."

Both these sections are extended to India by s. 1 of 23 & 24 Vic., c. 88, which says that "...the word 'colony' ... shall include and apply to every part and place heretofore under the Government of the *East India* Company, or which may be under the Government of Her Majesty in *India*, and all the provisions of the said Act shall be construed and take effect accordingly." Section 686 of the Merchant Shipping Act makes the provisions of s. 1 of 12 & 13 Vic., c. 96 (Admiralty Offences Act) applicable to India.¹⁵

Section 2 of 23 & 24 Vic., c. 88, gives the offender the right of being tried by the High Court. It provides that "where any person within any place in *India* is charged with the commission of any offence in respect of which jurisdiction is given by the said Act (12 & 13 Vic., c. 96), or where any person charged with the commission of any such offence is brought for trial under the said Act to any place in *India*, if at any time before his trial he make it appear to the Court exercising criminal jurisdiction in the place where he is so charged or brought for trial, that in case the offence charged had been committed in such place he could have been tried only in the Supreme Court of one of the three Presidencies in *India*, and claim to be tried by such a Supreme Court accordingly, the said Court exercising criminal jurisdiction as aforesaid shall certify the fact and claim to the Governor of such place or chief local authority thereof, and such Governor or chief local authority thereupon shall order and cause the person charged to be sent in custody to such one of the presidencies as such Governor shall think fit for trial before the Supreme Court of such presidency, and the said Supreme Court and all public officers and other persons in the presidency shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed or originally charged

¹⁵ *Sengodai Vannan*, (1927) 53 M. L. J. 101, 28 Cr. L. J. 543, [1927] AIR (M) 688.

to have been committed within the limits of the ordinary jurisdiction of such Supreme Court.”

Where a murder was committed on board a British steamer from Penang to Negapatam by a British subject, the Sessions Court of East Tanjore at Negapatam was held to have jurisdiction to try the offence.¹⁶

Law and procedure applicable to offences committed on high seas.—

Under the provisions of 12 & 13 Vic., c. 96, extended to India by 23 & 24 Vic., c. 88, persons charged with crimes on the high seas were proceeded against in the Courts of British India in the same way as if the offence had been committed upon any waters situate within the limits of British India and within the limits of the local jurisdiction of its criminal Courts, and on conviction were punished as if their crimes had been committed in England. The English law was held to be the substantive law of decision in cases made cognizable by the local tribunals by virtue of that statute.¹⁷ The Bombay High Court is of opinion that this is altered by the Colonial Courts Act (37 & 38 Vic., c. 27), s. 3, and an offence committed on the high seas should be tried and punished according to the local law.¹⁸ In a full bench case the former Chief Court of Lower Burma had adopted the same view.¹⁹ The Calcutta High Court has differed from the Bombay cases and held that the Colonial Courts Act has made no such alteration and such offence should be tried, and the charge framed, under the English law, whether the accused is a British European subject or a British Indian subject, but the procedure at the trial and the sentence must be regulated by the law of India.²⁰ Section 3 of the Courts (Colonial) Jurisdiction Act (37 & 38 Vic., c. 27) says: “When by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such Court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the Court, and to no other, anything in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the Court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.”

The Calcutta High Court has held that this section does not deal with the trial of the case, but with the sentence after conviction, the statute adopting the local machinery for punishment to the English definition of crime.²¹

The procedure to be followed in cases where offences are committed on the high seas is the ordinary criminal procedure.²² Three things are essential in cases of trial of offences committed on the high seas:—

- (1) The offence charged must be an offence under the English law according to the Calcutta High Court though not according to the Bombay High Court.
- (2) The trial must be conducted under the Code of Criminal Procedure.
- (3) The punishment must be regulated by the Penal Code.

Piracy.—Piracy is of two kinds, viz., piracy *jure gentium* and piracy by the statute law of England. Piracy *jure gentium* is an offence against all nations. Piracy “is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the Lord Admiral hath, or pretends to have, juris-

¹⁶ *Sengodai Vannan*, (1927) 53 M. L. J. 101, 28 Cr. L. J. 543, [1927] AIR (M) 688.

¹⁷ *Elmstone*, (1870) 7 B. H. C. (Cr. C) 89; *Thompson*, (1867) 1 Beng. L. R. (O. Cr. J.) 1.

¹⁸ *Sheikh Abdool Rahiman*, (1889) 14 Bom. 227; *Chief Officer of Mushtari*, (1901) 3 Bom. L. R. 253, 25 Bom. 636.

¹⁹ *Po Thaug*, (1910) 5 L. B. R. 221, 12 Cr. L. J. 198, F.B.

²⁰ *Salimullah*, (1912) 39 Cal. 487, 490, 491.

²¹ *Ibid.*

²² *Elmstone*, (1870) 7 B. H. C. (Cr. C.) 89; *Thompson*, sup.; *Barton*, (1889) 16 Cal. 238; *Gunning*, (1894) 21 Cal. 782.

diction, this is also robbery and piracy. The intention will, in these cases, appear by considering the end for which the fact was committed; and the end will be known, if the evidence shall shew you what hath been done."²³ "The offence of piracy, by common law," according to Blackstone,²⁴ "consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there." "To whatever country the pirate may have originally belonged, he is *justiciable* everywhere: his detestable occupation has made him *hostis humani generis*, and he cannot upon any ground claim immunity from the tribunal of his captor."²⁵ "The King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world: so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity, shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this Court."²⁶ A pirate is one who is a source of danger to the vessels of all nations.

Actual robbery is not an essential element of the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*.²

If the subjects of the same State commit robbery upon each other, upon the high seas, it is piracy. If the subjects of different States commit robbery upon each other, upon the high seas, if their respective States are in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility.³

By statutes passed at various times and still in force, many artificial offences have been created, which are to be deemed to amount to piracy.⁴

Thus by 11 Will. III, c. 7, ss. 8 and 9, 8 Geo. I, c. 24, s. 1, and 18 Geo. II, c. 30, British subjects committing hostilities against British subjects under a commission from a foreign prince or adhering to an enemy, and persons running away with or hindering defence of ships and other offenders, are punishable as pirates. By 5 Geo. IV, c. 113, s. 9, the carrying away, conveying or removing of any person upon the high seas, for the purpose of his being imported or brought into any place as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose, is made piracy.

Piracy is dealt with in several statutes, dating from 1536.⁵

The admiralty jurisdiction extends to pirates who were foreigners in the case of piracy *jure gentium* only.

Cases.—Several mariners on board a ship seized the captain, he not agreeing with them, and after putting him on shore, carried away the ship, and committed several piracies. It was held that the force upon the captain, and the carrying away of the ship, was piracy.⁶ But where the master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England, the ship was burnt with intent to defraud the owners and insurers, it was held that no piracy had been committed but only a breach of trust, and that it would not be piracy to convert the goods in a fraudulent manner until the special trust was determined.⁷

²³ Per Sir Charles Hedges in *Joseph Dawson*, (1696) 13 St. Tr. 451, 454, confirmed in *Attorney-General for the Colony of Hong Kong v. Kwok-a-Sing*, (1873) L. R. 5 P. C. 179, 199, which further holds that there can be no difference between mariners and passengers.

²⁴ Blackstone's Commentaries on the Laws of England, Vol. IV, p. 72 (4th Edn.).

²⁵ Phillimore's International Law, Vol. I, p. 488 (3rd Edn.).

¹ Per Sir Charles Hedges in his charge to the jury in *Joseph Dawson*, (1696) 13 St. Tr. 451, 455.

² *Piracy Jure Gentium*, [1934] A. C. 586.

³ 4 Coke 154. Vide Archbold, 30th Edn., 662.

⁴ Report of Comms. of Crim. Law.

⁵ 28 Hen. VIII, c. 15; 22 & 23 Carr. II, c. 2; 11 Will. III, c. 7; 4 Geo. I, c. 2, s. 7; 8 Geo. I, c. 24; 18 Geo. II, c. 30; 12 Geo. III, c. 20; 7 & 8 Geo. IV, c. 28, s. 2; 9 Geo. IV, c. 54, s. 8; 7 Will. IV and 1 Vic., c. 88, ss. 2-4; 5 & 6 Vic., c. 28, ss. 16-18; 13 & 14 Vic., c. 26; 41 & 42 Vic., c. 73, s. 6.

⁶ *May*, (1696) 2 East P. C. 796.

⁷ *Mason*, (1722) 2 East P. C. 796, 8 Mod. 74. See *Curling's Case*, (1807) Russ. & Ry. 123

Liability of foreigners in British India for offences committed outside British India.—There is no express enactment by which the Indian Legislature can assume to render foreigners subject to the criminal law of British India with reference to acts committed by them beyond the limits of British India. In the words of Chief Justice Cockburn, “no proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such limits :—... This rule must, however, be taken subject to this qualification, namely, that if the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations.”⁸ The acts of a foreigner committed by him in the territory beyond the limits of British India do not, therefore, constitute an offence against the Penal Code of British India, and, consequently, a foreigner cannot be held criminally responsible under that Code by the tribunals of that country for acts committed by him beyond its territorial limits. It is only for acts done when the person doing them is within the territory over which the authority of the British law extends, that the subjects of a foreign State owe obedience to that law and can be made amenable to its jurisdiction. Thus, when it is sought to punish a person, who is not a British subject, as an offender in respect of a certain act, the question is not ‘where was the act committed,’ but ‘was the person at the time, when the act was done, within the territory of British India.’ For if he was not, the act is not an offence, the doer of it is not liable to be punished as an offender, and he is, therefore, not subject to the jurisdiction of criminal Courts.⁹ A foreign subject, resident in a foreign territory, instigating the commission of an offence which, in consequence, is committed in British territory, is not amenable to the jurisdiction of a British Court if the instigation has not taken place in British India.¹⁰

But if a foreigner in a foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was completed.¹¹

There is nothing in s. 188, Criminal Procedure Code, which contravenes the general rule of international law that no Court has jurisdiction over foreigners in respect of offences committed in a foreign State.¹²

An Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.¹³

Cases.—Dacoity in foreign territory.—Where the accused committed dacoity in the Patiala State but were found in British territory where they had stayed for three years, it was held that they were not liable to be tried by a British Court as they were foreign subjects and the offence was committed in a foreign territory.¹⁴

Kidnapping in foreign territory.—A girl was enticed away in Faridkot State from the lawful guardianship of her husband by the accused, who were foreign subjects, and was found being conveyed by them by rail from that State to a station in the Bhawalpur State at the railway station of Abdhar in the British territory.

⁸ *Keyn*, (1876) 2 Ex. D. 63, 160. See *Punja Guni*, (1917) 20 Bom. L. R. 98, 42 Bom. 234.

⁹ Per Plowden, J., in *Musst. Kishen Kour*, (1878) P. R. No. 20 of 1878. See also *Roda*, (1889) P. R. No. 30 of 1889; *Baldewa*, (1906) 28 All. 372.

¹⁰ *Pirtai*, (1873) 10 B. H. C. 356, followed in *Raj Bahadur*, (1918) P. R. No. 23 of 1918, 19 Cr. L. J. 931, [1918] AIR (L) 49; *Balwant Singh*, (1918) P. R. No. 31 of 1918, 20 Cr. L. J. 65. The former Chief Court of the Punjab held that the subject of a Native State was

not liable to be punished under the Penal Code by a Court in British India for acts committed in British India, he being at the time of such commission in foreign territory, even if he afterwards was in British India: *Musst. Kishen Kour*, (1878) P. R. No. 20 of 1878.

¹¹ *Chhotalal Babar*, (1912) 14 Bom. L. R. 147, 36 Bom. 524.

¹² *Jaimal Singh*, (1900) P. R. No. 1 of 1901.

¹³ *Jameson*, [1896] 2 Q. B. 425, 430.

¹⁴ *Nawabji*, (1881) P. R. No. 37 of 1881; *Ibrahim*, (1893) P. R. No. 7 of 1894.

It was held that, as the act of kidnapping was complete outside British India, the British Courts, had no jurisdiction to try and convict the accused.¹⁵

Murder on high seas.—The accused, a subject of an Indian State, was charged with the offence of attempt to murder, on board a ship belonging to him on the high seas some eighteen miles off the coast of Kanara, British territory. He was tried for the offence by a Magistrate in the British territory. It was held that the Magistrate had no jurisdiction to try the accused as the accused was not a British subject and the offence was committed on a non-British ship on the high seas outside the territorial limits.¹⁶

Abetment in foreign territory of forgery committed in British India.—The accused who lived at Cambay, an Indian State, conspired with his partner A, at Cambay, to get a valuable security forged by a professional forger at Umreth, a place within British territory. To facilitate forgery, the accused sent an account book with A, who proceeded to Umreth and had the book forged there accordingly. The accused was committed for trial to the Sessions Court on a charge of abetment of forgery of a valuable security (ss. 467 and 109.). The Sessions Judge, being of opinion that the British Court had no jurisdiction to try the accused, referred the case to the High Court for an order quashing the commitment. It was held that the British Court had jurisdiction to try the accused, inasmuch as his offence was not wholly committed within Cambay territory but having been initiated there was continued and completed within British territory.¹⁷

Jurisdiction.—Over non-British subjects who have committed offences beyond the limits of British India, the criminal Courts of British India have no jurisdiction, except that conferred by s. 4 (3) of the Code and by ss. 4 and 10 of the Indian Extradition Act (XV of 1903). These sections only empower Magistrates to arrest, and, if so ordered by Government, to inquire into the truth of the accusation made.

Amendment.—Burma.—For clauses (1), (2) and (3) the following were substituted: “(1) any British subject domiciled in Burma, when committed in any place without and beyond British Burma; (2) any other British subject or any servant of the Crown, when committed within any part of Burma ‘outside British Burma’; and the illustrations were omitted by the Government of Burma (Adaption of Laws) Order, 1937.

PRACTICE.

Evidence in cases of piracy.—Prove (1) that the accused has committed acts which amount to robbery (see s. 390, *infra*), or to frustrated attempt to commit it.

(2) That such acts have been committed within the jurisdiction of admiralty.

Charge.—When a person is tried before a Court which would not have jurisdiction but for special circumstances, the Court should specify in the charge those circumstances.

The charge should run thus:—

I (*name and office of Magistrate*) hereby charge you as follows—

That you, being a Native Indian subject (*or* British subject *or* servant) of His Majesty the King-Emperor, on or about the—day of, at—, without and beyond British India, did—and thereby committed an offence punishable under ss. 4 and—of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

If the accused is a British subject or servant of the King-Emperor and has committed an offence within the dominions of an Indian Prince, the second paragraph in the above charge would run thus:—

That you, being a British subject (*or* a servant) of His Majesty the King-Emperor, on or about the—day of—, at—, within the dominions of—did, etc.

¹⁵ *Jaimal Singh*, (1900) P. R. No. 1 of 1900.

¹⁷ *Chhotalal Babar*, (1912) 14 Bom. L. R. 147, 36 Bom. 524.

¹⁶ *Punja Guni*, (1917) 20 Bom. L. R. 98, 42 Bom. 234.

If the offence comes under the admiralty jurisdiction, the second paragraph of the above charge would generally be as follows :—

That you, on or about the—day of—, then being a British subject (*omit these words if the accused is a foreigner*) on board the British ship—, on the High seas, did—, and thereby committed an offence punishable, etc.

5. Nothing in this Act is intended to repeal,¹ vary, suspend, or affect any of the provisions of the Statute 3 & 4 William IV, Chapter 85, or of any Act of Parliament passed after that Statute in anywise affecting the East India Company or British India, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen² in the service of Her Majesty, or of any special or local law.³

COMMENT.

This section acts as a saving clause to s. 2. Though “the Code was intended to be a general one, it was not thought desirable to make it exhaustive, and hence offences defined by local and special laws were left out of the Code, and merely declared to be punishable as theretofore.”¹⁸ “Section 2... repealed all existing penal enactments in force on the date from which the Code was to come into operation. Then the effect of section 5 was to qualify this general repeal and to declare that, notwithstanding it, offences defined by special and local laws should continue to be punishable as theretofore... If, therefore, a person were required to ascertain from the Penal Code what acts and omissions are punishable in British India as offences, he would properly answer that it appeared from section 2 and section 5, that all acts or omissions contrary to the provisions of the Code itself or the provisions of special and local laws and some other laws enumerated in section 5, and these alone and none others, were punishable as offences.”¹⁹ The preamble to the Code and ss. 1 and 2, read with this section, prescribe that all acts or omissions contrary to the provisions of the Code, or of special and local laws enumerated in this section and none others, are punishable as offences.²⁰

‘Statute 3 & 4 William IV, Chapter 85’ was the Government of India Act, 1833, which has now been repealed in part.

1. ‘Repeal.’—Under the General Clauses Act (X of 1897), s. 6, where an Act repeals any enactment then, unless a different intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect, or affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or affecting penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or affect any investigation, legal proceeding or remedy in respect of any such penalty, forfeiture or punishment; and any such penalty or forfeiture or punishment may be imposed as if the repealing Act had not been passed. Section 6A says that where any Central Act repeals any enactment by which the text of any Central Act was amended by the express omission, insertion, or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal, section 4 of the Repealing and Amending Act (XXV of 1942) says that the repeal by that Act of any enactment shall not affect any Act... in which such enactment has been applied, incorporated or referred to.^{20a} The effect of repealing a statute is to obliterate it as completely from the records as if it had never been passed. But the effect of an Act or Order which is superseded is not to obliterate it altogether. An Act or Order effects the same purposes as an earlier one by

¹⁸ (1886) 3 M. H. C. App. 11, 16, 17.

¹⁹ *Ibid.*, p. 17.

²⁰ *Satish Chandra Chakravarti v. Ram Doyal* (1920) 38 Cal. 388, s.b.

^{20a} See *Manilal Bhaichand v. Mohanlal*, (1945) 47 Bom. L. R. 836, [1946] AIR (B) 102; *Alla Bux*

[1946] A. L. J. R. 82, 84; *Radhey Lal v. Roop Ram*, [1942], A. L. J. R. 571; [1942] AIR (A) 396; *Bennett v. Tatton*, (1918) 118 L. T. 788; *Kay v. Goodwin*, (1830) 6 Bing. 576; Halsbury, Vol. XXXI, §§ 772-775.

repetition of its terms or otherwise. Proceedings for the breach of an Order can, therefore, be commenced even after its supersession.^{20b}

2. 'Officers, soldiers, sailors or airmen.'—The laws relating to Army and Navy here referred to are the several Acts and Articles of War, passed from time to time to punish offences committed by military and naval men. The Code does not affect their provisions. See the Army Act (44 & 45 Vic., c. 58) and the Air Force Act (7 & 8 Geo. V, c. 51), as continued and amended by subsequent annual Army and Air Force Acts, which provide a special procedure for the trial of offenders by a Court-martial, and which give a list of persons subject to military law; the Indian Army Act (VIII of 1911); and the Indian Air Force Act (XIV of 1932).

3. 'Special or local law.'—No special or local law (ss. 41 and 42) is repealed, varied, suspended, or affected by the enactment of the Code. Although an offence is expressly made punishable by a special or local law, yet it will be punishable under the Penal Code, if the facts come within the definitions of the Code.²¹ The distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new penalty only, in the latter, it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included.²² The principle is that where a new offence is created and the particular manner in which proceedings should be taken is laid down, then proceedings cannot be taken in any other way.²³ No prosecution under the Code is admissible, if it appears upon the whole frame of the special Act that it was intended to be *complete in itself*, and to be enforced only by the penalties created by it,²⁴ but in the absence of anything in the special Act to exclude the operation of the Code, an intention on the part of the Legislature to exclude it should not be inferred.²⁵ The principle that where a particular set of acts or omissions constitute an offence under the general law and also under a special law the prosecution should be under the special law, is confined to cases where the offences are coincident or practically so.¹ Where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty.² Where there is a conflict between a special Act and a general Act the provisions of the special Act prevail.³ However, a person cannot be punished under both the Penal Code and a special law for the same offence,⁴ and it is ordinarily desirable that the sentence should be passed under the special Act.⁵ For, it is presumed that the Legislature intends that the special form of punishment is appropriate to special cases. The General Clauses Act⁶ provides that 'where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of

^{20b} *Nand-Kishore*, (1945) 20 Luck. 376.

²¹ *Ramachandrappa*, (1883) 6 Mad. 240; *Sadasiva Pillai*, (1865) 1 Weir 26; *Bayne*, (1906) 8 Bom. L. R. 414, 3 Cr. L. J. 494; *Kaulashia*, (1932) 12 Pat. 1; *Motilal Shah*, (1930) 32 Bom. L. R. 1502, 55 Bom. 89; *Bishan Sahai Vidyarthi*, [1937] All. 779. A police constable punished departmentally under the Police Act is liable to be punished under the Penal Code: *Gul Muhammad*, (1915) P. R. No. 26 of 1915, 10 Cr. L. J. 788, [1915] AIR (L) 350.

²² *Per Patkar, J.*, in *Bhalchandra Ranadive*, (1929) 31 Bom. L. R. 1151, 54 Bom. 35. But see, contra, the dictum of Das, J., in *Abdu Hamid*, (1922) 2 Pat. 134, 141, s.b.

²³ *Per Wild, J.*, in *Bhalchandra Ranadive*, sup., p. 1178.

²⁴ *Chandi Pershad v. Abdur Rahman*, (1894) 22 Cal. 131, 139; *Anon.*, (1876) 1 Mad. 55.

²⁵ *Imam Bakhsh*, (1884) P. R. No. 10 of 1885; *Segu Baliah v. Ramasamiah*, (1917) 6 L. W. 283, 18 Cr. L. J. 992, [1918] AIR (M) 460 (2).

¹ *Suchit Raut*, (1929) 9 Pat. 126; *Joti Prasad Gupta*, (1931) 53 Al. 642, 649.

² *Jiwa Ram*, (1931) 33 Cr. L. J. 309, 810, [1932] A. L. J. R. 519, [1932] AIR (A) 69; *Oudh Bar Association*, Lucknow, (1930) 6 Luck. 266.

³ *Collector of Bombay v. Kamalavahoogi*, (1933) 36 Bom. L. R. 297, [1934] AIR (B) 162.

⁴ *Hussun Ali*, (1873) 5 N. W. P. 49; *Sukh-nandan Rai*, (1917) 19 Cr. L. J. 157, [1918] AIR (P) 649.

⁵ *Kuloda Prosad Majumdar*, (1906) 11 C. W. N. 100, 5 C. L. J. 47, 4. Cr. L. J. 439; *Rup Deb*, (1913) 11 A. L. J. R. 340, 14 Cr. L. J. 424; *Bhogilal*, (1931) 33 Bom. L. R. 648, 32 Cr. L. J. 1145, [1931] AIR (B) 409; *Bhagat Singh*, (1930) 31 Cr. L. J. 290, 31 P. L. R. 73, [1930] AIR (L) 266; *Veerasami Naicken*, (1931) 33 L. W. 205, 32 Cr. L. J. 354, [1931] AIR (M) 18.

⁶ X of 1897, s. 26; the Bombay General Clauses Act (Bom. I of 1904), s. 27; the Police Act (V of 1861), s. 36; the Bombay City Police Act (Bom. IV of 1902), s. 131; the Bombay District Police Act (Bom. IV of 1890), s. 74. See the Interpretation Act (52 & 53 Vic., c. 63), s. 38.

those enactments, but shall not be liable to be punished twice for the same offence". Where the accused is guilty of a specific offence under the Indian Penal Code he should be convicted under the Code if the punishment under the special Act is not adequate.⁷ The Allahabad High Court has held that a conviction of theft under s. 379 of the Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under s. 9 of the Indian Opium Act, 1878.⁸

Punishment for contempt under common law.—This section does not affect the common law principles introduced into the Presidency-towns when the late Supreme Courts were established. The High Courts in the Provinces have power to punish the offence of contempt on a summary proceeding in relation to proceedings before them not by virtue of the Penal Code but by virtue of the common law of England.⁹ The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record.¹⁰ This power has not been taken away or in anywise limited by the Contempt of Courts Act (XII of 1926).¹¹ Where the High Court considers that a person has committed contempt of itself, although the contempt may have been committed outside its jurisdiction it can deal with that person, if he were within its jurisdiction. There is, however, no power in the High Court to arrest for contempt of Court a person outside its jurisdiction.¹² The Allahabad High Court has held that the Court has such power. Where the contempt has been committed within the territorial jurisdiction of the High Court in India, such Court is competent to issue process to secure the attendance of the offender wherever he may be residing in British India.^{12a}

All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice will constitute contempt. Offences of this nature are of three kinds, namely, those which (1) scandalise the Court; or (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its Judges, officers, or proceedings: under the second and third heads anything which tends to excite prejudice against the parties, or their litigation while it is pending.¹³ Thus, a person is guilty of contempt of Court if, in respect of a pending proceeding, he publishes a writing (a) in which he assumes the truth of certain facts connected directly or indirectly with matters awaiting the decision of the Court; or (b) in which he attacks the conduct and the character of the parties to the proceeding or similarly attacks a person who is one of the principal figures and a witness in the proceeding though not a party to it; or (c) in which he forecasts the probable judgment of the Court and makes the comment that law and justice would be defeated by such judgment.¹⁴ A full bench of the Madras High Court laid down: (i) To comment on a case which is *sub judice* or to suggest that a Court should take a certain course in respect of a matter before it constitutes contempt and honesty of motive cannot remove it from this category. The criterion is not whether

⁷ *Futteh Khan*, (1874) P. R. No. 11 of 1874.

⁸ *Deoki Koeri*, (1926) 48 All. 496.

⁹ *Legal Remembrancer v. Matilal Ghose*, (1913) 41 Cal. 173, s.b.; *Surendra Nath Banerjee v. High Court Judges*, (1883) 10 Cal. 109, 10 I. A. 171; *Moti Lal Ghose*, (1917) 45 Cal. 169, s.b.; *Vernon Milward Bason v. Ann Helen Skone*, (1925) 53 Cal. 401; *Tusharkanti Ghosh*, (1935) 63 Cal. 217, s.b.; *M. K. Gandhi*, (1920) 22 Bom. L. R. 368, 21 Cr. L. J. 835, [1920] AIR (B) 175, F.B.; *Satyabodha Ramchandra*, (1922) 24 Bom. L. R. 928, 47 Bom. 76; *Pickhall (No. 1)*, (1922) 25 Bom. L. R. 15, 24 Cr. L. J. 289, [1923] AIR (B) 8; *Pickhall (No. 2)*, (1922) 25 Bom. L. R. 107, 24 Cr. L. J. 313; *Purshottam v. Navanilal*, (1925) 28 Bom. L. R. 148, 50 Bom. 275; *Ponnuswami Iyer v. Ganapathi Iyer*, (1923) 45 M. L. J. 742, 25 Cr. L. J. 753, [1924] AIR (M) 393; *Habib*, (1925) 6 Lah. 528, s.b.; *D. S. Bukhari*, (1927) 29 P. L. R. 294, 28 Cr. L. J. 727, [1927] AIR (L) 610, F.B.; *Murlidhar Manohar Prasad*, (1928) 8 Pat. 323, F.B. The Chief Court of Sind has a right to punish in a summary way contempt of itself: *F. C. Tarapore*,

[1941] Kar. 451.

¹⁰ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Khagendranath Das Gupta*, (1930) 58 Cal. 458, 460; *Gordon Woodroffe & Co. v. Radhakrishna Chetty*, (1930) 59 M. L. J. 746, [1931] AIR (M) 61; *Harkishen Lal*, (1936) 18 Lah. 69, s.b.; *Chandan Mall Karnani v. Sardari Lal Thapar*, [1937] 1 Cal. 345.

¹¹ *Harkishen Lal*, sup.; *K. L. Gauba*, [1942] Lah. 411, F.B.; *Horniman*, (1943) 46 Bom. L. R. 94, (1944) AIR (B) 127.

¹² *Horniman*, (1943) 46 Bom. L. R. 94, [1944] AIR (B) 127; *Khushal Chand*, (1945) 47 Cr. L. J. 115, 47 P. L. R. 148, [1945] A I R (L) 206.

^{12a} (a) *Benjamin Guy Horniman*, [1944] All. 665.

¹³ *Rajah of Venkatagiri v. Rama Naidu*, [1937] M. W. N. 1139, (1937) 39 Cr. L. J. 328, [1938] AIR (M) 248; *Iyer*, (1934) 16 Lah. 266; *Radhey Lal v. Niranjana Nath*, [1940] A. L. J. R. 798, (1940) 42 Cr. L. J. 370, [1941] AIR (A) 95; *F. B. Kolte*, [1942] Nag. 506.

¹⁴ *Nagendra Nath Das*, [1939] 1 Cal. 399, s.b.

the Court will be influenced, but whether the action complained of is calculated to prejudice the course of justice. (ii) To comment on proceedings which are imminent but not yet launched in Court with knowledge of the fact is as much a contempt as comment on a case actually launched. (iii) A discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. But this does not mean that reference cannot be made to pending cases or that items of news which are connected with pending cases should not be published.¹⁵ A person does not commit contempt of Court by publishing comment on a case in which proceedings have not actually commenced, if the person has no knowledge or has no reasonable ground for believing that such proceedings are imminent.^{15a} Where in an article in a newspaper it was stated, "we doubt whether in any case where opinions count, any subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided," it was held that this amounted to gross contempt of Court.¹⁶ Comment in a newspaper upon a pending case, which has any tendency to interfere with the due course of justice, or to prejudice the public against persons who are on their trial, is technically a contempt of Court.¹⁷ Aspersions cast upon an advocate, with reference to the conduct of his case, which tend to embarrass him in the further conduct of his client's case, is contempt of Court.¹⁸ It is rare for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding Judge, he may very properly be adjudged guilty of contempt of Court. If a litigant or an advocate threatened or attempted violence on his opponent or used language so outrageous and provocative as to be likely to lead to a brawl in Court, the offence of contempt is committed.^{18a} Newspapers which publish copies or resumes of pleadings and similar documents in pending suits do so at the risk of committing contempt of Court.¹⁹ Any such act or writing tending to undermine the authority of Courts of justice, or to influence the result of pending litigation is contempt of Court and a most serious offence.²⁰ When during the pendency of a suit in which the genuineness of a will was seriously disputed, the editor of a newspaper published a certified copy of the will as a paid advertisement, and the object of the publication was to make the public believe that it was genuine, it was held that the editor was guilty of contempt of Court.²¹ The essence of the offence of contempt of Court is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings must go on, even where the proceedings do not involve trial by jury and no one would imagine that the mind of the Magistrates or Judges charged with the case would or could not be induced thereby to swerve from the straight course.²² 'Contempt of Court' may include conduct which, while it cannot directly influence a Judge's mind, is calculated to affect the conduct of parties to proceedings, and the Court's jurisdiction to commit for contempt is not confined to cases in which its orders may directly be affected.²³ "It is indeed difficult and almost impossible to frame a comprehensive and complete definition of contempt of Court. The law of contempt covers the whole field of litigation itself. The real end of a judicial proceeding, civil or

¹⁵ *Tulajarama Rao v. Sir James Taylor*, [1939] Mad. 466, F.B.; *Superintendent and Remembrancer of Legal Affairs, Bihar v. Murali Manohar Prasad*, (1940) 20 Pat. 306; *Tushar Kanti Ghosh*, (1946) 47 C. L. J. 333; *M. G. Kadir v. Kesri Narain Jaitley*, [1945] All. 7.

^{15a} *J. Chaudhuri*, (1947) 51 C. W. N. 700.

¹⁶ *Advocate General, Madras v. Ramanatha Goenka*, [1943] Mad. 26.

¹⁷ *Anantlal Singha v. Alfred Henry Watson*, (1930) 58 Cal. 884; *The Government Advocate, Burma v. Saya Sein*, (1929) 8 Ran. 844; *His Excellency the Governor of Bengal in Council v. Tusharkanti Ghosh*, (1932) 60 Cal. 603; *The Bishop of Norwich*, [1932] 2 K. B. 402; *Vidya Sagar Kapur*, [1938] 40 Cr. L. J. 156, [1938] AIR (L) 815; *District Magistrate, Kheri v. M. Hamid Ali*, (1939) 15 Luck. 268; *Anis Ahmad v. Hakim Qazi*, (1941) 16 Luck. 758; *Superintendent and Legal Remembrancer of Legal Affairs, Bihar v. Murali Manohar*, (1940) 20 Pat. 306.

¹⁸ *Anantlal Singha v. Alfred Henry Watson*, (1930) 58 Cal. 884.

^{18(a)} *Shamdasani*, (1945) 47 Bom. L. R. 733.

¹⁹ *Hemanta Kumari Devi v. Satyendra Nath Mazumdar*, (1933) 38 C. W. N. 330, [1934] AIR (C) 606; *Bennett Coleman & Co. Ltd. v. G. S. Monga*, (1936) 18 Lah. 34.

²⁰ *Iyer*, (1934) 16 Lah. 266, S.B.; *Suresh Chandra v. Biswa Nath*, (1938) 42 C. W. N. 952, [1938] AIR (C) 772; *Nasir Ahmad v. Anis Ahmad Abbasi*, [1940] O. W. N. 1197, (1940) 42 Cr. L. J. 221, [1941] AIR (O) 67.

²¹ *Guru Charan Prasad v. Rao Vishnu Parankar*, [1931] A. L. J. R. 647, [1931] AIR (A) 420.

²² *Sathappa Chettiar v. Ramachandra Naidu*, [1931] M. W. N. 1058, 34 L. W. 727, 61 M. L. J. 848, 33 Cr. L. J. 270, [1932] AIR (M) 26; *Radhey Lal v. Niranjan Nath*, [1940] A. L. J. R. 798, (1940) 42 Cr. L. J. 370, [1941] AIR (A) 95.

²³ *The William Thomas Shipping Co.*, [1930] 2 Ch. 368.

criminal, is to ascertain the true facts and dispense justice. Various persons have their respective contributions to make in the proper fulfilment of that task. They are necessarily the Judges or the Magistrates, the parties to the proceedings, or their agents or pleaders or advocates, the witnesses and the ministerial or menial staff of the Court. All these persons can well be described as the limbs of the judicial proceeding. For proper administration of justice it is essential that all these persons are, in the performance of their respective duties, ensured such fullness of freedom as is fair and legitimate. Anything that tends to curtail or impair the freedom of the limbs of the judicial proceeding must of necessity result in perverting the due administration of law and interfering with the course of justice. It must, therefore, be held to constitute contempt of Court.²⁴ Criticism of a capital sentence case pending confirmation by the High Court may amount to contempt although no appeal has been preferred at the date of such criticism.²⁵ Proceedings for punishing contempt are taken not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public and specially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. The gravamen is an endeavour to shake the confidence of the public in Court.¹ The practice in proceedings to punish contempt of Court has been for the Judges who have been defamed to hear the case and to state in their judgment the facts within their knowledge or their reasons for taking a particular course of action.²

The Rangoon High Court has held that the High Court has power to deal with contempts summarily, instead of acting under s. 476 or 480 of the Code of Criminal Procedure or under O. XVI, r. 17, of the Code of Civil Procedure.³ The Court has power to punish, by commitment for contempt, a libel published while the Court is not sitting.⁴

The Lahore High Court has held that the Criminal Procedure Code does not apply to summary proceedings for punishing contempt. No application for adjournment under s. 344, Criminal Procedure Code, will be entertained because immediate action is necessary to vindicate the authority of the Court.⁵

Contempt proceedings are of a summary nature. Such proceedings are not, therefore, suitable for the decision of a hotly contested question of fact. The proceedings for contempt of Court, though not criminal, are of a *quasi-criminal* nature and so where there is any reasonable doubt, the person charged with contempt is entitled to the benefit of such a doubt. An honest, though mistaken, arrest, though it might interfere with the due course of justice, cannot amount to contempt. The arrest of a counsel by the police in order to prevent him from filing an application to the High Court under s. 491, Criminal Procedure Code, for the release of a detenu and appearing on behalf of the detenu or to prevent other counsel from appearing and to prevent the counsel from obtaining an order from the High Court for an interview with the detenu in the jail amounts to interference with the due course of justice and constitutes contempt of Court.^{6a}

If a person says or writes anything which amounts to contempt of Court, he is not permitted to lead evidence to establish the truth of his allegations.⁶

The Calcutta High Court had held that it had no jurisdiction to commit a person for contempt for a criminal Court in the *mofussil*.⁷ But the Bombay High Court was of opinion that it had such power.⁸ The Allahabad High Court in earlier cases took the same view.⁹ But in a subsequent full bench case it laid down that no power to punish for contempt of an inferior Court existed independently of the Penal Code and the Contempt of Courts Act. The inherent powers of the Supreme Court of Calcutta

²⁴ *The Telhara Cotton Ginning Company, Ltd. v. Kashinath Gangadhar Namjoshi*, [1940] Nag. 69, 71.

²⁵ *His Excellency the Governor of Bengal in Council v. Tusharkanti Ghosh*, (1932) 60 Cal. 603.

¹ *Gray*, [1900] 2 K. B. 36; *Advocate-General v. Maung Chit, Maung*, (1939) 41 Cr. L. J. 445, [1940] AIR (R) 70.

² *K. L. Gauba*, [1942] Lah. 411, F.B.

³ *Ebrahim Mamoojee Parekh*, (1926) 4 Ran. 257.

⁴ *William Tayler*, (1869) 26 C. L. J. 345; *Banks*, (1869) 26 C. L. J. 401.

⁵ *K. L. Gauba*, [1942] Lah. 411, F.B.

^{5(a)} *Homi Rustomji v. Sub-Inspector Baig*, (1944) 46 Cr. L. J. 174, [1944] AIR (L) 196.

⁶ *Advocate of Allahabad*, [1935] A. L. J. R. 46.

⁷ *Amrita Bazar Patrika*, (1913) 17 C. W. N. 1253, 1282.

⁸ *Balkrishna Govind Kulkarni*, (1921) 24 Bom. L. R. 16, 46 Bom. 592.

⁹ *Abdul Hasan Jauhar*, (1926) 48 All. 711, F.B.; *An Advocate*, (1928) 29 Cr. L. J. 801, [1928] AIR (A) 673, F.B.; *Ganesh Shunker Vidhyarthi*, (1928) 26 A. L. J. R. 1307, 30 Cr. L. J. 217, [1929] AIR (A) 81, F.B.

were not conferred on the Allahabad High Court by the Indian High Courts Act, 1861.¹⁰ The Contempt of Courts Act (XII of 1926), s. 2, has adopted the Bombay view. The Lahore High Court has held that it could take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it, notwithstanding the provisions of s. 2(3) of the Contempt of Courts Act, as the words "where such contempt is an offence punishable under the Indian Penal Code" means that the contempt must be punishable as a contempt under the Indian Penal Code and not punishable only because it otherwise is an offence.¹¹ The Patna High Court has held likewise.¹²

All other Courts including the Judicial Commissioners' Courts can only take action for contempt of Court under s. 228 of the Penal Code and s. 487 of the Code of Criminal Procedure.¹³

Where the contempt is some form of physical violence or obstruction and as such punishable by a criminal Court, the aggrieved party ought not to be allowed to invoke the special jurisdiction inherent in the Court by way of proceeding for contempt of Court. The proper place for such matters is the Magistrates' Court.¹⁴ Where the parties came to a settlement of their dispute and one of the terms of such settlement was that the defendant would not dispose of certain properties until the decree was satisfied and the terms of settlement were made part of the decree passed by the Court but before the decree was satisfied, the parties giving the undertaking mortgaged the properties, it was held that the party was guilty of contempt of Court and the breach of the undertaking was not such a trivial matter as would be beneath the dignity of the Court to notice.¹⁵

Amendment.—After the words "Her Majesty" there were the words "or of the East India Company, or of any Act for the Government of the Indian navy"; but they were repealed by Act XIV of 1870. The word "soldiers" was introduced by Act X of 1927 and the word 'sailors' by Act XXXV of 1934. The words "or airman" were introduced by Act X of 1927.

After the words "East India Company or" the words "British India" were substituted for the words "the said territories" by the Government of India (Adaptation of Indian Laws) Order, 1937.

PRACTICE.

Jurisdiction.—Section 101 of the Mutiny Act (41 Vic., c. 10) does not deprive the civil (as opposed to military) Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief.¹⁶

Conviction under special Act not to be quashed.—The circumstance that the act proved would also constitute an offence under a section of the Code, is no reason for quashing a conviction under a special law.¹⁷

¹⁰ *Mahant Shantanand Gir v. Mahant Basudevanand Gir*, (1930) 52 All. 619, F.B.

¹¹ *Bennett Coleman & Co. Ltd. v. G. S. Monga*, (1936) 18 Lah. 34.

¹² *Superintendent and Legal Remembrancer of Legal affairs, Bihar v. Murali Manohar*, (1940) 20 Pat. 306.

¹³ *Venkatrao*, (1922) 24 Bom. L. R. 386,

46 Bom. 973.

¹⁴ *Nirmal v. Mahendra Lal*, (1937) 41 C. W. N. 1325.

¹⁵ *Hari Charan v. Ranjit Kumar*, (1937) 42 C. W. N. 203.

¹⁶ *Magwire*, (1879) 5 Cal. 124.

¹⁷ *Kassimuddin*, (1867) 8 W. R. (Cr.) 55.

CHAPTER II.

GENERAL EXPLANATIONS.

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained, and the meanings thus announced are steadily adhered to throughout the subsequent chapters. Sir James Stephen suggests that the object of this Chapter is to prevent captious Judges from wilfully misunderstanding the Code and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those cases where difficulty may arise, when it will be necessary to refer to this Chapter to see what the meaning of the Code is.¹

6. Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision or illustration.

Definitions in the Code to be understood subject to exceptions.

ILLUSTRATIONS.

(a) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) A, a police-officer, without warrant, apprehends Z who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

COMMENT.

The proper place for this section would be Chapter IV as it refers to exceptions mentioned in that chapter.

Illustration (a) is based on s. 82, *infra*, and (b), on s. 76, *infra*.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Sense of expression once explained.

COMMENT.

The maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another) or *expressio unius est exclusio alterius* (the mention of one is the exclusion of another) is the basis of this section. "To say that it shall have a particular meaning everywhere, is to say that it shall have no other meaning anywhere...if the words taken grammatically have a definite, certain and unequivocal meaning, if they constitute a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only, then, however absurd and pernicious the consequences, that meaning is to be followed. If, however, the expression does not include the complete thought of the legislature, or if the words are equally susceptible of several meanings, we are to seek in other parts of the same statute, or in other statutes, certainly

¹ P. L. C. (1860), p. 1261.

in those in *pari materia* with this, the one of the several possible meanings which ought to be put upon the words.²

It is an ordinary canon of construction that a word which occurs more than once in the same Act must be given the same meaning throughout the Act, unless some definition in the Act or the context shows that the Legislature used the word in different senses.³

Gender.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

COMMENT.

There is a similar provision in s. 13 of the General Clauses Act⁴ which provides that in all Central Acts and Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females.

9. Unless the contrary appears¹ from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

COMMENT.

The General Clauses Act similarly says that unless there is anything repugnant in the subject or context, words in the singular shall include the plural, and *vice versa*.⁵

1. 'Unless the contrary appears'.—This expression means unless the contrary intention appears.

"Man".

"Woman".

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.¹

COMMENT.

The word 'man', in a scientific treatise on zoology or fossil organic remains, would include men, women, and children, as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense, in philosophical or religious disquisitions. But, in almost every other connection, the word 'man' is used in contradistinction to 'woman'. This restricted sense is its ordinary and popular sense.⁶

Speaking generally, the term 'man' is used in the Code in its generic sense meaning a human being. Thus a girl of six years of age is held to be a woman within the meaning of s. 354 of the Code.⁷

1. 'Of any age'.—These words indicate that a male or female child will come within the word 'man' or 'woman', respectively.

11. The word "person" includes any Company or Association, or body of persons, whether incorporated¹ or not.

"Person".

COMMENT.

The word 'person' includes both a natural person (a human being), whether a man, woman or child and an artificial person (a corporation⁸.) Its definition is not.

² Per Holloway, J., in (1866) 3 M. H. C. Appx. 11, 12. See *Fateh Chand Agarwalla*, (1916) 44 Cal. 477, F.B.

³ *Rameshwar Prasad*, (1931) 32 Cr. L. J. 1266, 27 N. L. R. 270, [1931] AIR (N) 177.

⁴ Act X of 1897.

⁵ Act X of 1897, s. 13 (2).

⁶ *Chorlton v. Lings*, (1868) L. R. 4 C. P. 374, 392.

⁷ *Tatia Mahadev*, (1912) 14 Bom. L. R. 961, 13 Cr. L. J. 858.

⁸ See *Pharmaceutical Society v. London and Provincial Supply Association*, (1880) 5 App. Cas. 857.

exhaustive and must be taken to include artificial or juridical persons as well. An idol is a juridical person capable of owning property and therefore a 'person' as defined in the Code⁹. It is, however, used frequently in the Code in a sense in which it is clear from the context that corporate bodies, etc., are not included.¹⁰

The General Clauses Act¹¹ says that 'person' shall include any company or association or body of individuals, whether incorporated or not. But a limited liability company cannot be committed for trial on an indictment.¹² But persons who abet or aid the company would be liable.¹³

The word 'person' is sufficiently wide to include the Government as representative of the whole community.¹⁴ Thus, possession of wood by a Forest Inspector, a servant of Government, is held to be possession of the Government itself: and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft if that consent was unauthorized or fraudulent.¹⁵

I. 'Incorporated'.—Incorporation is the formation of a legal body, with the quality of perpetual existence and succession, except as limited by the Royal Charter or Act of Parliament effecting the incorporation.¹⁶

12. The word "public" includes any class of the public or any community.

COMMENT.

This definition is inclusive and does not define the word "public". It only says that class of public or community is included within the term "public". A class or community residing in a particular locality may come within the term "public".¹⁷

In popular parlance the word 'public' means the general body of mankind, or of a nation, State, or community. It is also sometimes used in a more restricted sense of denoting only a particular body or aggregation of people; as, an author's public.¹⁸

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

COMMENT.

Section 13A of the General Clauses Act¹⁹ provides that in all Central Acts and Regulations, references to the Sovereign or to the Crown shall, unless a different intention appears, be construed as references to the Sovereign for the time being.

14. The words "servant of the Queen" denote all officers or servants continued, appointed or employed in India by or under the authority of the Government of India Act, 1935, or by or under the authority of any Government¹ in British India or of the Crown Representative.

COMMENT.

The words "servant of the Queen" now include officers or servants continued, appointed or employed by (1) the Government of India, (2) any Government in British India, and (3) the Crown Representative.

⁹ *Vadivelu Arsuthiyar*, [1943] 2 M. L. J. 445, 56 L. W. 645, 45 Cr. L. J. 405, [1944] AIR (M) 77.

¹⁰ See ss. 56, 73, 84-87, 100, 105, 114, 137, 139, 141, 149-151, 153, 157, 159, 170, 191, 216, 220-225, 278, 282, 295, 297, 298, 491, 492, 497 and Ch. XVI.

¹¹ Act X of 1897, s. 3 (39).

¹² *Daily Mirror Newspaper*, [1922] 2 K.

B. 580.

¹³ *Ibid.*

¹⁴ *Hannamta*, (1877) 1 Bom. 610, 622.

¹⁵ *Ibid.*

¹⁶ Wharton, 14th Edn., p. 501.

¹⁷ *Harnandan Lal v. Rampalak Mahto*, (1938) 18 Pat. 76.

¹⁸ Webster.

¹⁹ Act X of 1897.

1. 'Government'.—See s. 17, *infra*.

Amendment.—The words "the Government of India Act, 1935...Representative" were substituted for the words "the said Statute 21 & 22 Victoria, Chapter 106, entitled 'an Act for the better government of India', or by or under the authority of the Government of India or any Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

In Burma, the word "Burma" was substituted for "India" and for the words "the said Statute...Government" the words "the Government of Burma Act, 1935, or by or under the authority of the Governor of Burma" were substituted by the Government of Burma (Adaptation of Laws) Order, 1937.

15. [Definition of "British India."] *Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937; and the Government of Burma (Adaptation of Laws) Order, 1937.*

16. [Definition of "Government of India."] *Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937; and the Government of Burma (Adaptation of Laws) Order, 1937.*

17. The word "Government" denotes the person or persons authorized by law to administer executive Government in any part of British India.

C O M M E N T .

According to this definition 'Government' means the local Government of a province. A Collector acting in the management of a Khas Mehal, the property of Government, is as much the Government within the meaning of this section as when he is exercising any other of the duties of his official position.²⁰ The General Clauses Act,²¹ however, says that 'Government' or 'the Government' shall include both the Central Government and any Provincial Government.

Act III of 1895 has varied the definition of 'Government' so far as ss. 255 to 263A are concerned. Section 263A defines what 'Government' means in those sections.

Ministers chosen from the elected representatives of the people of the province for the purpose of carrying into effect, if possible, and within prescribed limits, their wishes, and acting as advisers to the Governor, cannot be described as "officers subordinate" to the Governor within the meaning of s. 49 of the Government of India Act, 1935. Although in popular language the Ministers may be referred to as "The Government" they are not "the Government" within the meaning of this section and s. 124A of the Code. The Ministers are, in law, the Governor's advisers.²²

18. [Definition of "Presidency."] *Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.*

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person

who is empowered by law to give, in any legal proceeding,¹ civil or criminal, a definitive judgment, or a judgment which, if not appealed

²⁰ *Bajoo Singh*, (1898) 26 Cal. 158.

²¹ X of 1897, s. 3 (21).

²² *Hemendra Prasad Ghose*, [1939] 2 Cal. 411, 417.

against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

ILLUSTRATIONS.

(a) A Collector exercising jurisdiction in a suit under Act X of 1859² is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(c) A member of a panchayat which has power, under Regulation VII, 1816, of the Madras Code,³ to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

COMMENT.

Every person officially designated a Judge is a Judge, e.g. High Court Judge, District Judge, Assistant Judge, and Subordinate Judge.

The illustrations show that a person other than one who is officially designated a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding—revenue, civil or criminal—is concerned he is a Judge but he is not a Judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of “Judge” when it is empowered by law to give a judgment, such as arbitrators.²⁴

The definition of “Judge” as given in this section differs from that given in the Civil Procedure Code, s. 2 (8).

1. ‘Legal proceeding.’—This means a proceeding regulated or prescribed by law, in which a judicial decision may or must be given.²⁵ Thus a president of a Union Board is not a Judge because he does not give his judgment in a legal proceeding.¹ A village police patel deciding a case under s. 14 of the Village Police Act (VIII of 1867)² a member of a village Panchayat,³ and the Manager exercising functions under the Chota Nagpur Encumbered Estates Act;⁴ an election officer empowered to remove names from the electoral roll,⁵ come within the term “Judge”.

The expression ‘legal proceeding’ means the same thing as ‘judicial proceedings’, in s. 4(m) of the Code of Criminal Procedure.

Magistrate.—A Magistrate is a “judge” within the meaning of this section, read with s. 4(2), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. Therefore, an affidavit sworn before a Magistrate cannot be used in the High Court.⁶

Arbitrators.—Arbitrators empowered by law to give a definitive judgment are included in the term ‘Judge’. They can come within the term “judge” only when dealing with a case on reference to their arbitration. It has, however, been held by the Judicial Commissioner’s Court, Peshawar, that an arbitrator is not empowered to give a judgment at all. He makes an award and the Court passes judgment thereon. Hence, an arbitrator is not a Judge within the meaning of this section or s. 21.⁸ This decision is of doubtful authority. The Court passes a decree on the award of an arbitrator which is, therefore, akin to a judgment. It does not pass a judgment on the award.

²⁴ *Ramchandra Modak*, (1925) 5 Pat. 110, 115.

²⁵ *Abboy Naidu v. Kannappa Chettiar*, (1928) 30 Cr. L. J. 365, [1929] AIR (M) 175.

¹ *Ibid.*

² *Shankar Sayaji*, (1938) 40 Bom. L. R. 1106, 40 Cr. L. J. 116, [1938] AIR (B) 489.

³ *Kamla Patel v. Bhagwandas*, (1935) 37 Cr. L. J. 294, 18 N. L. J. 177.

⁴ *Hamendra Nath Gupta*, (1936) 17 P. L. T. 932, 38 Cr. L. J. 94, [1937] AIR (P) 160.

⁵ *Hanumanth Rao v. Lakshmayya*, [1937] M. W. N. 740.

⁶ *Ramchandra Modak*, (1925) 5 Pat. 110.

⁷ First Rep., s. 76.

⁸ *Pearey Lal Bhatia*, (1940) 42 Cr. L. J. 68, [1940] AIR (Pesh.) 41.

2. 'Act X of 1859'.—This Act has been repealed in the Chota Nagpur Division of Bengal (except as to the district of Manbhum and the Tributary Mahals) by Ben. Act I of 1879, and in the rest of Bengal (except as to Calcutta, Orissa and the Scheduled Districts) by the Bengal Tenancy Act (VIII of 1885). It is now in force in the district of Manbhum, in the Darjeeling District and in part of the Jalpaiguri District in Bengal, and such parts of it as are not inconsistent with the portions of Act VIII of 1885 which have been extended to the Orissa Division are in force in that Division.

'Act X of 1859' has also been repealed in the United Provinces (except as to certain Scheduled Districts) by the United Provinces Rent Act (XVIII of 1873) and Tenancy Act (II of 1901), and in the Central Provinces by the Central Provinces Tenancy Act (IX of 1883), superseded by the Central Provinces Tenancy Act (XI of 1898). In the province of Agra read now "the United Provinces Tenancy Act (II of 1901)" for 'Act X of 1859.'

3. 'Regulation VII, 1816, of the Madras Code'.—This has been repealed by the Madras Civil Courts Act (III of 1873).

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

ILLUSTRATION.

A panchayat acting under Regulation VII, 1816,¹ of the Madras Code, having power to try and determine suits, is a Court of Justice.

COMMENT.

"Court of Justice" does not mean here the place or building where justice is administered, but the Judge or Judges who conduct judicial proceedings in the due administration of justice. When the Judges are transacting merely administrative business, they are not a Court of Justice.⁹

The term 'Court' is defined in the Indian Evidence Act, 1872, s. 3, but the Bombay High Court has held that that definition is framed only for the purposes of that Act and should not be extended beyond its legitimate scope.¹⁰

1. 'Regulation VII, 1816'.—See Comment on s. 19, *supra*.

21. The words "public servant" denote a person falling under "Public servant." any of the descriptions hereinafter following, namely :—

First.—Every Covenanted servant of the Queen;

Second.—Every Commissioned Officer in the Military, Naval or Air Forces of the Queen while serving under any Government in British India or the Crown Representative;

Third.—Every Judge;

Fourth.—Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.—Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

⁹ *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q. B. 481.

¹⁰ *Tulja*, (1887) 12 Bom. 36. See *Venkatachala Pillai*, (1887) 10 Mad. 154.

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth.—Every officer of the Crown whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

Ninth.—Every officer whose duty, it is, as such officer, to take, receive, keep or expend any property on behalf of the Crown, or to make any survey, assessment or contract on behalf of the Crown, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Crown, or to make, authenticate or keep any document relating to the pecuniary interests of the Crown, or to prevent the infraction of any law for the protection of the pecuniary interests of the Crown, and every officer in the service or pay of the Crown or remunerated by fees or commission for the performance of any public duty ;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

ILLUSTRATION.

A Municipal Commissioner is a public servant.

Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words “public servant” occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3.[†]—The word “election” denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

COMMENT.

A line is drawn between the great mass of the community and certain classes of persons in the service and pay of Government, or exercising various public functions, who are here included in the words “public servant.” Those offences which

[†] In Burma, the following Explanation is substituted by Burma Act XVII of 1939.—

Explanation 3.—The word “election” means the selection, by any method which is by law

prescribed as by election, of any person as a member or officer of or to any office in the Legislature or any Municipal or other public authority.

are common between public servants and other members of the community are left to the general provisions of the Code. But there are several offences which can only be committed by public servants: and on the other hand public servants in the discharge of their duties have many privileges peculiar to themselves.¹¹ Public servants are dealt with more strictly than other persons for offences committed by them as they enjoy various privileges and possess power and authority. The offences peculiar to them are classed separately in Chapter IX.

The word 'servant' shall be deemed to signify any person duly appointed and invested with authority to administer any part of the executive power of the Crown, or to execute any other public duty imposed by law, whether it be judicial, ministerial, or mixed. This section does not define what a "public servant" means but enumerates the various functionaries who will be designated as public servants. A public servant is one who has to discharge some public duty. All Government servants are not public servants.

Clause 1.—'Covenanted servant'.—The members of the Indian Civil Service were known as covenanted servants as they had to sign a covenant by which they bound themselves to contribute for their pension and not to trade or to receive presents. This covenant was entered into after they were selected by the Board of Directors of the East India Company. Such a covenant is still, as a matter of form, signed by those who are successful in the Civil Service competitive examination.

Clause 2.—Statute 25 & 26 Vic., c. 4, enables His Majesty the King to issue Commissions to officers of the regular Army and Navy. Every officer holding a Commission in the Military, Naval or Air Forces of the King—Regular, Auxiliary or Volunteer—will be deemed to be a public servant, while serving under the Government of India or any Government. The words "or Air" were inserted by Act X of 1927. The words "in British India or the Crown Representative" were substituted for the words "of India or any Government" by Government of India (Adaptation of Indian Laws) Order, 1937. In Burma, the words "of India or any Government" were omitted by the Government of Burma (Adaptation of Laws) Order, 1937.

Clause 3.—The word "Judge" is defined in s. 19, A member of a Village Panchayat Court is a Judge.¹²

Clause 4.—A peon¹³ or a person¹⁴ executing a judicial process or a warrant of arrest¹⁵ or attachment¹⁶ or an officer whose duty it is to take property¹⁷ or a mukaddam—gumashta whose duty it is to report certain offences under the Penal Code.^{17a} comes under this Clause.

Clause 5.—In Burma, for the word "panchayat", the words "Village Committee" were substituted by the Government of Burma (Adaptation of Laws) Order, 1937.

Clause 6.—'Referred for decision or report'—To bring a case within this clause, there must be some cause or matter existing in dispute or controversy, in regard to which a competent public authority is desirous of a report to enable it to deal with the matter in dispute between the parties.¹⁸

Clause 7.—Convict-warders¹⁹ come under this clause.

Clause 8.—Persons appointed by a Government Solicitor to conduct prosecutions;²⁰ revenue and police Patels;²¹ the *gorait* of a village;²² officers of the Society for

¹¹ M. & M. 20.

¹² *Ponnusamy Thevar*, (1921) 15 L. W. 199, 42 M. L. J. 139, 23 Cr. L. J. 148, [1922] M. W. N. 122, [1922] AIR (M) 62.

¹³ *Bhagai Dafadar*, (1868) 2 Beng. L. R. 21, 10 W. R. (Cr.) 43, F.B.

¹⁴ *Thimmakka*, [1942] 2 M. L. J. 583, [1942] M. W. N. 375, (1941) 43 Cr. L. J. 757, [1942] AIR (M) 552.

¹⁵ *Sheo Proqash Tewari v. Bhoop Narain Prosad Pathak*, (1895) 22 Cal. 759; *Dharam Chand Lal*, (1895) 22 Cal. 596.

¹⁶ *Rajshahi Banking and Trading Corporation Ltd. v. Surendra Nath Mitra*, [1942] 2 Cal. 108.

¹⁷ *Thimmakka*, [1942] 2 M. L. J. 583, [1942]

M. W. N. 375, (1941) 43 Cr. L. J. 757, [1942] AIR (M) 552.

^{17(a)} *Lonkaran*, [1946] Nag. 714.

¹⁸ *Debi Din*, (1886) 6 A. W. N. 295.

¹⁹ *Kallachand Moitree*, (1867) 7 W. R. (Cr.) 63 [99]; *Muhammada*, (1908) P. R. No. 22 of 1908, 9 Cr. L. J. 90; *Saifin Rasul*, (1924) 26 Bom. L. R. 267, 25 Cr. L. J. 1382, [1924] AIR (B) 385; *Maula Bakhsh*, (1929) 30 Cr. L. J. 1103, [1929] AIR (L) 681.

²⁰ *Butto Kristo Doss*, (1878) 3 Cal. 497.

²¹ *Appaji bin Yadavrao*, (1896) 21 Bom. 517.

²² *Sidhu*, (1904) 26 All. 542.

the Prevention of Cruelty to Animals, appointed under the Bengal Police Act, V of 1861,²³ or the Madras City Police Act, III of 1888,²⁴ fall under this clause.

The words "the Crown" were substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Clause 9.—Throughout this clause the words "the Crown" were substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

'Officer'.—This word means a person employed to exercise to some extent a delegated function of Government; he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed.²⁵ It means a functionary or holder of some *officium* or office however humble, to whom in some degree are delegated certain functions of Government.¹

'Officer in the service or pay of'.—This expression means one who is appointed to some office for the performance of some public duty.²

Cases.—A surveyor employed by the Collector in the Khas Mehal department;³ a clerk in a Government Collectorate;⁴ a peon in the service and pay of Government and attached to the office of a Superintendent of the Salt Department;⁵ a put-waree;⁶ a supernumerary peon of the Collector's Court, who receives no fixed pay, but is remunerated by fees;⁷ a lascar in the service of the Public Works Department distributing water from public irrigation channels;⁸ a candidate or apprentice peon who serves process without remuneration;⁹ and a talayaree who assists the village office in collecting revenue,¹⁰ are public servants. The manager of an estate employed under the Court of Wards is a public servant according to the Allahabad High Court,¹¹ but not according to the Calcutta High Court.¹² A peon employed by such a manager is not a public servant.¹³

Clause 10.—The words "for any secular common purpose of any village, town or district" govern the whole clause. If any money is received or expended, it must be for a public purpose within the meaning of the section.¹⁴

Municipal engineers;¹⁵ municipal servants under the City of Bombay Municipal Act, III of 1888;¹⁶ a clerk in the Cess-collection Department of a Municipality constituted under the Bombay District Municipal Act;¹⁷ a municipal tax collector;¹⁸ a conservancy officer of the Corporation of Calcutta;¹⁹ a Local Board Sircar;²⁰ a Union Karnam;²¹ a chairman of a Union Panchayat;²² a toll contractor as well as his servant;²³ a bill collector of a Union Board;²⁴ the Vice-Chairman under the C. P. Local Self-Government Act,²⁵ and an assessor panch making collections under the Chaukidari Act,¹ are public servants falling under this clause.

²³ *Upendra Kumar Ghose*, (1906) 3 C. L. J. 475, 10 C. W. N. 727, 3 Cr. L. J. 420.

²⁴ *Nataraja Pillai*, (1922) 46 Mad. 90.

²⁵ *Ramajirav Jivabajirav*, (1875) 12 B. H. C. 1; *Karam Chand*, (1943) 46 P. L. R. 166, 45 Cr. L. J. 64, [1943] AIR (L) 255.

¹ *Ahad Shah*, (1917) P. R. No. 18 of 1918, 19 P. L. R. 316, 19 Cr. L. J. 621, [1918] AIR (L) 152 (2).

² *Nazamuddin*, (1900) 28 Cal. 344; *Ismail Mohamed*, [1941] R. L. R. 536.

³ *Bajoo Singh*, (1898) 26 Cal. 153.

⁴ *Jugal Singh*, (1942) 44 Cr. L. J. 745, [1943] AIR (P) 315.

⁵ *Nazamuddin*, (1900) 28 Cal. 344.

⁶ *Muds-ood-deen*, (1870) 2 N. W. P. 148.

⁷ *Ramakrishna Das*, (1871) 7 Beng. L. R. 446, 16 W. R. (Cr.) 27.

⁸ *The Public Prosecutor v. Annan Naidu*, (1924) 48 Mad. 867.

⁹ *Ram Chandra Sahu*, (1932) 12 Pat. 184.

¹⁰ *Karani*, [1943] 2 M. L. J. 674, [1943] M. W. N. 804, (1944) 45 Cr. L. J. 535, [1944] AIR (M) 183.

¹¹ *Mathura Prasad*, (1898) 21 All. 127.

¹² *Nazamuddin*, (1900) 28 Cal. 344.

¹³ *Arayi*, (1883) 7 Mad. 17.

¹⁴ *Shridhar*, (1934) 36 Bom. L. R. 1133, 36

Cr. L. J. 532, [1935] AIR (B) 36.

¹⁵ *Nantamram Utiamram*, (1869) 6 B. H. C. (Cr. C.) 64.

¹⁶ *Ezekiel*, (1904) 6 Bom. L. R. 54, 1 Cr. L. J. 23.

¹⁷ *Babulal Kanaiyalal*, (1908) 10 Bom. L. R. 761, 33 Bom. 213.

¹⁸ *Government Advocate, B. & O. v. Ganga Prasad*, (1922) 1 Pat. 423.

¹⁹ *S. C. Nandi v. Corporation of Calcutta*, (1930) 32 Cr. L. J. 138, 34 C. W. N. 449, [1930] AIR (C) 665 (1).

²⁰ *Aadaita Bhunia v. Kali Das De*, (1907) 12 C. W. N. 96, 6 Cr. L. J. 393.

²¹ *Gopalasaminatha Aiyen*, (1893) 1 Weir 128.

²² *Sheik Abdul Kadir Saheb*, [1916] 1 M. W. N. 384, 17 Cr. L. J. 168, [1917] AIR (M) 344.

²³ *Suleman*, (1934) 36 Bom. L. R. 1124, 36 Cr. L. J. 516, [1935] AIR (B) 24.

²⁴ *Ahamad Jalaluddin Rowther*, [1936] M. W. N. 638.

²⁵ *Anna Deshmukh*, (1936) 19 N. L. J. 221, 38 Cr. L. J. 444.

¹ *Gopal Mahlon*, (1940) 21 P. L. T. 716, 41 Cr. L. J. 819, [1941] AIR (P) 161.

The Sanitary Inspector of a Panchayat Board is not a public servant as he has not to perform any of the duties specified in this clause.²

Clause 11.—This clause was added by the Indian Elections Offences and Inquiries Act (XXXIX of 1920).

Explanation 1.—This Explanation shows that persons who hold offices under local laws, if their duties fall within any of the descriptions here given, are public servants. The absence of a formal appointment is immaterial where a person is in actual possession of a situation as a public servant.³

Explanation 2.—Public servant *pro confesso*.—Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities and is recognized as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a “public servant”. “If such a contention were allowed, and the question whether a man was a public servant were to depend wholly upon the test of his receiving or not receiving a salary, very great mischief and difficulty might arise in a country like this, where numerous persons are engaged in the performance of public duties without pay”.⁴

According to this Explanation the person who in fact discharges the duties of the office which bring him under some one of the descriptions of public servant, is for all the purposes of the Code rightfully a public servant, whatever legal defect there may be in his right to hold the office.⁵

A person serving as a volunteer in a Tahsildar's office,⁶ a Zamindari karnam,⁷ and a sanitary inspector under the Food Adulteration Act (Beng. Act VI of 1919),⁸ are public servants.

Explanation 3.—This explanation was added by the Indian Elections Offences and Inquiries Act (XXXIX of 1920).

Statutory public servants.—Various functionaries have been, by several local and special Acts, declared to be ‘public servants’ for the purpose of the Indian Penal Code.

For example a municipal inspector within the meaning of the Madras District Municipal Act (s. 41);⁹ a karkun employed by a manager appointed under Act XV of 1871 to execute revenue processes and receive rent;¹⁰ the Chairman of a District School Board constituted under the Bombay Primary Education Act, 1923.¹¹

Not statutory public servants.—A police-officer under suspension within the meaning of s. 8 of Act V of 1861;¹² a municipal corporation within the meaning of s. 39 of Beng. Act IV of 1877;¹³ a person nominated by a Collector under s. 69 of the Bengal Tenancy Act;¹⁴ a goods clerk of a railway company for the purpose of Chapter IX of the Penal Code;¹⁵ a person assisting, in virtue of s. 11 of the Burma Village Act, the headman of a village in arresting a person;¹⁶ and a Civic Guard unless the order calling him out is published in the Calcutta Police Gazette.¹⁷

² *Subramania Pillai v. Ponniah*, [1939] M. W. N. 469, [1939] 1 M. L. J. 729, 40 Cr. L. J. 822, [1939] AIR (M) 569. *Thiruvengada Mudali*, (1898) 21 Mad. 428, is no longer of any authority as the Madras Local Boards Act of 1884 on which the case was decided has been repealed by the Madras Local Boards Act of 1920.

³ *Brijbehari*, (1940) 22 P. L. T. 443, 42 Cr. L. J. 508, [1941] AIR (P) 539.

⁴ Per Straight, J., in *Parmeshar Dat*, (1886) 8 All. 201, 202.

⁵ *Ramkrishna Das*, (1871) 7 Beng. L. R. 446, 448, 16 W. R. (Cr.) 27, 28.

⁶ *Parmeshar Dat*, (1886) 8 All. 201, 202.

⁷ *Subramanya v. Somasundara*, (1891) 15 Mad. 127.

⁸ *Shaileshchandra Lahiri v. Nehalchand Mar-*

wari, (1931) 59 Cal. 234.

⁹ *Ramasami*, (1889) 13 Mad. 131.

¹⁰ *Isab Musa*, (1876) Unrep. Cr. C. 117.

¹¹ *Nhamesaheb Ahmedsaheb*, (1936) 38 Bom. L. R. 956, [1937] Bom. 78.

¹² *Dinanath Gangooly*, (1872) 8 Beng. L. R. (Appx.) 58, 17 W. R. (Cr.) 12.

¹³ *Municipal Corporation of the Town of Calcutta*, (1878) 3 Cal. 758.

¹⁴ *Chatter Lal v. Thacoor Pershad*, (1891) 18 Cal. 518.

¹⁵ *Zaharia*, (1898) P. R. No. 9 of 1898.

¹⁶ *Ngā Paw E*, (1916) 10 B. L. T. 170, (1914-1916) 2 U. B. R. 122, 18 Cr. L. J. 351, [1917] AIR (UB) 8.

¹⁷ *Jitendra Mohan*, (1943) 48 C. W. N. 188, 45 Cr. L. J. 384, [1944] AIR (C) 79.

Not public servants.—A lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself;¹⁸ a Poddar of the Bank of Bengal;¹⁹ a Mysore policeman;²⁰ a peon employed by the manager of an estate under the charge of the Court of Wards;²¹ a carter employed by Government;²² an arbitrator appointed by the parties to a proceeding under s. 145 of the Criminal Procedure Code;²³ a clerk appointed by a Sub-Registrar and paid out of an allowance given to the latter;²⁴ a Municipal Water-Tax Collector;²⁵ an unpaid apprentice of Government;¹ a villager required to bring an accused person to a police-station in arrest under s. 11 of the Burma Village Act;² a village chowkidar;³ a municipal committee (though the members forming the municipal corporation are public servants);⁴ and the president of a Co-operative Society.⁵

PRACTICE.

Evidence.—Where the offence concerns any ‘public servant’ it is sufficient to show “actual possession of the situation”, and this is sufficiently shown by the proof that the duties or functions are actually discharged by the person alleged to be such servant.

22. The words “moveable property” are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

COMMENT.

The term ‘property’ conveys a compound idea composed of that which is its subject, and of the right to be exercised over it. It is everywhere used in this Code so as to be applicable exclusively to “that which is its subject”.⁶

The General Clauses Act of 1897 says that “moveable property” shall mean property of every description, except “immoveable property”.⁷ The Indian Registration Act says that “moveable property” includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except “immoveable property”.⁸ The Indian Companies Act (VII of 1913), s. 28, provides that “the shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company”.

The definition in the Penal Code is restricted to corporeal property; it excludes all choses in action. It differs from the definitions given in the two above Acts, as it excludes incorporeal rights.

1. ‘Corporeal property’ is property which may be perceived by the senses, in contradistinction to incorporeal rights, which are not so perceivable, as obligations of all kinds. Thus, salt produced on a swamp,⁹ papers forming part of the record of case,¹⁰ and a cheque,¹¹ are moveable property within the meaning of this section.

In an Allahabad case the question arose, but was not decided, whether a letter received by post could be considered “moveable property” of the receiver. A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W read the letter, and put it on a table in the room and left it there. H took the letter, and subsequently attempted to file it as an exhibit attached

¹⁸ *Ramajirav Jiobajirav*, (1875) 12 B. H. C. 1.

¹⁹ *Modun Mohun*, (1878) 4 Cal. 376.

²⁰ *Venkatigadu*, (1879) 1 Weir 342.

²¹ *Arayi*, (1883) 7 Mad. 17.

²² *Nachimuttu*, (1883) 7 Mad. 18.

²³ *Sundar Majhi*, (1908) 30 Cal. 1084.

²⁴ *Bhagwati Sahai*, (1905) 32 Cal. 664.

²⁵ *Gulab*, (1904) 1 A. L. J. R. 125 (notes).

¹ *Mahendra Prosad*, (1910) 15 C. W. N. 319, 12 Cr. L. J. 117. See *Ram Chandra Sahu*, (1932) 12 Pat. 184.

² *Nga Payo E*, (1916) 10 B. L. T. 170, (1914-1916) 2 U. B. R. 122, 18 Cr. L. J. 351, [1917]

AIR (UB) 8.

³ *Arjan Mal*, (1922) 8 Lah. 440, contra, *Bhagwan Din*, (1929) 58 All. 203.

⁴ *Nanhe v. The Municipal Committee, Jubulpore*, (1929) 25 N. L. R. 194, 31 Cr. L. J. 382, [1930] AIR (N) 33.

⁵ *Somabari Behara*, [1935] M. W. N. 1337.

⁶ 1st Rep., s. 82.

⁷ Act X of 1897, s. 3(34).

⁸ Act XVI of 1908, s. 3.

⁹ *Tamma Ghanmaya*, (1881) 4 Mad. 228.

¹⁰ *Ramaswami Aiyar v. Vaithilinga Mudali*, (1882) 1 Weir 28.

¹¹ *Rich*, (1930) 52 All. 894.

to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, "of strengthening Mrs. W's case and of improving his own position. The Court, however, refused to receive the letter. It was held that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter.¹²

2. 'Land and things attached to the earth'.—This section does not exempt "earth and things attached to the earth", but "land and things attached to the earth"; "land" and "earth" are not synonymous terms, and there is a great distinction between "the earth" and "earth". By severance things that are immoveable become movable, and it is perfectly correct to call those things attached which can be severed; and undoubtedly it is possible to sever earth from the earth, and attach it again thereto. Earth, that is soil and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft.¹³ Any part of "the earth", whether it be stones or sand or clay or any other component, when severed from "the earth" is moveable property.¹⁴ But growing crops¹⁵ or standing teak trees¹⁶ are not moveable property.

'Attached to the earth'.—The Transfer of Property Act defines this expression. According to s. 3 of that Act "attached to the earth" means

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls of buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

23. "Wrongful gain" is gain by unlawful means of property
 "Wrongful gain". to which the person gaining is not legally entitled.

"Wrongful loss" is the loss by unlawful means
 "Wrongful loss". of property to which the person losing it is legally entitled.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property,¹ as well as when such person is wrongfully deprived of property.

COMMENT.

The word 'wrongful' means prejudicially affecting a party in some legal right. This word is not defined anywhere in the Code though the word "illegal" is defined in s. 43. The words 'by unlawful means' are intended to refer to an act which would render the doer liable to an action or prosecution.¹⁷

For either wrongful loss or gain, the property must be lost to the owner or the owner must be wrongfully kept out of it. Thus, where a pledgee used a turban that was pledged, it was held that the deterioration of the turban by use was not 'wrongful loss' of property to the owner, and the wrongful beneficial use of it by the pledgee was not a 'wrongful gain' to him.¹⁸

1. 'Wrongfully kept out of any property'—When the owner is kept out of possession of his property with the object of depriving him of the benefit arising from the possession, even temporarily, the case will come within the definition.¹⁹ But where the owner is kept out of possession temporarily not with any such intention, but only

¹² *Harris*, (1917) 40 All. 119.

¹³ *Shivram*, (1891) 15 Bom. 702.

¹⁴ *Suri Venkatappayya Sastri v. Madula Venkanna*, (1904) 27 Mad. 531, 535, F.B., overruling *Kotayya*, (1887) 10 Mad. 255.

¹⁵ *Nallamadān Chettiar*, (1929) 31 Cr. L. J. 1196, 31 L. W. 719, 58 M. L. J. 509, [1930] M. W. N. 352, [1930] AIR (M) 509.

¹⁶ *U Ka Doe*, (1929) 8 Ran. 13.

¹⁷ *Nga Te*, (1904) 2 L. B. R. 216, 10 Burma L. R. 249, 1 Cr. L. J. 730, F.B.; *Athi Ayyar*, (1920) 14 L. W. 728, 23 Cr. L. J. 607, [1921] AIR (M) 322.

¹⁸ (1868) 8 M. H. C. (Appx.) 6.

¹⁹ *Nabi Baksh*, (1897) 25 Cal. 416.

with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense. Thus, where the accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the cow-shed to give a lesson to his master, it was held that no theft was committed as there was no wrongful loss.²⁰

Fees payable to a college for attending lectures are 'property' within the meaning of this section.²¹

CASES.

Wrongful loss.—Cattle.—Forcible and illegal seizure of bullocks of a widow in satisfaction of a debt due to the accused by her deceased husband was held to be a 'wrongful loss',²² but not illegal seizure and sending to a pond of cattle, even though this was done with the malicious intent of subjecting the owners to additional expense, inconvenience, and annoyance.²³ Merely permitting cattle to stray was held not to establish any intention of causing 'wrongful loss' to the public or any person.²⁴

Secreting document.—Where the plaintiff, in a suit referred to arbitration, with a view to prevent a witness from referring to an endorsement on a bond, snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that it could hardly be inferred from those circumstances that the act of the accused was prompted by any desire to cause 'wrongful loss' or 'wrongful gain'.²⁵

Breach of condition not 'wrongful loss'.—Where a person who purchased rice from a famine relief officer at a certain rate, on condition that he should sell it at a pound the rupee less did not sell it at the rate agreed upon, but at four pounds the rupee less, it was held that no wrongful gain or wrongful loss had been caused to anyone within the meaning of this section. The rice having been sold to the accused, and he having paid for it, it was not unlawful for him to sell it again at such prices as he thought fit.¹

Abatement of nuisance by unlawful means.—Where the accused demolished a structure because it was an encroachment on a public street, it was held that as the accused had no justification in law to demolish it the acts done by them were not lawful and they were guilty of mischief.²

24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

COMMENT.

From this definition it will appear that the term 'dishonestly' is not used in the Code in its popular significance as implying deviation from probity. Dishonesty in law is at times different from the dishonesty of the market place. Unless there is wrongful gain to one person, or wrongful loss to another, an act would not be 'dishonest'. It is not necessary for a thing to be done 'dishonestly' that there should be an intention to cause both wrongful gain and wrongful loss. Except so far as loss or detriment is almost necessarily involved when an advantage is obtained, any intention of causing loss is a matter of inference.

The word 'dishonestly' is used as bearing relation to property. The 'intention' under the section must be to cause wrongful gain or wrongful loss to a person. "The word 'intent,' by its etymology, seems to have metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result—foreseen

²⁰ *Nabi Baksh*, (1897) 25 Cal. 416.

²¹ *Soshi Bhushan*, (1898) 15 All. 210, 216.

²² *Preonath Banerjee*, (1866) 5 W. R. (Cr.)

68.

²³ *Aradhun Mundal v. Mayan Khan Takad-geer*, (1875) 24 W. R. (Cr.) 7; *Dayal*, [1943] O. W. N. 202, (1943) 44 Cr. L. J. 640, [1943]

AIR (O) 280.

²⁴ *Toorebajkhan*, (1868) Unrep. Cr. C. 11.

²⁵ *Subramania Ghanapati*, (1881) 3 Mad. 261.

¹ *Lal Mahomed*, (1874) 22 W. R. (Cr.) 82.

² *Narasimhulu v. Nagur Sahib*, (1933) 57 Mad. 351.

perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken.”³ A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means.⁴ An actual intention to convert an illegal or doubtful claim into an apparently legal one makes an action dishonest.⁵

The definition of the word ‘dishonestly’ is not exhaustive.⁶

The word ‘dishonestly’ occurs alone in the definition of theft (s. 378), extortion (s. 383), robbery (s. 390), criminal misappropriation (s. 403), criminal breach of trust (s. 405), and receiving stolen property (s. 411). It occurs with the word ‘fraudulently’, defined in the next section, in several offences such as cheating (s. 415) forgery (s. 463), and counterfeit coins (ss. 246, 247).

The law takes into account the primary or immediate intention and not the secondary or remote. Thus, if A takes an article belonging to Z out of Z’s possession, without Z’s consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration, he takes it dishonestly and commits theft.⁷ As every man is presumed to intend the natural consequences of his act, it is from the consequences that the Court has often to presume the intention of the accused in doing a particular act. The law does not look to the motive: it looks only to the intention. Motive and intention are two different things. Motive is directed to the ultimate end, good or bad, which a person hopes to secure; his intention is concerned with the immediate effects of his acts. End cannot justify the means, in other language, the motive does not justify the intention. Take the case of a scoundrel or a man of bad character, whom it might be desirable to destroy on the spot, but if a person takes the law into his own hands and kills him, none the less he is guilty of murder.

25. A person is said to do a thing fraudulently if he does that “Fraudulently”. thing with intent to defraud¹ but not otherwise.

COMMENT.

“As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined, . . . whether the word ‘defraud’...implies the deprivation or intended deprivation of property as a part or result of the fraud.”⁸

The word ‘fraudulently’ is equivalent to ‘intent to defraud.’ It should not be confined to transactions of which deprivation of property forms a part.⁹

The word ‘fraudulently’ occurs alone in the definition of many offences, chief of which are offences against public justice (ss. 206-208, 210), weights and measures (ss. 264-266), and counterfeit coins and stamps (ss. 242, 243, 252, 253, 261-263).

1. ‘Intent to defraud.’—“The word ‘intent’, by its etymology, seems to have metaphorical allusion to archery, and implies ‘aim’ and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken.”¹⁰ The terms ‘fraud’ and ‘defraud’ are not defined in the Penal Code. The word ‘defraud’ is of double meaning in the sense that it either may or may not imply deprivation, and, as it is not defined, its meaning must not be sought by a consideration of the context in which the word ‘fraudulently’ is found.¹¹ Sir James Stephen, in his History of the Criminal Law of England,¹² observes: “There has always been a great reluctance amongst lawyers to attempt

³ Per Batty, J., in *Bhagwant v. Kedari*, (1900) 2 Bom. L. R. 986, 1009, 25 Bom. 202, 226.

⁴ *Sarsar Singh*, (1934) 35 Cr. L. J. 1307, [1934] A. L. J. R. 749, [1934] AIR (A) 711.

⁵ *Kalyanmal*, [1937] Nag. 45.

⁶ *Baju Jha*, (1928) 9 P. L. T. 800, 30 Cr. L. J. 236, [1929] AIR (P) 60.

⁷ Section 378, ill. (i).

⁸ Per Maclean, C. J., in *Abbas Ali*, (1897) 25 Cal. 512, 521, F.B.

⁹ *Ibid.*

¹⁰ Per Batty, J., in *Bhagwant v. Kedari*, (1900) 25 Bom. 202, 226, 2. Bom L. R. 986, 1009.

¹¹ *Abbas Ali*, (1897) 25 Cal. 512, 521, F.B.

¹² Vol. II, p. 121; *Balkrishna*, (1913) 15 Bom. L. R. 708, 713, 37 Bom. 666; *Crown Prosecutor v. Sellamuthu*, [1940] 1 M. L. J. 761, 51 L. W. 744, [1939] M. W. N. 1248, (1938) 41 Cr. L. J. 397, [1940] AIR (M) 271.

to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."

Approving these observations, the Allahabad High Court has laid down that where there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud.¹³ A somewhat wider interpretation has been placed on the word 'fraud' in *Haycraft v. Creasy*,¹⁴ which is expressly followed by the Bombay High Court.¹⁵ Le Blanc, J., in the judgment, says: "By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial."

The expression 'intent to defraud' implies conduct coupled with an intention to deceive and thereby to injure; in other words, 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is an infringement of some legal right possessed by him, but not necessarily deprivation of property.¹⁶ The term 'defraud' denotes some form of dishonesty. An 'intention to defraud' has to be inferred from the conduct of the accused, and must necessarily involve something in the nature of cheating.¹⁷ The issuing of a false statutory report of a company calculated to deceive the public and intended to induce them to invest their money in the company which they would not otherwise have invested is an act done 'with intent to defraud' within the meaning of this section.¹⁸ Where the accused, after the execution and registration of a document which was not required by law to be attested, added his name to the document as an attesting witness, but without putting a date or alleging actual presence at the time of its execution, it was held that this act was neither fraudulent nor dishonest and that the accused was therefore not guilty of forgery.¹⁹ Similarly, where the accused attested a document, without the authority of the executant, after its execution, to prevent other people from setting up a claim to the property in the possession of the accused under the document, it was held that he was not guilty of forgery for there was no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused.²⁰ The accused, in order to obtain recognition from a Settlement Officer that they were entitled to the title of "Loksar," filed a *sannad* before that officer purporting to grant that title. This document was found not to be genuine and they were convicted under ss. 471 and 464 by the Sessions Judge. It was held that they could not be found guilty as their intention was not to cause wrongful gain or wrongful loss to anyone, but to produce a false belief in the

¹³ *Muhammad Saeed Khan*, (1898) 21 All. 113, 115; *Narain Dutt Tewari v. Rudra Dutt Bhatt*, (1925) 23 A. L. J. R. 657.

¹⁴ (1901) 2 East 92, 108.

¹⁵ *Vijhal Narayan*, (1886) 13 Bom. 515n, followed in *Lolit Mohan Sarkar*, (1894) 22 Cal. 313, 322, and in *Khandusingh*, (1896) 22 Bom. 768.

¹⁶ *Surendra Nath Ghose*, (1910) 38 Cal. 75, 89, followed in *Harjivan Valji*, (1925) 28

Bom. L. R. 115, 123, 50 Bom. 174, 184; *Robinson*, (1921) 22 Cr. L. J. 681.

¹⁷ *Visram Valji*, (1934) 37 Bom. L. R. 102, 36 Cr. L. J. 1511, [1935] AIR (B) 162.

¹⁸ *Ram Chand Gurwala*, (1920) 27 Cr. L. J. 1883, [1926] AIR (L) 385.

¹⁹ *Surendra Nath Ghose*, (1910) 38 Cal. 75.

²⁰ *Manicka Asari*, [1915] M. W. N. 278, 16 Cr. L. J. 246, [1915] AIR (M) 826.

mind of the Settlement Officer that they were entitled to the dignity of "Loskur" and that this could not be said to constitute an intention to 'defraud'.²¹ This case cannot be reconciled with the full bench decision of the Madras High Court in *Kotam-raj's case*.²²

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would be sufficient to support a conviction.²³ In order to prove an intent to defraud it is not at all necessary that there should have been some person defrauded, or who might possibly have been defrauded. "A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque either to try his credit, or to imitate his handwriting, there would be no *intent* to defraud, though there would be parties who might be defrauded; but where another person has no account at his bankers, but a man *supposes* that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded."²⁴ When it is material to prove an intent to defraud, evidence may be given of similar offences by the defendant.²⁵

Where property was removed openly in the light of day and there was no question of concealment, secrecy, clandestine action, deception or of anything else which the word "fraud" suggests, the act could not be said to be made or done fraudulently.¹

'Fraudulently': 'Dishonestly.'—There is a real distinction between the meaning of the terms 'fraudulently' and 'dishonestly'; the former denotes an intention to deceive. The difference between an act done dishonestly and an act done fraudulently is that if there is the intention by the deceit practised to cause wrongful loss that is dishonesty, but even in the absence of such an intention, if the deceitful act wilfully exposes anyone to risk of loss, there is fraud.² The production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced, though it may not be dishonest within the meaning of s. 24, may yet be fraudulent within the meaning of s. 471.³

26. A person is said to have "reason to believe" a thing if he
 "Reason to believe." has sufficient cause to believe that thing but not otherwise.

COMMENT.

A person can be supposed to 'know' where there is a direct appeal to his senses. A person "has reason to believe" under this section if he has sufficient cause to believe the thing but not otherwise.⁴

The expression "reason to believe" occurs in ss. 411 to 414.

See Comment on s. 414 where the word 'believe' is distinguished from 'suspect'.

27. When property is in the possession of a person's wife,¹ clerk or servant,² on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk, or servant, is a clerk or servant within the meaning of this section.

²¹ *Jan Mahomed*, (1884) 10 Cal. 584.

²² (1905) 28 Mad. 90, F.B.

²³ *Dhurnum Kaze*, (1882) 9 Cal. 53, 60.

²⁴ Per Maule, J., in *Nash's Case*, (1852)

2 Den. Cr. C. 493, 499; *Bajinath Bhagat*, (1940)

21 P. L. T. 206, [1940] AIR (P) 486.

²⁵ *Edith Irene Simmonds*, (1909) 2 Cr. App. R. 303.

¹ *Ramaswamy Ambalan v. Nagasubrahmaniam*

Iyer, [1936] M. W. N. 1150; *Kothandarama Reddy v. Balarami Reddi*, [1937] 2 M. L. J. 802, 46 L. W. 139, [1937] AIR (M) 713.

² *Sukhamoy Maitra*, (1937) 16 Pat. 688.

³ *Kedar Nath Chatterjee*, (1901) 5 C. W. N. 897.

⁴ *Latoor*, (1980) 81 Cr. L. J. 288, [1980] AIR (A) 33.

COMMENT.

Under this section property in the possession of a person's wife, clerk or servant, on account of that person, is deemed to be in that person's possession.

Object.—The object of the framers of the Code in the Explanation is to lay down a few rules, in accordance with the general sense of mankind, for the purpose of preventing any difference of opinion arising in cases likely to occur very often.

Principle.—This section abrogates the distinction made by the English law between 'possession' and 'custody.' But it does not express the complete thought of the Legislature on the question of possession.⁵ 'Possession' involves the idea of proprietorship, the right to exercise power or control over the thing possessed.

According to English law 'possession' is used as regards the owner, whereas 'custody' is used to mean 'such a relation towards the thing as would constitute possession if the person having custody had it on his own account.'⁶ What would be a mere 'custody' under English law would be 'possession' under the Code.

Corporeal property is in a person's possession when he has such power over it that he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or of some person for whom he is a trustee. But a wife, a clerk, or a servant, has not this power of intention to deal with things in their charge as owners. They are, therefore, said to have custody merely according to English law.

A man's goods are in his possession, not only while they are in his house or on his premises, but also when they are in a place where he may usually send them (as when horses and cattle feed on common land), or in a place where they may be lawfully deposited by him, as if he buries money or ornaments in his own land, or puts them in any other secret place of deposit.

1. 'Wife'.—A permanent mistress may be regarded as a 'wife'. When a man furnishes a house for his mistress' occupation, he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. But the inference must be inapplicable to articles of which the mistress is in possession illegally or contrary to the provisions of law, especially when the article in question is such that he might well remain in ignorance that it was in his mistress' possession.⁷

2. 'Clerk or servant'.—The possession by a clerk or servant of that which belongs to the master, or of that which, whether it belongs absolutely to his master, or to another person, the clerk or servant holds for his master and on his account, is the master's possession. The possession of the servant must be on account of his master to make the master liable. A pistol was discovered lying on the floor of a shop which could not reasonably be expected to be dealing in such articles. At the time of the discovery the shop was in charge of a servant and there was no proof that he was holding the pistol for his master. It was held that the master was not liable.⁸

28. A person is said to "counterfeit" who causes one thing¹ to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

⁵ *Fateh Chand Agarwalla*, (1916) 44 Cal. 477, F.B.

⁶ *Stephen's Digest of Criminal Law*, p. 243.

⁷ *Banwari Lal*, (1914) P. R. No. 20 of 1914,

15 Cr. L. J. 172, [1914] AIR (L) 455.

⁸ *Chhotey*, (1922) 20 A. L. J. R. 855, 23 Cr. L. J. 729, [1923] AIR (A) 33.

COMMENT.

The word 'counterfeit' occurs in offences relating to coins provided in Chapter XII, and offences relating to trade and property marks in Chapter XVIII. The word 'counterfeit' does not connote an exact reproduction of the original counterfeited. The difference between the counterfeit and the original is not therefore limited to a difference existing only by reason of faulty reproduction.⁹

Under this section it is not necessary to show that deception actually took place. Intention to practise deception by causing one thing to resemble another is quite sufficient.

1. 'Thing.'—The thing may be a coin or a piece of metal. Its value is immaterial. The counterfeit coin may be more valuable so far as money value is considered than the coin for which it is intended to pass.

When the coins counterfeited are such imitations of the genuine coin as might deceive people on account of the resemblance, the presumption referred to in explanation 2 arises.¹⁰ Altering used stamps so as to resemble genuine unused stamps amounts to counterfeiting.¹¹ If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of counterfeit coins.¹²

Amendment.—Explanations 1 and 2 have been substituted for the original Explanation by Act 1 of 1889, s. 9.

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used,¹ or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

ILLUSTRATIONS.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

ILLUSTRATION.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

COMMENT.

The term 'document' seems to include everything done by the pen, by engraving, by printing, or otherwise, whereby is made on paper, parchment, wood, or other

⁹ *Local Government v. Seth Motilal Jain*, [1938] Nag. 192.

¹⁰ *Qadir Bakhsh*, (1907) 30 All. 93.

¹¹ *Ramlal*, (1920) 22 Cr. L. J. 289, [1921]

AIR (N) 86 (2).

¹² *Velayudham*, [1938] Mad. 80; *Sahebrao*, (1938) 39 Cr. L. J. 838, [1938] AIR (N) 444.

substance a representation of words or other equivalents addressed to the eye. This word occurs in ss. 167, 175, 192, 204, 464, and 479.

The definition here given seems to be faulty; because the "matter described" is manifestly not the "document". According to English law the material on which words are written is said to be a 'document.' Under the Code it is the matter written and not the material that is called a 'document.' But the matter should be intended to be used as evidence of that matter. A writing is a document. Words printed, lithographed, or photographed are documents. A map or plan is a document. An inscription on a metal plate or stone is a document. A caricature is a document. Letters or marks imprinted on trees and intended to be used as evidence that the trees were passed for removal by a Ranger of a forest, are a document.¹³ A hammer for marking sleepers is a document.¹⁴

An avouchment, whether written or printed, of the character or quality of a chattel, is not a document which, if false, would be forgery, e.g., the false signature of an artist's name to a picture,¹⁵ or enclosing spurious goods in a wrapper imitating a trade-mark.¹⁶ But an instrument, though not signed by all parties thereto, fulfils the requirements of the definition of "document".¹⁷

Section 3 of the Indian Evidence Act (I of 1872) says that 'document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used for the purpose of recording that matter.

Section 3 (16) of the General Clauses Act says that 'document' shall include any matter written, expressed or described upon any substance by means of letters figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

1. 'Intended to be used.'—A writing which is not legal evidence of the matter expressed may yet be a document, if the parties framing it believed it to be, and intended it to be, evidence of such matter.¹⁸

Amendment.—The present Explanations were substituted by Act I of 1889, s. 9.

30. The words "valuable security" denote a document which is, or purports to be,¹ a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

"Valuable security".

ILLUSTRATION.

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

COMMENT.

The words "valuable security" denote a particular class of documents, viz., such documents as create or extinguish legal rights. This expression occurs in ss. 329-331, 347, 348, 420, 467, and 477.

1. 'Which is, or purports to be.'—The use of the words "which is, or purports to be" indicates that a document, which, upon certain evidence being given, may be held to be invalid, but on the face of it creates, or purports to create, a right in immoveable property, although a decree could not be passed upon the document, is contemplated within the purview of that section. Had it not been so, any forged document, if the forgery was admitted, or any document which was not executed or stamped according to law and on which no decree could be passed by a civil Court, could not be called a valuable security.¹⁹

¹³ *Krishappa Khandappa*, (1925) 27 Bom. L. R. 599, 26 Cr. L. J. 1014, [1925] AIR (B) 327.

¹⁴ *A. V. Joseph*, (1924) 3 Ran. 11.

¹⁵ *Closs's Case*, (1858) Dears. & B. 460.

¹⁶ *John Smith*, (1858) 27 L. J. (M. C.) 225.

¹⁷ *Ramaswami Ayyar*, (1917) 41 Mad. 589.

¹⁸ *Sheefail Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. 12.

¹⁹ *Ram Harakh Pathak*, (1925) 48 All. 140.

Unstamped document.—The fact that a document has not been stamped, or not properly stamped, and is not, therefore, receivable in evidence, does not prevent its being a valuable security.²⁰ This is so because such document “purports to be” a valuable security. A document whereby a person acknowledges himself to be under a legal liability is a valuable security.²¹

Unregistered document.—An unregistered document though it may not be a valuable security until the registration is completed still “purports” to be a valuable security.²²

Copy.—The term “valuable security” applies to the original document, and not to a copy.

Cancelled instrument.—A cancelled instrument is not a valuable security, “for an instrument available, for the purpose for which it was made is clearly what the clause intended; a cancelled instrument therefore, though by the cancelling of it a legal right may be ‘extinguished’, inasmuch as the instrument upon which such right depended is thereby voided, does not fall within its scope.”²³

Valuable securities.—A settlement of accounts in writing, though not signed by any person, and containing no promise to pay;²⁴ a *kabulayat*;²⁵ a deed of divorce;¹ a *hundi*;² a title page in an account book containing the names of partners and the amount of the capital contributed by each and signed by them;³ a counterfoil of a paying-in slip purporting to be an acknowledgment of receipt of a sum of money by a bank;⁴ an original transit pass without which no forest produce could be removed, under a Forest Regulation;⁵ a promissory note executed by a minor through force;⁶ and blank pieces of paper on which thumb-impressions are put by a person through fear of injury,⁷ are valuable securities.

A signature purporting to be that of B was forged on each of two printed forms, one intended to be used as a promissory note and the other as a receipt. The blank spaces left for entering particulars of the amount, the name of the person in whose favour the document was executed, the date and place of execution and the rate of interest were not filled in; a one-anna stamp was affixed on the top of each paper, but the stamp was neither signed across nor cancelled in any way. It was held that the documents, as they stood, were valuable securities.⁸ A document, though not signed by all the parties thereto, is a valuable security if it imposes an obligation on the actual executants and an option on the others and there is no condition precedent to be found in the document that the document is to be inoperative against the executants until all the parties executed it.⁹ Where, with a view to arriving at a compromise, the appellant executed a *patta* purporting to create a legal right in the other party in the land in dispute, and although the land comprised in the said *patta* belonged to a family of six it was signed by the appellant and the respondent only as representing the family, it was held that the document came within the definition of valuable security.¹⁰

Not valuable securities.—The copy of a lease;¹¹ a *sanad* purporting to confer a personal title;¹² a postal receipt for an insured parcel;¹³ a copy of a decree passed by a Court;¹⁴ an administrative order passed by the Superintendent of Court of

²⁰ (1873) 7 M. H. C. (Appx.) 26; *Ramasami*, (1888) 12 Mad. 148.

²¹ *Idu Jolaha*, (1917) 3 P. L. J. 386, 19 Cr. L. J. 709, [1918] AIR (P) 274.

²² *Kashi Nath Naek*, (1897) 25 Cal. 207.

²³ 1st Rep., s. 89.

²⁴ *Kapalavaya Saraya*, (1864) 2 M. H. C. 247.

²⁵ (1866) 6 W. R. (Cr. L.) 2; *Nasiruddin*, (1883) 3 A. W. N. 59.

¹ *Azimooddeen*, (1869) 11 W. R. (Cr.) 15.

² *Lekhraj*, (1910) P. R. No. 31 of 1910, 11 Cr. L. J. 639.

³ *Hari Charan Gorait v. Girish Chandra Sadhukhan*, (1910) 38 Cal. 68.

⁴ *Turner*, (1925) 52 Cal. 636.

⁵ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram Mudi*, (1932)

59 Cal. 1238.

⁶ *Ramnarain Sahu*, (1933) 15 P. L. T. 66, 35 Cr. L. J. 123, [1933] AIR (P) 601 (1).

⁷ *Batisa Singh*, (1932) 13 P. L. T. 588, 34 Cr. L. J. 81, [1932] AIR (P) 385.

⁸ *Jawahir Thakur*, (1916) 38 All. 430.

⁹ *Ramaswami Ayyar*, (1917) 41 Mad. 589.

¹⁰ *Ram Harakh Pathak*, (1925) 48 All. 140.

¹¹ *Khushal Hiranman*, (1867) 4 B. H. C. (Cr. C.) 28; *Naro Gopal*, (1868) 5 B. H. C. (Cr. C.) 56.

¹² *Jan Mahomed*, (1884) 10 Cal. 584.

¹³ *Arura*, (1912) P. R. No. 10 of 1913, 14 Cr. L. J. 436; *Sadho Lal*, (1916) 17 Cr. L. J. 272, [1917] AIR (P) 699.

¹⁴ *Charu Chandra Ghose*, (1923) 39 C. L. J. 122, 28 C. W. N. 414, 25 Cr. L. J. 1034, [1924] AIR (C) 502.

Session directing the Nazir of the Court to release an accused on bail,¹⁵ and a bill receipted as by a cheque,¹⁶ are not valuable securities.

31. The words "a will" denote any testamentary document.

COMMENT.

A "will" is a disposition or declaration by which the person making it provides for the distribution or administration of property after his death. It does not take effect until the testator's death, and is always revocable by him.

The Indian Succession Act¹⁷ defines 'will' as "the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death." The General Clauses Act¹⁸ says that 'will' "shall include a codicil and every writing making a voluntary posthumous disposition of property". This term occurs in ss. 467 and 477 of the Code.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts¹ done extend also to illegal² omissions.³

COMMENT.

This section simply says that acts include illegal omissions.

1. 'Acts'.—An 'act' generally means something voluntarily done by a person. 'Act' is a determination of the will, producing an effect in the sensible world. This word includes writing and speaking, or, in short, any external manifestation. In the Code the term 'act' is not confined to its ordinary meaning of positive conduct of doing something but includes also illegal omissions.

2. 'Illegal'.—See *post*, s. 43.

3. 'Omissions'.—This word is used in the sense of intentional non-doing. Thus, according to this section, 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must no doubt be such as to have an active effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred.¹⁹ The Code makes punishable omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, a certain evil effect in the same manner as it punishes acts, provided they were illegal. And when the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment.²⁰

33. The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

COMMENT.

The word 'act' is nowhere defined. It must necessarily be something short of a transaction which is composed of a series of acts but cannot, in ordinary language, be restricted to every separate willed movement of a human being; for when we speak of an act of shooting or stabbing, we mean the action taken as a whole, and not the numerous separate movements involved.²¹

The effect of s. 32 and this section taken together is that the term 'act' comprises one or more acts or one or more illegal omissions.

¹⁵ *Sher Alam Khan*, (1933) 35 Bom. L. R. 1062, 35 Cr. L. J. 479, [1933] AIR (B) 494.

¹⁶ *H. K. Shaw*, (1935) 39 C. W. N. 1182, 62 C. L. J. 119, 37 Cr. L. J. 828, [1936] AIR (C) 324.

¹⁷ Act XXXIX of 1925, s. 3(h).

¹⁸ X of 1897, s. 3 (57).

¹⁹ *Thornotti Madathil Poker*, (1886) 1 Weir 549.

²⁰ *Latifkhan*, (1895) 20 Bom. 394; *Basharat*, (1934) 36 P. L. R. 37, 36 Cr. L. J. 308, [1934] AIR (L) 813. See *Beharry Singh*, (1867) 7 W. R. (Cr.) 3; *Sonoo*, (1868) 10 W. R. (Cr.) 48; *Kali Churn Gangooly*, (1873) 21 W. R. (Cr.) 11.

²¹ *Bhogilal*, (1931) 33 Bom. L. R. 648, 651, 32 Cr. L. J. 1145, [1931] AIR (B) 409.

Where an accused person commits two (or more) acts, closely following upon and intimately connected with each other, they cannot be separated and assigned, the one to one intention and the other to another, but both must be ascribed to the original intention which prompted the commission of those acts and without which neither could have been done.²²

An act may constitute an offence under two or more enactments.²³

34. When a criminal act is done by several persons,¹ in furtherance of the common intention of all,² each of such persons is liable for that act in the same manner as if it were done by him alone.³

Acts done by several persons in furtherance of common intention.

COMMENT.

This section lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.²⁴ It deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself; for "that act" and "the act" in the latter part of the section must include the whole action covered by a "criminal act" in the first part, because they refer to it.²⁵ The section does not create a distinct offence; it lays down only a principle of criminal liability.¹

As to the distinction between this section and s. 149, see Comment on the latter section.

Sections 33, 34, 37 and 38 should be read together.

Object.—This section is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them.² The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support, and protection to the person actually committing the act.

Principle.—This section embodies the common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.³ If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined.⁴ All are guilty of the principal offence, not of abetment.⁵ But a party not cognizant of the intention of his companion to commit murder is not liable, though in his company, to do an unlawful act.⁶ For instance, "if three persons go out to commit a felony, and one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out."⁷

²² *Nehal Mahto*, (1939) 18 Pat. 485.

²³ *Sesha Ayyar v. Venkatasubba Chetty*, (1923) 19 L. W. 201, 25 Cr. L. J. 442, [1924] M. W. N. 268, [1924] AIR (M) 487.

²⁴ *Mahbub Shah*, (1945) 47 Bom. L. R. 941, 72 I. A. 148.

²⁵ *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 158, 52 Cal. 197, 52 I. A. 40; *Maung Thwe*, (1925) 3 Ran. 74; *Mian Khan*, (1928) 10 L. L. J. 366, 29 Cr. L. J. 474; *Krishnaswami Naicker*, [1936] M. W. N. 644.

¹ *Barendra Kumar Ghose*, (1928) 28 C. W. N. 170, 189, 38 C. L. J. 411, 25 Cr. L. J. 817, [1924] AIR (C) 257, F.B.; *Dastarali*, (1930) 59 Cal.

822; *Debiprasad Kalowar*, (1932) 59 Cal. 1192.

² *Nga Po Sein*, (1902) 1 L. B. R. 233; *Nga Tha Htin*, (1935) 36 Cr. L. J. 1393, [1935] AIR (R) 304.

³ *Waryam Singh*, [1941] Lah. 423.

⁴ *Nga Po Sein*, (1902) 1 L. B. R. 233; *Sultan*, (1930) 12 Lah. 442.

⁵ *Pha Laung*, (1906) 3 L. B. R. 264; 5 Cr. L. J. 414; but see *Po Ya*, (1919) 10 L. B. R. 99, 21 Cr. L. J. 797, [1919] AIR (LB) 20 (2).

⁶ *Duffey's case*, (1830) 1 Lewin 194. See *Duma Baidya*, (1896) 19 Mad. 483.

⁷ Per Park, J., in *Duffey's case*, *ibid*.

Scope.—This section is restricted to common intention and does not embrace any knowledge.⁸ It does not require proof that any particular accused was responsible for the commission of the actual offence.⁹ It is not restricted to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. It can well be applied to cases in which the offence is committed by only one of two or three persons who all had a common intention.¹⁰

It provides not only for liability to punishment, but also for subjection to another jurisdiction. If a foreigner in a foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was completed.¹¹

This section has no application in the construction of ss. 397¹² and 398, though it may be read with ss. 392 and 395 to determine the substantive offence which is created.¹³ It cannot be used to make a co-accused liable to the minimum punishment laid down in s. 397 because one accused is so liable.¹⁴

The Calcutta High Court has held that this section applies to a case under the second part of s. 304.¹⁵ On the other hand the Allahabad High Court is of the opinion that in order to make this section applicable to the second part of s. 304, it will be necessary to widen it in terms of s. 149. Until that is done, accused persons cannot be found guilty under s. 304, second part, read with this section.¹⁶ Similarly, the Judicial Commissioner's Court, Peshawar, has held that the provisions of this section cannot be applied to an offence under the second part of s. 304. This section provides for the punishment of acts which are done with a common intention by more than one person, whereas the second part of s. 304 applies only to acts where there was no intention to cause death but only knowledge that death would be caused.¹⁷

1. 'Criminal act is done by several persons'.—The section contemplates the case where more persons than one share in the doing of the act, and it is necessary to bear in mind the definition of 'act' given in s. 33 and also the provisions of ss. 35, 37 and 38.¹⁸ The term 'act' contemplates a series of acts done by several persons, some perhaps by one of those persons and some by another, but all in pursuance of a common intention.¹⁹ A 'criminal' act means that unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.²⁰

The section only comes into operation when there is a substantive charge of an offence having been committed.²¹

2. 'In furtherance of the common intention of all'.—The words 'in furtherance of the common intention of all' have introduced as an essential part of the section the element of a common intention prescribing the condition under which each might be criminally liable when there are several actors.²² 'Common intention' is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention.²³ The Privy Council has held that it must be shown that the criminal act complained against

⁸ *Sunder Singh*, (1939) 14 Luck. 660.

⁹ *Manindra Chandra Ghose*, (1914) 41 Cal. 754.

¹⁰ *Raja Ram*, (1938) 14 Luck. 328.

¹¹ *Chhotatal Babar*, (1912) 14 Bom. L. R. 147, 36 Bom. 524.

¹² *Labadan Sain*, (1930) 32 Cr. L. J. 476, [1931] AIR (P) 49.

¹³ *Ali Mirza*, (1923) 51 Cal. 265; *Abdullah*, (1926) 27 Cr. L. J. 949, 27 P. L. R. 627; *Bachna*, (1926) 28 Cr. L. J. 17, [1927] AIR (L) 149.

¹⁴ *Po Myaing*, (1920) 10 L. B. R. 269, 22 Cr. L. J. 593, [1920] AIR (LB) 116.

¹⁵ *Abdul Gaffar Panchayet*, (1926) 45 C. L. J. 131, sub-nom. *Adam Ali Taluqdar*, (1926) 31 C. W. N. 814, 28 Cr. L. J. 334, [1927] AIR (C) 324. Contra, *Anirudha Mana*, (1924) 26 Cr. L. J. 827, [1925] AIR (C) 913.

¹⁶ *Ramnath*, [1943] A. L. J. R. 207, (1943) 44 Cr. L. J. 624, [1943] AIR (A) 271.

¹⁷ *Sher Ali*, (1941) 48 Cr. L. J. 766, 768,

[1942] AIR (Pesh.) 51.

¹⁸ *Nga Tun Baw*, (1907) 1 U. B. R. (P. C.) 5, 7 Cr. L. J. 205.

¹⁹ *Matlal Mullick*, (1934) 39 C. W. N. 199, 36 Cr. L. J. 1220, [1935] AIR (C) 526.

²⁰ *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 162, 52 Cal. 197, 52 I. A. 40, overruling *Nirmal Kanta Roy*, (1914) 41 Cal. 1072, and *Profulla Kumar Mazumdar*, (1923) 50 Cal. 41. *Harnam Singh*, (1919) P. R. No. 21 of 1919, 20 Cr. L. J. 87, may also be considered to have been overruled: *Indar Singh*, (1933) 14 Lah. 814.

²¹ *Reazuddi*, (1912) 16 C. W. N. 1077, 13 Cr. L. J. 502.

²² *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 52 Cal. 197.

²³ *Nga E*, (1930) 8 Ran. 603, F.B.; *Shwe On*, (1919) 10 L. B. R. 117, 21 Cr. L. J. 678, [1919] AIR (LB) 24, dissented from; *Sunder Singh*, (1939) 14 Luck. 660.

was done by one of the accused persons in furtherance of the common intention of all ; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone 'Common intention' within the meaning of the section implies a prearranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. It is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.²⁴ Same or similar intention must not be confused with common intention ; the partition which divides "their bounds" is often very thin ; nevertheless, the distinction is real and substantial, and if overlooked, will result in miscarriage of justice. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.²⁵

The Privy Council case, according to the Madras High Court, is warrant only for the proposition that it is not enough to attract the provisions of this section that there was the same intention on the part of several people to commit a particular criminal act or a similar intention but it is necessary before the section could come into play that there must be a prearranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants. The question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from proved facts and not on any direct evidence about a preconceived scheme or plan which may not be available at all.¹ Mahmood, J., in *Dharam Rai's case*² said : "This section was the subject of consideration impliedly in the case of *Queen v. Gorachand Gopee*.³ At p. 456, Sir Barnes Peacock clearly laid down the rule of law that mere presence of persons at the scene of an offence is not, *ipso facto*, sufficient to render them liable to any rule such as s. 34 enunciates, and that 'the furtherance of a common design' was an essential condition before such a rule applied to the case of an individual person. It was probably in consequence of this expression of view from such a high authority that the Legislature by s. 1 of Act XXVII of 1870, repealed the original s. 34 ; and in substituting another section therefor, inserted the important words 'in furtherance of the common intention of all', as representing the condition precedent to each of such persons being held liable for the crime in the same manner as if it were committed by him alone. This change in the law is very significant, and it indicates to my mind that the original section having been found to be somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act. We have the opinion of an American jurist on the point, whom Mr. Mayne, in his Commentary on the Indian Penal Code, quotes (Bishop, s. 439), where that learned author, laying down the rule, goes on to say :—'But if the wrong done was a fresh and independent wrong, springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be a partaker with the doer in a different wrong'. This seems to me to be the right interpretation of the words 'in furtherance of the common intention of all' as they occur in s. 34 of the Indian Penal Code. There is another section in that Code which is somewhat similarly worded, and seems to turn upon the same principle, so far as this particular point is concerned. That section is 149, which, instead of using the words quoted above, uses the words 'in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object.' It will be observed that while s. 34 limits itself to the furtherance of the common intention, s. 149 goes further, inasmuch as it renders every member of an unlawful assembly guilty of the offence when it is likely that such an offence might have been committed in prosecution of the common object. I have referred

²⁴ *Mahbub Shah*, (1945) 47 Bom. L. R. 941, 943, 72 I. A. 148; *Mamand*, (1945) 48 Bom. L. R. 295, P.C., *Nga E*, (1930) 8 Ran. 608, F.B.; *Tara Singh*, (1931) 33 P. L. R. 1, 33 Cr. L. J. 457, [1932] AIR (L) 189; *Jai Mangal*, [1936] A. L. J. R. 462, 37 Cr. L. J. 864, [1936] AIR (A) 437.

²⁵ *Mahbub Shah*, *ibid.*, p. 944; *Gajraj Singh*, (1946) 21 Luck. 527.

¹ *Nachimuthu Goundan*, [1947] Mad. 425.

² (1887) 7 A. W. N. 236, 237.

³ (1866) Beng. L. R. Sup. Vol. 443, 5 W. R. (Cr.) 45, F.B.

to this section to show that it is more strongly worded than s. 34; and even upon this section a full bench of the Calcutta High Court in *Queen v. Sabed Ali*⁴ held that any sudden and unpremeditated act done by a member of an unlawful assembly would not render all the other members liable therefor, unless it was shown that the assembly did understand and realize either that such offence would be committed or was likely to be necessary for the common object". Thus to establish guilt under s. 34 it is necessary to prove a common intention as distinguished from a common object as in s. 149 and it must be shown that the criminal act was committed in furtherance of that intention.⁵ The words 'common intention' in s. 34 and 'common object' in s. 149 are not synonymous. The object of an assembly as a whole may not be the same as the intention which several persons may have when in pursuance of that intention they perform a criminal act and it may well be that the object of the assembly was lawful whereas the intention common to those of the assembly who jointly committed a criminal act was in itself criminal and the joint criminal act must be equally imputed to all of them. The accused with some others were convicted by a Magistrate under s. 326 read with s. 149. The Sessions Judge found that the element of an unlawful common object in the assembly as a whole which is required to convict the accused persons under s. 326 read with s. 149 was wanting, but as the accused had the common intention to cause grievous hurt he convicted them under s. 326 read with this section, without framing a specific charge on those sections. It was held that the conviction was not bad.⁶

A furtherance of a common design is a condition precedent for convicting each of the persons who take part in the commission of a crime, and the mere fact that several persons took part in a crime in the absence of a common intention is not sufficient to convict them of that crime. Thus, where several persons joined together in striking another but there was no evidence to show that the common intention of all was to cause grievous hurt⁷ or murder,⁸ the conviction of all of them for the same offence was held to be bad in law. It is not sufficient for joint responsibility for an offence under this section that the offence actually committed was likely to occur as a result of the several persons acting together; but that the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention.⁹ The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under this section, the former by itself is irrelevant to the section. It is only when a Court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that this section may be applied.¹⁰ If several persons have the common intention of doing a particular criminal act and in furtherance of that common intention all of them join together or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, if he helps by his presence or by his other acts in the commission of the act, he would be held to have done that act within the meaning of this section.¹¹ The mere fact that a particular accused was not present throughout the beating of the

⁴ (1878) 11 Beng. L. R. 347, F.B.

⁵ *Rabindra Singh*, (1917) 4 P. L. W. 120, 19 Cr. L. J. 789, [1918] AIR (P) 146; *Bhabataram Mahto*, (1925) 7 P. L. T. 388, 26 Cr. L. J. 1601, [1925] AIR (P) 706; *Mujjaffar Shaikh*, [1940] 2 Cal. 258.

⁶ *Bhondur Das*, (1928) 7 Pat. 758.

⁷ *Dhian Singh*, (1912) 9 A. L. J. R. 180, 13 Cr. L. J. 265; *Kottoora Thevan*, (1923) 46 M. L. J. 311, [1924] AIR (M) 584; *Sankata Prasad*, (1933) 11 O. W. N. 86, 35 Cr. L. J. 410, [1935] AIR (O) 178. See *Jhakri Chamar*, (1912) 16 C. L. J. 440, 13 Cr. L. J. 905. *Dhian Singh's* case is not followed in *Jai Mangal*, [1936] A. L. J. R. 462, 37 Cr. L. J. 864, [1936] AIR (A) 437.

⁸ *Sultan*, (1930) 12 Lah. 442; *Dhanwant Singh*, (1930) 31 Cr. L. J. 1068, [1930] AIR (L) 485.

⁹ *Maung Gyi*, (1923) 1 Ran. 390, disapproving *Nga Po Sein*, (1902) 1 L. B. R. 233; *Kamaldin*, [1946] A. L. J. 1006.

¹⁰ *Satrugham Patar*, (1919) 20 Cr. L. J. 289, [1919] AIR (P) 111.

¹¹ *Harihar Singh*, (1924) 26 Cr. L. J. 1498, [1926] AIR (P) 182; *Shafi Ahmed*, (1925) 31 Bom. L. R. 515, 49 Bom. 642; *Sada Singh*, (1930) 32 Cr. L. J. 56, [1930] AIR (L) 338; *Bhikari Pati*, (1929) 9 Pat. 592; *Nga E*, (1930) 8 Rar. 603, F.B.; *Nga Tike Maung*, (1936) 38 Cr. L. J. 284, [1937] AIR (R) 24.

deceased would not absolve him from the liability of the consequences of the beating if the actual type of the beating be held to be in furtherance of the common intention of all.¹² Where five men assault at one and the same time, each of them seeing that the other four are assaulting also, the assault may be regarded as a common one though the impulse to assault may have arisen independently.¹³ When on a quarrel starting up, one person calls upon his companions to beat his opponent, and they cause hurt to him, the person at whose instance the beating is started is, under this section, equally guilty of an offence under s. 323, along with those who give the actual beating.¹⁴

The fact that a criminal act done in furtherance of the common intention of several persons was the act of a single individual does not render the provisions of this section inapplicable.¹⁵

Where the accused is one of the participators in a joint criminal action in the course of which a murder is committed, his temporary absence when the murder is committed will not free him from guilt under this section.¹⁶

This section will not apply if the fight has begun suddenly, and every person who took part in the fight would be taken to be responsible for his individual acts. But where there is proof that some of the persons taking part in the fight, which has suddenly arisen, go and jointly commit an offence and there are indications that their joint object was to commit that offence, there is no bar for the Courts to hold that they had formed a joint intention there and then to do the act of violence.¹⁷

The Court of Criminal Appeal in England has held that where in pursuance of a common design to commit robbery with violence, one prisoner strikes a blow which results in death, and another is present aiding and abetting the robbery, as a principal in the second degree, both are guilty of murder although the latter may have consented to the use of only a limited degree of violence and the former may have departed from the agreed method of attack.¹⁸

Cases—Common intention.—Where each of several persons took part in beating a person so as to break eighteen ribs and cause his death, each of them was convicted of murder.¹⁹ A party of the accused consisting of three opened fire on the party of the deceased in revenge for an insult of which the brother of the deceased was originally guilty. The shots fired by the accused did not hit any one but his two companions fired and hit the deceased. It was held that the accused was guilty of murder.²⁰ Where several persons joined in beating another with *lathis* (sticks), and inflicted such injuries on him that he died shortly after the beating, all were held guilty of murder without distinction.²¹ The common intention must cover the act done by all the several persons.²² Where four persons formed themselves into a body with the common object of beating the complainant, and while two of them assaulted him the other two stood by ready armed with *lathis* to take part in the assault, if necessary, it was held that the latter two were equally guilty with the others of an offence under s. 353.²³ Where of three accused connected with one another and living together at the same place, one of them grappled with an eye witness so that he might not rescue the deceased from the clutches of the other two, it was held that this fact justified the inference that the murder was committed in furtherance of the common

¹² *Nazir*, [1947] A. L. J. 417.

¹³ *Ebrahim*, (1931) 33 Cr. L. J. 360, [1931] AIR (R) 321.

¹⁴ *Mian Jan*, (1923) 26 Cr. L. J. 67, [1924] AIR (O) 248.

¹⁵ *Ranchhod Sursang*, (1924) 26 Bom. L. R. 954, 49 Bom. 84; *Irshad Ullah Khan*, (1933) 55 All. 607; *Syed Ali*, (1941) 73 C. L. J. 299, 43 Cr. L. J. 47, [1941] AIR (C) 608.

¹⁶ *Indar Singh*, (1933) 14 Lah. 814.

¹⁷ *Dost Mohd.*, (1941) 43 Cr. L. J. 498, [1942] AIR (Pesh) 29 (2).

¹⁸ *Betts*, (1930) 29 Cox 259.

¹⁹ *Gour Chund'r Das*, (1875) 24 W. R. (Cr.) 5; *Ralya v. Arjan*, (1886) P. R. No. 2 of 1887; *Lati*, (1937) 39 Cr. L. J. 131, [1937] AIR (N) 335. See *Jamiruddi Biswas*, (1912) 16 C. W. N. 909, 13 Cr. L. J. 715.

²⁰ *Sher Khan*, (1940) 42 P. L. R. 614, 42

Cr. L. J. 82, [1940] AIR (L) 485.

²¹ *Sipahi Singh*, (1922) 45 All. 130; *Umed*, (1923) 45 All. 727; *Kanhai*, (1912) 35 All. 329; *Allah Ditta*, (1920) 25 Cr. L. J. 547; *Jailal Raut*, (1921) 23 Cr. L. J. 54, [1921] AIR (N) 78; *Sheo Balak*, (1926) 3 O. W. N. 411, 27 Cr. L. J. 763, [1926] AIR (O) 367; *Sikandar*, (1931) 32 P. L. R. 414, 32 Cr. L. J. 645, [1931] AIR (L) 536; *Mahabir Singh*, (1934) 15 P. L. T. 819, 36 Cr. L. J. 146, [1934] AIR (P) 565.

²² *Nga Tun Baw*, (1907) 1 U. B. R. (P. C.) 5, 7 Cr. L. J. 205. See *Salmon*, (1880) 6 Q. B. D. 79; *Po Ya*, (1919) 13 B. L. T. 44, 10 L. B. R. 99, 21 Cr. L. J. 797, [1919] AIR (LB) 20; *Sarna Imam Sahib v. Gopal Rao*, [1930] M. W. N. 1254.

²³ *Lachho Singh*, (1917) 18 Cr. L. J. 382, [1917] AIR (P) 456.

intention of all the accused.²⁴ Where several accused were all concerned in a case of torture, and were prosecuting a common object, each was held guilty as a principal, and not as an abettor of others.²⁵

The appellant was charged under s. 302 with the murder of a Post-master. At the trial the evidence showed that while the Post-master was in his office counting money, three men, of whom the appellant was one, fired pistols at him after having called upon him to hand over the money; he was hit in two places and died. The trial Judge directed the jury that if they were satisfied that the Post-master was killed in furtherance of the common intention of all three men, then the appellant was guilty of murder, whether he fired the fatal shot or not. It was held by the Privy Council that having regard to ss. 33, 37 and 38, the direction was correct.¹ Where five persons armed with big sticks or clubs joined together to forcibly carry off a girl and grievous hurt was caused to persons attempting to prevent the girl being carried off by any one of them, it was held that all must be regarded as being responsible for the hurt caused.² Where four persons armed with heavy sticks came up with the set purpose of making a serious onslaught on three brothers who were grazing their flocks of sheep, goats and other cattle, and inflicted a number of fatal blows, with the result that two of them became insensible and died soon after, and the third, though he did not lose consciousness, could not move, it was held that all the accused were guilty of culpable homicide even although it was not known as to who struck the fatal blow.³ The accused, who were armed with guns and had plenty of ammunition, entered a shop for the purpose of committing robbery and were disturbed in their act by a large number of villagers. They decided to retreat and in so retreating they fired a large number of shots and one of the pursuers was killed. It was held that though their primary intention was to effect their escape and not to kill any of their pursuers, still it must be concluded from the circumstances that their intention was to effect their escape even though for that purpose it was necessary to shoot any of the pursuers mortally, and that the other accused should be convicted under s. 302 read with this section or s. 114.⁴ Three persons proceeding along a road at a late hour of the night were challenged and on the arm of one of them being pulled, he let fall a bundle containing disguise caps. Each was then caught by the arm by a man whereupon the two companions of the accused shot their captors with revolvers. The two who fired shots escaped and the accused, who was secured after a struggle, was found to have on his person a dagger which he tried to use and a knuckle-duster. It was held that the reasonable inference from the circumstances was that the accused and his two companions had set forth for the purpose of committing some crime of violence involving the use of the weapons they carried, that each knew how the others were armed, that at the time of the shooting they had acted in concert and had the common intention of murdering persons who had seized them in order to make good their escape, and that consequently the accused was constructively guilty of murder.⁵ Where a party of men set out towards a field, with the common intention of attacking another party of men and preventing them from irrigating the field from a well, and one of the attacking party had a gun and the others had heavy sticks and all of them attacked the other party with the result that two persons died of gun shot wounds and others received different injuries, it was held that all the participants in the attack could be convicted of murder.⁶ Where the accused and his son attacked the deceased who succumbed to the injuries, and it was put forward in defence of the accused that the sole common intention of the accused and his son was to cause grievous hurt to the deceased by the use of a spear and long bamboo, and that thereafter when the accused's actions had ceased, the son proceeded to stab the deceased to death whilst the accused stood aside and took no further part in

²⁴ *Mamand*, (1945) 48 Bom. L. R. 295,

P. C.

²⁵ *Tarinee Churn Chuttopadhyia*, (1867) 7 W. R. (Cr.) 3.

¹ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 162, 52 Cal. 197; *Said Nur*, (1925) 26 Cr. L. J. 1407, [1926] AIR (L) 140; *Sher Muhammad*, (1927) 28 P. L. R. 588, 28 Cr. L. J. 854, [1927] AIR (L) 765.

² *Allah Rakha*, (1925) 26 Cr. L. J. 1105, [1925] AIR (L) 565.

³ *Pira*, (1925) 27 Cr. L. J. 818, 27 P. L. R. 347; *Pakkhar Singh*, (1928) 31 Cr. L. J. 41, [1929] AIR (L) 292; *Nga Pu Ke*, (1933) 35 Cr. L. J. 267, [1933] AIR (R) 340.

⁴ *Mukundamurari Pal*, (1933) 61 Cal. 190.

⁵ *Matilal Mullick*, (1934) 39 C. W. N. 199, 36 Cr. L. J. 1220, [1935] AIR (C) 526.

⁶ *Irshad Ullah Khan*, (1938) 55 All. 607; *Goverdhan*, [1935] A. L. J. R. 1114, 37 Cr. L. J. 85, [1935] AIR (A) 980.

the matter, it was held that the intentions and actions of the accused and his son could not be divided into two parts and the accused was guilty of murder.⁷ Where the common intention of four accused was to commit robbery and one of them went to fetch the owner of the house from his fields in order to threaten him to surrender the property, and one of the remaining three, in the absence of the first, shot down the son of the owner who came to the house suspecting foul play, it was held that the accused who was absent when the murder was committed was one of the participants in the joint criminal action in the course of which the murder was committed and was guilty of murder.⁸ Eleven persons formed an unlawful assembly with the common intention of beating the complainant. Four members chased the complainant and beat him, one of them inflicting a grievous injury with a weapon. While the complainant was being beaten some people came to his rescue and the other members of the assembly beat them. It was held that all the members of the unlawful assembly were liable to be convicted of the offences of causing hurt with a dangerous weapon (s. 326) and rioting (s. 147).⁹

Where both master and servant were present at the sale of *ganja* (an intoxicating drug) in contravention of the terms of his licence and the servant received the money paid for the *ganja*, it was held that the servant was guilty of the offence of selling *ganja* without a licence by the operation of this section.¹⁰

No common intention.—Where three persons assaulted the deceased and gave him a beating, in the course of which one struck him a blow on the head, which resulted in death, it was held that, in the absence of proof that the accused had the common intention to inflict injury likely to cause death, they could not be convicted of murder but of voluntarily causing grievous hurt.¹¹ One D was killed by a blow on his head with some sharp weapon. The accused B and M with others armed with *gandas* had invaded the compound where D was sleeping, and had immediately assaulted D, and one of their number struck him on the head and killed him. The accused's intention was to insult and disgrace one K. The accused M, who gave the fatal blow, was convicted under s. 302 and B was convicted of abetment of grievous hurt under s. 325 read with s. 109. As both the accused had armed themselves with deadly weapons B must have known that in case of opposition the weapons would be used and in all probability grievous hurt would be caused.¹² In a fight which ensued over the division of property between three persons, one of them was hit by a *lathi* (heavy stick) and died. It did not appear which of the other two had struck the blow which caused his death. It was held that the accused were not acting in concert and none of them could be convicted of murder.¹³ During the course of a political trial police were posted in different places in the Court to keep order. Large crowds gathered, and some men, who were not permitted to go into the Court room, had some sort of *melee* with the police. Several men were seen assaulting individual policemen in different parts of the premises. It was held that each assault was independent of other similar assaults and this section had no application as the assaults on individual policemen were not the result of attack on the police.¹⁴ A gang of persons making preparations to commit dacoity was discovered in the limits of a certain village and was pursued by villagers who seized and arrested two accused who were members of

⁷ *Maung Twa*, (1925) 5 B. L. J. 12, 27 Cr. L. J. 827; *Bhagwat Singh*, (1928) 9 P. L. T. 826, 30 Cr. L. J. 276, [1929] AIR (P) 65.

⁸ *Indar Singh*, (1933) 14 Lah. 814.

⁹ *Debi Dayal*, [1942] O. W. N. 440, (1942) 43 Cr. L. J. 781, [1942] AIR (O) 444.

¹⁰ *Keshwar Lal Shaha v. Girish Chunder Dutt*, (1902) 29 Cal. 496.

¹¹ *Duma Baidya*, (1896) 19 Mad. 483; *Gouridas Namasudra*, (1908) 36 Cal. 659; *Mala Singh*, (1922) 5 L. L. J. 121; *Rama Boyan*, (1934) 67 M. L. J. 355, 40 L. W. 476, 36 Cr. L. J. 113, [1934] M. W. N. 241, [1934] AIR (M) 565; *Public Prosecutor v. Narasingadu*, [1937] M. W. N. 1124, (1936) 46 L. W. 486, [1937] 2 M. L. J. 490, 39 Cr. L. J. 139, [1937] AIR (M) 792; *Raja Ram*, [1938] O. W. N. 1057, 40 Cr. L. J. 14, [1938] AIR (O) 256;

Zahid Khan, [1939] O. W. N. 7, 40 Cr. L. J. 187, [1939] AIR (O) 49; *Mian Singh Nand Lal*, (1938) 40 Cr. L. J. 84, [1938] AIR (L) 747. But, see, *Chandan*, (1926) 27 Cr. L. J. 619; *Subramanya Goundan*, [1941] M. W. N. 815.

¹² *Bahal Singh*, (1918) P. R. No. 24 of 1919, 20 Cr. L. J. 711, [1919] AIR (L) 375; *Hari Singh*, (1925) 27 Cr. L. J. 233, 7 L. L. J. 576, [1926] AIR (L) 4; *Ram. Damodar*, [1938] O. W. N. 1103, 40 Cr. L. J. 38, [1939] AIR (O) 33.

¹³ *Bhagwana*, (1919) 17 A. L. J. R. 1095; *Raja*, (1919) 20 Cr. L. J. 369, 20 P. L. R. 28, [1919] AIR (L) 136 (2).

¹⁴ *Fateh Chand*, (1922) 20 A. L. J. R. 706, 23 Cr. L. J. 596, [1922] AIR (A) 428.

the gang. Shortly afterwards, a dacoit at large fired a gun and killed one of the villagers. The accused were thereupon tried for the offence of murder. It was held that the accused were not guilty of murder, for the separation of the two accused from the gang having been prior to the murder, there could be no common object.¹⁵ When the common intention of the accused as established on the record was not to commit murder but to carry off a woman, and on intervention by the complainant party, the accused set upon the complainant party, each accused was responsible for his act and in case of death of one of the complainant party, only that accused was responsible for the death who had caused the fatal blow.¹⁶

The Rangoon High Court has held that where it is not established that there was a common intention among the robbers to commit murder, if necessary, then this section does not apply and such intention cannot be presumed. It would be going very far to hold, that because a man takes part in a robbery in which some of the robbers are armed with deadly weapons it can be presumed that he thereby becomes a party to an intention to kill any person who may happen to resist them in carrying out the robbery. Of course, when a man accompanies robbers, who are armed with such weapons, he must know it to be likely that a murder will be committed if the attempt to rob is resisted, but further than that, it is not safe to go. Knowledge is not the same thing as intention.¹⁷

English cases.—Where Lord Dacre agreed with several persons to hunt in another's park for deer, and to kill all who might resist, one of the party having killed the keeper, all were held to be guilty of the murder, though Lord Dacre was a quarter of a mile distant, and knew nothing of the individual blow.¹⁸

Three soldiers went together to rob an orchard; two got upon a pear tree, and the third stood at the gate with a drawn sword in his hand. The owner's son coming by collared the man at the gate and asked him what business he had there and thereupon the soldier stabbed him. It was held that he had committed murder, but that those on the tree were innocent. It would have been otherwise if they had all come thither with a general resolution against all opposers.¹⁹ Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unreasonableness of the hour; whereupon they went away uttering imprecations. Some time after one of them rushed in, the other remaining out, and renewed his demand for beer. On his refusing to depart the landlord pushed him towards the outer door where the other soldier gave the landlord a violent blow with a sharp instrument on the head. The landlord died after a few days. It was held that both the soldiers had committed murder, notwithstanding the previous struggle between the landlord and one of them.²⁰

Both of two persons, in pursuit of a common purpose, may be guilty of criminal negligence by driving, although only one of them actually drives.²¹

3. 'Each of such persons is liable for that act in the same manner as if it were done by him alone'.—The words "that act" include the whole action covered by "a criminal act" in the first part of the section.²² "Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several confederates, the act would be done by them all within the meaning of [this section]. If death followed the different acts of different confederates at the same time and place, then again [this section] would probably suffice. Every confederate would be regarded as having done every criminal act and would therefore be liable as if he had done them all alone. The responsibility is mutual."²³

One usually meets with three classes of cases of fatal assault where the question of the joint responsibility of the several assailants arises, viz., (1) where several persons join in the assault and inflict numerous injuries on their victim and the cumulative

¹⁵ *Hari Bijal*, (1915) 17 Bom. L. R. 906, 16 Cr. L. J. 745, [1915] AIR (B) 247.

¹⁶ *Nizam*, (1947) 49 P. L. R. 100.

¹⁷ *Sanlaydo*, (1933) 35 Cr. L. J. 262, [1933] AIR (R) 204; *Sulaiman*, [1941] Ran. 258, (1941) 43 Cr. L. J. 123, [1941] AIR (R) 301.

¹⁸ *Dacre's case*, Palm. 35, 1 Hale P. C. 439.

¹⁹ *Foster*, 353.

²⁰ *Willoughby*, (1791) 1 East P. C. 288.

²¹ *Cyril Baldessare*, (1930) 22 Cr. Ap. R. 70.

²² *Barendra Kumar Ghosh*, (1924) 52 L. A. 40, 27 Bom. L. R. 148, 158, 53 Cal. 197.

²³ *Barendra Kumar Ghose*, (1923) 28 C. W. N. 170, 214, 38 C. L. J. 411, 576, 25 Cr. L. J. 817, 868, [1924] AIR (C) 257, F.B.; *Amrita Lal, Bose v. Corporation of Calcutta*, (1917) 44 Cal. 1025, F.B.; *Zulfikar*, (1933) 34 P. L. R. 801, 34 Cr. L. J. 911, [1933] AIR (L) 927.

effect of all or some of the injuries is to cause death ; (2) where several persons commit the assault and inflict minor injuries, but one of them deals a fatal blow and there is evidence of the latter's guilt ; (3) where several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves it in doubt as to who struck the fatal blow. In the first case all the assailants are responsible for the fatal assault. In the second case the man who is shown by the evidence to have dealt the fatal blow is alone responsible. In the third case where the evidence leaves it in doubt as to who dealt the fatal blow, none of the assailants is responsible for the fatal blow.²⁴

Mere presence does not raise presumption of complicity.—Although a man is present when a felony is committed if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it, or to apprehend the felon. All who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.²⁵ There must be community of design to make the person present liable.¹ The mere circumstance of a person being present on a lawful occasion does not, therefore, raise a presumption of that person's complicity in an offence then committed.²

Amendment.—The words “ in furtherance of the common intention of all ” were introduced by Act XXVII of 1870, s. 1.

PRACTICE.

Calcutta rule.—When several persons are accused of the commission of the same offence, it would be obviously inconvenient if a Magistrate were to punish some and commit others to the Court of Session ; and, as the Code does not seem to contemplate such procedure, the Magistrate should, if he considers the case to be one for the Sessions, commit all those concerned for trial before that tribunal.³

Conviction of substantive offence when there is charge under this section.—When several persons are charged with any offence read with this section, the conviction of one only of the offence itself, apart from this section, is legal, even when all the rest are acquitted.⁴

Finding of definite acts by several accused necessary.—Before any accused can be convicted of an offence read with this section, the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such a finding is illegal.⁵ Two accused were charged with murder. The jury acquitted them of this charge but found that one of them brought himself within exception 4 to s. 300. It was held that when once the jury were satisfied that one of the accused had brought himself within exception 4, there was no room for the application of this section against the other at all.⁶ The common intention may be inferred from the circumstances disclosed in the evidence, and need not be the subject of an express agreement between the persons concerned. In combinations of this kind a mortal stroke though given by one of the party is deemed in the eye of the law to have been given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike.⁷

In order to convict accused under this section constructively, it is not necessary to find that he actually committed any overt act. But there must be clear evidence of

²⁴ *Mahabir*, (1912) 16 O. C. 19, 14 Cr. L. J. 241, 244.

²⁵ *Gora Chand Gopee*, (1866) 5 W. R. (Cr.) 45 Beng. L. R. Sup. Vol. 443; *Gurusami Tevan*, [1936] M. W. N. 177. See *Coney*, (1882) 8 Q. B. D. 534.

¹ *Basharat*, (1934) 36 P. L. R. 37, 36 Cr. L. J. 308, [1934] AIR (L) 813; *Mahadeo Nath*, (1940) 22 P. L. T. 1035, 42 Cr. L. J. 603, [1941] AIR (P) 550.

² *Macanlal and Motilal*, (1889) 14 Bom. 115; *Gangapathi Sarma*, (1922) 17 L. W. 197,

24 Cr. L. J. 531, [1923] M. W. N. 104, [1923] AIR (M) 369; *Basharat*, sup.

³ C. H. R. and O., Vol. I, Ch. I, s. 40, p. 14.

⁴ *Dastarali*, (1930) 58 Cal. 822.

⁵ *Fazoo Khan v. Jatoo Khan*, (1931) 35 C. W. N. 463, 33 Cr. L. J. 92, [1931] AIR (C) 343.

⁶ *Asmat Sheikh*, (1939) 70 C. L. J. 299, 41 Cr. L. J. 383, [1940] AIR (C) 147.

⁷ *Nga Aung Thein*, (1935) 13 Ran. 210; *Nga Tha Aye*, (1935) 36 Cr. L. J. 1380, [1935] AIR (R) 299.

some action or conduct on his part to establish that he shared in the common intention of committing the offence.⁸

Direct motive not material.—The question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor.⁹

Specific charge.—The Lahore High Court has held that this section does not create any offence and it is not necessary to specify it in the charge.¹⁰ Where the accused persons were charged and convicted by a Magistrate for an offence under s. 326 read with s. 149, but on appeal the Sessions Judge altered the conviction to one under s. 326 read with s. 34, it was held by the Patna High Court that the conviction was not bad by reason of the absence of a specific charge under this section.¹¹ In considering the legality of the conviction in such circumstances the test is whether the facts which it was necessary to prove and on which evidence was given of the charge upon which the accused was actually tried are the same as the facts upon which he was convicted.¹²

The Allahabad High Court has, however, held that where the prosecution invokes the aid of this section for holding one person responsible for the result produced by the act of another, it is necessary to frame a charge under that section. Omission to do so is a vital defect and the result is that a man can be held responsible only for the result of an act committed by himself.¹³

There is in law no distinction between a charge under s. 379 and a charge under that section read with this section: The latter section is a mere statement of explanation to be attached to any section which deals with a criminal offence.¹⁴

Concession that common intention cannot be inferred.—A concession by the Public Prosecutor that common intention cannot be inferred cannot stand in the way of the appellate Court setting aside a conviction based on such a concession.¹⁵

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

COMMENT.

This section follows as a corollary from s. 32. The legal consequences of an 'act' and of an 'omission' being the same, if an act is committed partly by an act and partly by an omission the consequences will be the same as if the offence was committed by an 'act' or by an 'omission' alone.

The preceding section provides for a case in which a criminal act was done by several persons in furtherance of the common intention of all. Under this section a person assisting the accused, who actually performs the act, must be shown to have the particular intent or knowledge if the act is criminal only by reason of its being done with a criminal knowledge or intention.

If several persons, having one and the same criminal intention or knowledge, jointly commit murder or an assault, each is liable for the offence as if he had acted alone: but if several persons join in an act, each having a different intention or knowledge from the others, each is liable according to his own criminal intention or knowledge, and he is not liable further.

If an act which is an offence in itself and without reference to any criminal knowledge or intention on the part of the doers is done by several persons, each of such persons is liable for the offence.

This section makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or inten-

⁸ *Abdul Kader*, (1945) 48 Cr. L. J. 46, [1946] AIR (C) 452, (1945) 50 C. W. N. 88.

⁹ *Murgi Munda*, (1938) 18 Pat. 101.

¹⁰ *Waryam Singh*, [1941] Lah. 423.

¹¹ *Bhundu Das*, (1928) 7 Pat. 758.

¹² *Ibid.*

¹³ *Bishwanath*, [1945] A. L. J. R. 531, [1946] O. W. N. (H. C.) 38, [1946] AIR (A) 153, 47 Cr. L. J. 532.

¹⁴ *Hari Lal*, (1934) 14 Pat. 225.

¹⁵ *Subbamma*, [1947] Mad. 224.

tion, each person is liable for the act to the extent of his knowledge or intention : in other words, the Court or the jury have to consider what is the knowledge or intention with which each person joined in the act.¹⁶ A and B beat C who dies. A intended to murder him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt.¹⁷

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Effect caused
partly by act and
partly by omission.

ILLUSTRATION.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

COMMENT.

This section shows that when an offence is the effect partly of an act or partly of an omission, it is one offence only.¹⁸

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Co-operation by
doing one of several
acts constituting an
offence.

ILLUSTRATIONS.

(a) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) A and B are joint jailors, and as such, have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(c) A, a jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but, as A did not co-operate with B, A is guilty only of an attempt to commit murder.

COMMENT.

This section provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence.¹⁹

This section follows as a corollary from s. 35 as will appear from the illustrations.

¹⁶ *Adam Ali Taluqdar*, (1926) 81 C. W. N. 814, 28 Cr. L. J. 334, [1927] AIR (C) 324, sub-nom. *Abdul Gaffur Panchayati*, (1926) 45 C. L. J. 131.

¹⁷ *Ibid.*

¹⁸ *Barendra Kumar Ghose*, (1928) 28 C. W. N. 170, 189, 38 C. L. J. 411, 548, 25 Cr. L. J. 817, 848, [1924] AIR (C) 257, F.B.

¹⁹ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 158, 52 Cal. 197.

It overlaps s. 34, but it applies also to acts which are separate and which are not necessarily part of a series. The distinction between s. 34 and this section is that while the former requires a common intention for a criminal act done by several persons, in which case each actor becomes liable as if that act were done by him alone. This section deals with intentional co-operation in an offence committed by means of several acts, and punishes such co-operation as if it constituted the offence itself.²⁰ The words "several acts" in this section read with s. 38 may mean "several series of acts". Thus, if it is sought to make two persons A and B responsible for an offence under s. 34, the terms of this section might meet an objection that the individual acts of A and B were not of such a nature that they could be called a series.

We have seen that if several persons combine both in intent and act, each is answerable for the joint criminal act just as if he alone had done it; and so it is if each person has his several parts to do, the whole contributing to one result. It is immaterial what particular share is allotted to each, or whether the object be accomplished jointly by all present at the same time and place, or each performs his own part separately. Where all concur in effecting the criminal result, each does the act so far as his own part extends, and, as to the residue, may be regarded as causing it to be done by means of a guilty agent. All the persons concerned stand in the mutual relation of principals and agents to each other. If, for instance, several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.²¹ Where two persons are acting in concert in the sense that their attack on the deceased (with a heavy stick by the one, and with a heavy stone by the other) is a single indivisible thing, both of them are liable for the resultant murder.²² Three persons, brothers, attacked with heavy sticks a fourth, against whom they bore a grudge, and beat him with great severity, so that he died shortly afterwards. His skull was badly fractured, and numerous other injuries were inflicted upon him. It did not appear which injuries were caused by which of the assailants, but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death. It was held that all the three assailants were guilty of murder.²³

Persons concerned in criminal act may be guilty of different offences.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

ILLUSTRATION.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

COMMENT.

This section provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.²⁴

Sections 34, 35 and 38 deal with the same subject and should be read together. Section 34 treats of acts done with a 'common intention', s. 38, of acts done with different intentions. A quarrel arose between C on the one side and A and B on the other. C abused A, whereupon A struck him with a stick, and B struck him down with an axe on the head. He also received two other wounds with the axe on other parts of the body. Any one of the three axe-wounds was sufficient to cause death, more

²⁰ *Itwa Munda*, (1938) 17 P. L. T. 476, S.B.

²¹ *Bingley's Case*, (1821) Russ. & Ry. 446.

²² *Subbappa Channappa*, (1912) 15 Bom. L. R. 303, 14 Cr. L. J. 235.

²³ *Ram Newaz*, (1913) 35 All. 506.

²⁴ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 158, 52 Cal. 197.

especially that on the head. It was held that B was guilty of culpable homicide, while A was guilty of voluntarily causing hurt.²⁵

Section 38 would cover two different situations. One is where several persons act together in furtherance of a common intention, as in the illustration to the section. In such a situation, the section provides that the Court may convict each person of a different offence, according as circumstances operate to create legal extenuation in individual cases. The other situation is where there is action in common but a difference in the several intentions of the participants. In that case the section is a converse to s. 34, and each person is to be found guilty of the particular offence constituted by his individual act. In the first case, however, the section is a supplement to s. 34, not a converse.

Sections 34 to 38 lay down principles similar to the English law of "principals in the first and second degrees". See Comment on s. 107, *infra*.

39. A person is said to cause an effect "voluntarily" when he causes it by means¹ whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

ILLUSTRATION.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act: yet, if he knew that he was likely to cause death, he has caused death voluntarily.

COMMENT.

The word 'voluntarily' is defined in relation to the causation of effects and not to the doing of acts from which those effects result. It has been given a peculiar meaning, differing widely from its ordinary meaning, in the Code.

In general, the Code makes no distinction between cases in which a man causes an effect designedly and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. If the effect is a probable consequence of the means used by him he causes it 'voluntarily', whether he really meant to cause it or not. He is not allowed to urge that he did not know or was not sure that the consequence would follow; but he must answer for it just as if he had intended to cause it. The English law by means of an artificial presumption, viz. that a man is presumed to intend the natural or probable consequences of his own act, gives to the words which denote intention the meaning here annexed to 'voluntarily'.¹ See s. 81, *infra*.

The definition of the term 'voluntarily' bears resemblance to the definition of 'wilfully', current in the English law. An injury shall be deemed to be 'wilfully' caused whensoever the person from whose act or omission such injury results, whether he directly intended it to result from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury.²

"The principle of exemption from criminal responsibility in respect of a hurtful consequence is that of *bona fide* ignorance of the connexion existing between the mere mechanical act and its consequence. That principle ceases to operate where the connexion is known to be either certain or probable. If the doer of an act know or believe that a noxious consequence will result from that act, he is just as culpable, both in Law and Morals as if he had acted with the most direct intention to hurt. Let it however be supposed that the consequence is not certain, but that it is a likely or probable consequence, and that the likelihood or probability is known to the doer of the act. Here again it is clear that the principle of exemption above mentioned is unavailable to exempt the offender from liability in respect of the consequence. All

²⁵ *Indar*, (1882) 2 A. W. N. 23; *Sultan*, (1930) 12 Lah. 442.

¹ M. & M. 21.

² 10th P. R. 16.

he can urge is, that he was not sure that the hurtful consequence would follow ; but he had no right to incur the risk and danger of producing the mischief, and having done so is justly responsible for it ; he cannot reasonably complain that the Law did not give him notice of the penalty annexed to the offence, or that he did not wilfully offend, for the Law may justly, after due notification, doom such an offender to the penalties inflicted on those who accomplish their purposes by more certain or direct means ; the safety of society is inconsistent with any distinction in this respect, and the offender in truth acted wilfully, in wilfully incurring the risk and danger of causing the injurious result ”.³

1. ‘ Means ’.—This word signifies acts as well as omissions.

40. Except in the chapters and sections mentioned in clauses two and three of this section, the word “offence”¹ denotes a thing made punishable by this Code.²

“Offence.”

In Chapter IV, Chapter VA and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word “offence” denotes a thing punishable under this Code, or under any special or local law as herein-after defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441 the word “offence” has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

COMMENT.

The word ‘ offence ’ as defined in this section has three sets of meaning as explained in the three clauses of this section.

1. ‘ Offence ’.—This word does not extend to acts punishable under the law of England. Stokes says that the Code is defective in not declaring that in certain sections (e.g., ss. 216, 221, 224, 225), ‘ offence ’ shall include acts and omissions punishable by the law of England.

2. ‘ A thing made punishable by this Code ’.—In *S. Moorga Chetty’s* case⁴ West, J., remarked : “ If verbal criticism is to have a preponderating influence, I may observe that there is an inaccuracy in section 40. ‘ A thing ’, meaning an act or omission, is not susceptible of punishment. What is meant is ‘ a thing for which he who is guilty of it is punishable ’.” The term ‘ a thing ’ is a rather unhappy substitute for what it seems to mean—“ an aggregate of acts or omissions ”.⁵ A ‘ thing ’ must be an *act*, or a series of illegal *acts*, or an illegal *omission*, or a series of illegal *omissions* ; or, to use the words of Mr. Bentham “ We give the name of *offence* to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce ”.

‘ Punishable ’ must mean that the commission or omission of the act, the commission or omission of which is prohibited, renders the person who commits or omits it liable to the sanction of the law, i.e., to punishment.⁶ This word is “ here used according to a common idiom for ‘ rendering a person liable to punishment ; ’ for it, is obvious that in the strict and primary usage of the word, no thing is punishable and no person since Xerxes, except a child with his doll, has ever supposed otherwise. The expression, therefore, is incomplete ”.⁷ The words ‘ made punishable ’ may be

³ English Law Commissioners’ 7th Rep., p. 23, cited in First Rep., s. 106.

⁴ (1881) 5 Bom. 338, 353, F.B.

⁵ Per Collett, J., in (1866) 3 M. H. C. Appx. 11, 17.

⁶ Per Duthoit, J., in *Kandhaia*, (1884) 7 All. 67, 71.

⁷ Per Holloway, J. in (1866) 3 M. H. C. App. 11, 12.

reasonably and rightly read as if they were “declared punishable”.⁸ ‘A thing made punishable’ is no doubt an inaccurate expression. . . . , but ‘punishable’ is here used in a sense which is popularly familiar in the expression “a punishable offence”, that is, “an offence to which a punishment is attached”, and the words ‘a thing made punishable’ mean. . . . an act or omission which by this Code is constituted one to which a punishment is attached.⁹

Under this clause an act or omission is not an ‘offence’ if it is punishable only under some other enactment.¹⁰

Clause 2.—The effect of this clause is to make everything punishable under a special law an offence within the meaning of the Code. Thus, for instance, offences under the Police Act (V of 1861), or the Excise Act (XII of 1896), or the Post Office Act (VI of 1889), or the Explosive Substances Act (VI of 1908), or the Registration Act (XVI of 1908) become also offences under the Penal Code.

Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of this section.¹¹

Order under s. 55 of the Criminal Procedure Code.—Such an order does not come within the definition of an offence.¹²

Maintenance order.—An order for payment of maintenance is not a conviction for an offence.¹³

Proceeding under s. 28 of Public Conveyances Act.—A proceeding to recover legal fare under s. 28 of the Bombay Public Conveyances Act, 1867, is not a complaint of an offence.¹⁴

Attempt.—An attempt to commit an offence is itself an offence within the definition of ‘offence’ as given in this section; and where no express provision is made in any other part of the Code for the punishment of such offence, it is punishable under s. 511.¹⁵

Abetment.—The abetment of an offence is in itself an offence within the meaning of this section.¹⁶

Amendment.—This section was substituted for the original s. 40 by Act XXVII of 1870, s. 1. The figures 64, 65, 66 and 71 were inserted by Act VIII of 1882, s. 1; and the figure 67, by Act X of 1886, s. 21. The term ‘offence’ is thus, in certain cases, extended to things made punishable under any special or local law. The object of the amendment was to enlarge the scope of the Penal Code by making offences under special laws also offences under the Code.¹⁷ But nothing contained in the amending Act XXVII of 1870 is to be taken to affect any of the provisions of any special or local law (s. 15). The word, figure and letter ‘Chapter VA’ were inserted by Act VIII of 1913. The word ‘chapters’ was substituted for ‘chapter’ by Act VIII of 1930.

41. A “special law” is a law applicable to a particular subject.

“Special law.”

COMMENT.

Whenever there is an intention to apply the provisions of the criminal law to acts authorized or required by particular statutes, that intention is always made clear by express words to that effect, *e.g.*, the Income-tax Act,¹⁸ the Land Acquisition Act,¹⁹ etc.²⁰

⁸ Per Collett, J., in (1866) 3 M. H. C. Appx. 11, 15.

⁹ Per Innes, J., in *ibid.*, pp. 20, 21.

¹⁰ *Ali Mahomed Adamalli*, (1945) 48 Bom. L. R. 120, 72 I. A. 226.

¹¹ *Bux Soo Meah Chowdry*, (1938) 39 Cr. L. J. 985, [1938] AIR (R) 350.

¹² *Kandhaia*, (1884) 7 All. 67, 69; *Shasti Churn Napi*, (1882) 8 Cal. 381. Neither does an order under rule 35 of the Defence of India Rules, 1939 : *Gopilal Sharma*, [1945] Nag. 395.

¹³ *Ponnammal*, (1892) 16 Mad. 234; *Golam*

Hossain Chowdhry, (1867) 7 W. R. (Cr.) 10; *Thaku bin Ira*, (1868) 5 B. H. C. (Cr. C.) 81.

¹⁴ *Valli Mitha*, (1919) 22 Bom. L. R. 195, 44 Bom. 463.

¹⁵ *Ajudhia*, (1895) 17 All. 120; *Cheddi*, [1942] All. 889.

¹⁶ *R. Spier*, (1887) P. R. No. 49 of 1887.

¹⁷ *Joti Prasad Gupta*, (1931) 53 All. 642, 648.

¹⁸ XI of 1922, ss. 37, 52, 54.

¹⁹ I of 1894, s. 10.

²⁰ *Chandi Pershad v. Abdur Rahman*, (1894) 22 Cal. 131, 139.

The special laws contemplated in s. 40 and this section are only laws, such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the Penal Code. The Whipping Act is not a special law in this sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code.²¹

42. A "local law" is a law applicable only to a particular part of British India.

"Local law."

COMMENT.

Laws applicable to particular localities are termed local laws, e.g., Port Trust Acts. A local law does not necessarily include all rules made under the provisions of a local law.²² Where a local law declares a breach of the rules made under its authority to be punishable then a breach of such rules might constitute an offence within the meaning of s. 40 of the Code.²³

43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action¹: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

"Illegal".

"Legally bound to do".

COMMENT.

The word "illegal" has been given a very wide meaning as it includes (1) everything which is an offence; (2) everything which is prohibited by law; and (3) everything which furnishes ground for a civil action. The words of this section cover not merely a tort, but also a breach of contract which furnishes ground for a civil action, that is to say, in respect of which damages could be obtained under s. 73 of the Indian Contract Act, 1872, or which could be enforced specifically.²⁴ The prohibition in the second case must be *legal*. The accused submitted to his official superior a false 'nil' return of lands in his enjoyment, and also made a false statement to the same effect in a revenue inquiry. It was held that no offence had been committed as the act of the accused was not 'illegal'.²⁵ He was doubtless guilty of a breach of a departmental order, but he was not legally bound to furnish such information within the meaning of this section. Suppose an official is bound by the rules of his superior to be at his office at 10 a.m. and to enter his name in a book kept for that purpose: he falsely enters his arrival at 10 when he in fact arrived at 11 o'clock; can it be said that he has committed an offence? Certainly not. A breach of a departmental order is not a criminal offence. But if he entered the wrong time for the purpose of creating evidence of a false alibi to be used in Court he will be guilty of fabricating false evidence.

The words 'illegal' and 'unlawful' have the same meaning under the Code.¹ But it does not follow that if one of those words is specially defined, and the other is not, the two words must necessarily have the meaning given to the one word by the definition.² The word 'unlawful', in its general connotation, means what is not justified by law. It is akin to the word "illegal" which is defined in this section but has not the same restricted sense, but has been used in a more elastic manner. It is also not restricted to what is "immoral".³

1. 'Which furnishes ground for a civil action.'—"These appear wide words, but we think it would be difficult to restrict them without the risk of excluding

²¹ *Po Han*, (1913) 7 L. B. R. 63, 15 Cr. L. J. 3, [1914] AIR (LB) 145; *Arunagirinatha*, [1939] Mad. 87.

²² *Ganda Shah*, (1894) P. R. No. 23 of 1894; *Ma Khwet Kyi*, (1928) 8 Ran. 791.

²³ *Ma Khwet Kyi*, *ibid*.

²⁴ *Ganpat*, (1934) 36 Bom. L. R. 373, 58 Bom. 491.

²⁵ *Appayya*, (1891) 14 Mad. 484, *Virasami*

Mudali, (1881) 4 Mad. 144, dissented from.

¹ See 1st Rep., s. 658; *Fazlur Rahman*, (1929) 9 Pat. 725.

² Per Beaumont, C. J., in *Punjaji Bugul*, (1934) 37 Bom. L. R. 96, 98, 59 Bom. 177, 179.

³ *Mahendranth Chakrabarti*, (1934) 62 Cal. 629.

something that ought to be included. Generally we apprehend it will be found unobjectionable to designate as illegal anything done or omitted to be done by a man for which he is liable to a civil action".⁴

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.¹

"Injury."

COMMENT.

"Injury" is an act contrary to law.⁵ The word "injury" has been given a wide meaning in this section. It will include every tortious act. Thus an unlawful detention of a cart at a toll-gate caused by an illegal demand for payment of toll amounts to injury.⁶ Threat of a decree which can never be given effect to is a threat of harm to an individual in his person, reputation, or property.⁷ Threat to use the process of law for the purpose of enforcing payment of more than is due is illegal and such a threat made with such an object is a threat of injury.⁸ The threat of a decree that could not be executed by any competent authority is a threat of harm or injury.⁹ But a threat of a social boycott is not a threat of 'injury'.¹⁰

1. 'Property'.—This word here means something in existence and it cannot, with any propriety, be applied to the reasonable expectation of pecuniary benefit for the loss of which an action is maintainable by the representatives of a deceased person.¹¹ Where the accused took away the complainant's cattle and declined to release them until he was paid a certain sum and on the receipt of that sum he released them, it was held that he caused 'injury' to the complainant.¹²

Death of husband.—Where a Magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed, it was held that compensation could not be given to her for she did not suffer any injury as here defined.¹³ In view of the amendment in 1923 of s. 545 of the Code of Criminal Procedure which includes the word "loss" this ruling is of no authority now, because compensation could be given to the widow. Nothing could be more harmful to the mind of a woman than the death of her husband and the section speaks of harm to the mind as 'injury.' And it was held by the former Chief Court of the Punjab that loss of her husband's support affected a widow prejudicially in a legal right, and was therefore an injury as defined in the Penal Code.¹⁴

False charge is injury.—A false charge laid before the Police, and never intended to be prosecuted in a Court, may subject the accused to very substantial injury, as here defined.¹⁵

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

"Life".

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

"Death".

47. The word "animal" denotes any living creature, other than a human being.

"Animal".

⁴ 1st Rep., s. 91.

⁵ *Svami Nayudu v. Subramania Mudali*, (1864) 2 M. H. C. 158.

⁶ *B. Appalasami*, (1892) 1 Weir 441.

⁷ *Priyanath Gupta v. Lal Jhi Chowkidar*, (1923) 27 C. W. N. 479, 37 C. L. J. 526, 24 Cr. L. J. 396, [1923] AIR (C) 590.

⁸ *B. Appalasami*, (1892) 1 Weir 441.

⁹ *Bajjnath Bhagat*, (1940) 21 P. L. T. 206, 41 Cr. L. J. 427, [1940] AIR (P) 486.

¹⁰ *Arumuga Mudaliar v. Muthiah Mudaliar*, [1933] M. W. N. 736.

¹¹ *Yalla Gangulu v. Mamidi Dali*, (1897)

21 Mad. 74, 76, F.B.

¹² *Habib-ul-Razaq*, (1923) 46 All. 81.

¹³ *Yalla Gangulu v. Mamidi Dali*, (1897)

21 Mad. 74, 76, F.B.

¹⁴ *Saif Ali*, (1898) P. R. No. 17 of 1898, F.B.

¹⁵ *Ashraf Ali*, (1879) 5 Cal. 281, 282.

COMMENT.

This definition is, according to Sir James Stephen, not only superfluous but of doubtful correctness. It will include an angel, frog-spawn, and probably a tree.

48. The word "vessel" denotes anything made for the conveyance by water of human beings or of property.
"Vessel".

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.
"Year".
"Month".

COMMENT.

A year is the time wherein the sun goes around his compass through the twelve signs, or the period in which the revolution of the earth round the sun is completed, viz., 365 days, 5 hours, 48 minutes, and 51.6 seconds. For ordinary purposes the average length of a year is taken to be 365 days. But every fourth year the extra hours are taken into account and the statute 24 Geo. II, c. 25, enacts that the year shall consist of 366 days. The fourth year is called the leap year. By statute 21 Hen. III, the increasing day in the leap year, as well as the preceding day, are counted for one day only. The 1st January is the first day of the year by statute 24 Geo. II, c. 23; before that enactment the 25th March was the first day of the year.

The day on which a sentence is passed on a prisoner is calculated as a whole day. A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence takes effect.¹⁶ On the 31st October the accused was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence, he was detained in custody until the 14th of December. It was held that the detention was lawful, for as the calendar month did not expire until the 30th of November, he was not entitled to be discharged from the second term of imprisonment until the full period of fourteen days computed from the 1st of December had expired. Denman, J., said: "... I am of opinion that a sentence of imprisonment for one calendar month, passed on any given day of any given month, is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day, but as long as there is a day in the calendar numerically corresponding from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no ground for anticipating the expiration of the sentence."¹⁷

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.
"Section".

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.
"Oath".

COMMENT.

An 'oath' is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of Heaven if he do not speak the truth.¹⁸

¹⁶ *Migotti v. Colwill*, (1879) 4 C. P. D. 233.

¹⁷ *Ibid.*, p. 236.

¹⁸ *White's Case*, (1786) 1 Leach 430.

The Indian Oaths Act substitutes affirmation for an oath in the case of Hindus and Mahomedans. If oath is objected to then affirmation is admissible in other cases.¹⁹

52. Nothing is said to be done or believed in "good faith" which "Good faith". is done or believed without due care and attention.

COMMENT.

This definition of "good faith" is merely a negative one. It does not define "good faith". It says that an act is only done in good faith if it is done with due care and attention. Absence of good faith means simply carelessness or negligence.²⁰

According to the General Clauses Act,²¹ "A thing shall be deemed to be done in 'good faith' where it is in fact done honestly whether it is done negligently or not." This definition is borrowed from an English statute²² and it differs materially from that contained in this section. Under the definition of the Code the question of honesty is immaterial.

Mere good faith in the sense of simple belief, actual belief, with any grounds for believing, is not sufficient: the belief must be a reasonable, not an absurd, belief, that is, there must be some reasonable ground for it. Good faith in act or belief requires due care and attention to the matter in hand. The law cannot mark, except in this vague way, the amount of care and attention requisite; but if a man takes upon himself an office or duty requiring skill or care, and a question arises whether he has acted therein in good faith, he must show not merely a good intention, but such care and skill as the duty reasonably demands for its due discharge. The degree of care requisite will vary with the degree of danger which may result from the want of care. Where the peril is the greatest the greatest caution is necessary.²³

Good faith requires not logical infallibility, but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person, whose conduct is in question.²⁴ The phrase "due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. When a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge.²⁵

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. The law does not exact the same care and attention from all persons regardless of the position they occupy.¹ It varies in different cases.²

Where a police constable after questioning a person, who was carrying three bundles of cloth under his arms, and receiving unsatisfactory replies, arrested him, it was held that the putting of questions, not for the purpose of causing annoyance, but in order to clear up his suspicions, was an indication of good faith.³ A police-officer, seeing a horse, resembling one which his father had lost a short time previously tied up in B's premises, jumped at once to the conclusion that B had either stolen the horse himself, or had purchased it from the thief. He found that B had bought the animal from one S; so he sent for S and charged him with the theft without taking the trouble of getting any credible information as to whether it was his father's horse or not. It was held that he had acted without exercising due care and attention.⁴ The accused, who was an educated man living in a town where medical atten-

¹⁹ Act X of 1873, s. 6.

²⁰ *Bux Soo Meah Chowdry*, (1938) 39 Cr. L. J. 985, [1938] AIR (R) 350; *Prag*, (1942) 17 Luck. 591.

²¹ X of 1897, s. 3 (20).

²² The definition corresponds exactly with s. 90 of the Bills of Exchange Act, 1882, 45 & 46 Vic., c. 61, which is founded on the distinction pointed out in *Jones v. Gordon*, (1877) 47 L. J. Banky. 1, 2 App. Cas. 616, by Lord Blackburn, between the case of a person who was honestly blundering and careless, and the case of a person who has acted not honestly, that is, not necessarily with the intention to defraud, but not with an honest belief that the

transaction was a valid one, and that he was dealing with a good will. The Sale of Goods Act, 1893, (56 & 57 Vic., c. 71), s. 62, gives a similar definition.

²³ M. & M.

²⁴ *Abdool Wadood*, (1907) 9 Bom. L. R. 230, 31 Bom. 293; *Yadati v. Gaya Singh*, (1929) 57 Cal. 843.

²⁵ *Gaya Din*, (1934) 9 Luck. 517.

¹ *Bhawoo Jivaji v. Mulji Dayal*, (1883) 12 Bom. 377, 393.

² *Po Pye*, [1940] Ran. 109.

³ *Bhawoo Jivaji v. Mulji Dayal*, sup.

⁴ *Sheo Surun Sahai v. Mohamed Fazil Khan*, (1868) 10 W. R. (Cr.) 20.

dance was available, chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in an unnecessarily cruel way, it was held that he did not act with due care and attention.⁵ A person who permitted his coolies to work in an area which was outside the licensed area at a considerable distance was held to be not acting in good faith.⁶

Where a person, uneducated in matters of surgery, operated on a man for internal piles by cutting them out with an ordinary knife, and the man died from hæmorrhage, it was held that he had not acted in good faith although he had performed similar operations on previous occasions.⁷

Superstitious but rash act.—Where the accused entertained a belief that a stooping child whom he caught sight of in the early gloaming was a spirit or demon, the child being in a place which the accused and his fellow villagers deemed to be haunted, and acting on this belief caused the death of the child by blows he inflicted before he discovered his mistake, it was held that the accused was guilty of an offence under section 304A, for, though he was under a mistake of fact, he did not in good faith, that is, with due care and attention, believe himself justified in doing the act.⁸

52A. Except in section 157, and in section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word “harbour” includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.

COMMENT.

The present section was introduced here and s. 216B was omitted by the Indian Penal Code (Amendment) Act (VIII of 1942), ss. 2 and 3. Section 216B defined the word “harbour” as used in ss. 212, 216 and 216A of the Code as follows:—“The word ‘harbour’ includes the supplying of a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension.” The definition of ‘harbour’ is given here in an amended form.

The Statement of Objects and Reasons⁹ stated: Section 216B of the Indian Penal Code widens the meaning of the word “harbour” as used in sections 212, 216 and 216A. The word is also used in sections 130, 136 and 157, and as used in those sections bears its narrower dictionary meaning. There is no rational justification for differentiating between the meaning of the word as used in different sections of the Code, and the fact that the word is used in sections other than sections 212, 216 and 216A appears to have been overlooked when section 216B was inserted by Act III of 1894. The fact that the wider meaning does not attach to the word as used in section 130, which provides for the punishment of persons who harbour an escaped prisoner of war, might well produce untoward results in existing circumstances, and it is proposed to render the definition in section 216B applicable to the Code generally by transferring that section to Chapter II of the Code. It is also proposed to insert words in the concluding words of the definition as now contained in section 216B embrace all forms of assistance or only forms of assistance *ejusdem generis* with those previously mentioned in the section. The Allahabad¹⁰ High Court has held that the meaning is so limited, while the Calcutta¹¹ and Lahore¹² High Courts have taken the contrary view. It is proposed to clarify the point in the sense of the views taken by the Calcutta and Lahore High Courts.”

⁵ *Shimbu Narain*, (1923) 45 All. 495.

⁶ *Buz Soe Meah Chowdry*, (1938) 39 Cr. L. J. 985, [1938] AIR (R) 350.

⁷ *Sukaroo Kobiraj*, (1887) 14 Cal. 596.

⁸ *Hayat*, (1887) P. R. No. 11 of 1888.

⁹ *G. I.*, 1942, Part V, p. 14.

¹⁰ *Hussain Baksh*, (1903) 25 All. 261. In this case it was held that the assisting of an accused person to escape by merely telling lies to the police as to his whereabouts did not amount

to harbouring. *Damri*, (1924) 22 A. L. J. R. 496, 26 Cr. L. J. 151, [1924] AIR (A) 676, must be deemed to have been overruled. Here a pony was lent by the accused to dacoits to remove the loot.

¹¹ *Muchi Mian*, (1917) 21 C. W. N. 1062, 26 C. L. J. 141, 18 Cr. L. J. 731, [1918] AIR (C) 826.

¹² *Tara Singh*, (1925) 7 Lah. 30.

CHAPTER III.

OF PUNISHMENTS.

Punishments.

53. The punishments to which offenders are liable under the provisions of this Code are,—

First,—Death ;

Secondly,—Transportation ;

Thirdly,—Penal Servitude ;

Fourthly,—Imprisonment, which is of two descriptions, namely :—

(1) Rigorous, that is, with hard labour.

(2) Simple.

Fifthly,—Forfeiture of property ;

Sixthly,—Fine.

COMMENT.

The Court should realize the necessity of a proportion between an offence and a penalty; and should not inflict the maximum term of imprisonment on every offender without any regard to the seriousness or otherwise of the offence committed by him. While apportioning the punishment, it should also take into consideration the circumstances under which the offence was committed and the fact whether the criminal is a first offender or a habitual or professional offender.¹ A Court, in passing sentence, should inflict such sentence as the gravity or otherwise of the crime of which the accused has been convicted warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not, even although the accused may pray for an appealable sentence.²

“The determination of the right measure of punishment is often a point of great difficulty. Hard-and-fast rules cannot be laid down, but the decision must be left to discretion, and discretion has to be guided by a variety of considerations.

“There is the element of vindictiveness, which cannot be left out of sight, notwithstanding what has been said by Plato on the subject. Both personal and public sentiment demand that the person who has made others suffer unjustly, should himself be made to suffer in return. This is quite distinct from the moral side of an act with which properly the Courts have nothing to do. Their concern is solely with the nature of the act viewed as a crime or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.

“The principal object of punishment, however, is the prevention of offences, and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another.

“It may generally be taken as a safe principle to follow, that punishments should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a reaction of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but is a useless piece of cruelty, and economically wasteful and a source of loss to the community.”³

¹ *Kehr Singh*, (1928) 10 Lah. 524; *Maiku*, (1929) 31 Cr. L. J. 631, [1930] AIR (A) 279; *Jainarain Sah*, (1943) 22 Pat. 600

² *Yar Muhammad*, (1933) 58 Cal 392; *Kesri Chand*, [1945] Nag. 450.

³ *Nga Ku*, (1897) 1 U. B. R. (1897-10) P. C., 330, 334, 335; *Rup Lal Mehra*, (1944) 47 P. L. R. 134, [1945] AIR (Lah) 158, (1944) 47 Cr. L. J. 44.

The causing of merely retributive harm, whether by the community or the individual, is itself a crime. Punishment is in itself an evil, justified only by its effects in deterring the offender from a repetition of the offence and in deterring others by the example from the commission of it. In each case punishment must be the least that will produce both these effects.⁴ Courts should exercise discretion in making the penalty fit the crime. The practice of committing petty offenders to the Sessions Court after three or four convictions should cease.⁵

Where, however, a person has shown from his past actions that he intends to adopt a criminal career, three things should be borne in mind : first, it is necessary to pass a sentence upon him which will make him realise that a life of crime becomes increasingly hard, and does not pay; secondly, the sentence should serve as a warning to others who may be thinking of adopting a criminal career; and thirdly, the public must be protected against people who know that they are going to ignore the rules framed for the protection of society.⁶

To the six kinds of punishments mentioned in the section two more are added by subsequent enactments, viz., whipping and detention in reformatories. Penalty is also imposed by a criminal Court by passing an order under s. 106 or s. 565⁷ of the Code of Criminal Procedure. In the Madras Presidency the punishment of stocks is inflicted on offenders of lower castes.⁸

An order under s. 562, Criminal Procedure Code, directing release upon probation of good conduct cannot be said to be a punishment.⁹

1. **Death.**—The authors of the Code say : “We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed.... To the great majority of mankind nothing is so dear as life. And we are of opinion that to put robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life.... Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt.... As he has almost always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which only hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him a strong motive to follow up his crime with a murder.”¹⁰

Death is the punishment that must be awarded for murder by a person under sentence of transportation (s. 308). It may be awarded as punishment for the following offences only :—Waging war against the King (s. 121). (2) Abetting mutiny actually committed (s. 132). (3) Giving or fabricating false evidence upon which an innocent person suffers death (s. 194). (4) Murder (s. 302). (5) Abetment of suicide of a minor or insane, or intoxicated person (s. 305). (5) Dacoity accompanied with murder (s. 396). (7) Attempt to murder by a person under sentence of transportation, if hurt is caused (s. 307).

Burma Act.—A child under sixteen years is not to be sentenced to death (Burma Act III of 1930), s. 15. See similar Children's Acts enacted in various provinces in British India.

2. **Transportation.**—The authors of the Code observe : “The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the natives of India, particularly by those who live at a distance

⁴ *Nanhi Gond*, (1926) 28 Cr. L. J. 493, [1927] AIR (N) 221.

⁵ *Gala Mana*, (1924) 26 Bom. L. R. 434, 26 Cr. L. J. 759, [1924] AIR (B) 453.

⁶ *Mahomed Hanif*, (1942) 44 Bom. L. R. 456, 43 Cr. L. J. 754, [1942] AIR (B) 215.

⁷ *Garanand Singh*, (1933) 35 Cr. L. J. 116, (1933) AIR (R) 329.

⁸ Mad. Reg. XI of 1816, s. 10.

⁹ *Baba Tamboli*, (1923) 22 N. L. R. 166, 24 Cr. L. J. 738, [1924] AIR (N) 37.

¹⁰ Note A, p. 93.

from the sea, with peculiar fear. The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good; and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance; but it is not so much dreaded beforehand; nor does a sentence of imprisonment strike either the offender or the bystanders with so much horror as a sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return. It is natural that his fate should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends."¹¹

In fifty offences under the Code the sentence of transportation is provided.

Transportation for life must be inflicted for (1) unlawful return from transportation (s. 226), and for being a thug (s. 311). Transportation may be inflicted for any term under ss. 121A (conspiracy to wage war) and 124A (sedition). Except in the case of these two offences transportation prescribed is for life.

Age, sex and infirmities, combined with various other circumstances and considerations may frequently render the exercise of a discretion in substituting a moderate sentence of imprisonment for one of transportation.¹²

The Government of Bombay in virtue of a resolution of the Government of India have issued a resolution saying "Instructions should be issued to the prison authorities and the Court should be informed that as far as possible deportation to the Andamans will cease."¹³

Burma Act.—A child under sixteen years is not to be sentenced to transportation (Burma Act III of 1930), s. 15. See similar Children's Acts enacted in various provinces in British India.

3. Penal servitude.—The punishment of penal servitude, which is a substitute for transportation, is applicable only to Europeans and Americans¹⁴ under Act XXIV of 1855 which is based on Stat. 16 & 17 Vic., c. 99. The word "European", as used in this Act, shall be understood to include any person usually designated a European British subject.¹⁵ "By reason of the difficulty of providing a place to which Europeans or Americans can, with safety to their health, be sent for the purpose of undergoing sentences of transportation or of imprisonment for long terms it has become expedient to substitute other punishments for that of transportation."¹⁶

Penal servitude is a punishment which consists in keeping an offender in confinement and compelling him to labour. Persons sentenced to penal servitude are, during the term of the sentence, confined in such prison within British India as the Governor-General in Council directs, and kept to hard labour.¹⁷

See the Penal Servitude Act (XXIV of 1855) set out in the Appendix.

4. Imprisonment.—Imprisonment is of two kinds : rigorous and simple. In the case of rigorous imprisonment the offender is put to hard labour, such as grinding corn, digging earth, drawing water, cutting fire-wood, bowing wool, etc. In the case of simple imprisonment the offender is confined to jail and is not put to any kind of work. Where the Code provides that an offender shall be punished with imprisonment "*and shall also be liable to fine,*" the sentence should include some period of

¹¹ Note A, p. 94.

¹² 7 Parl. Rep., p. 93.

¹³ Government of Bombay Resolution H. D. No. 4568, dated May 7, 1921. Government of India Resolution, Home Department (Jails),

No. 101, dated March 30, 1921.

¹⁴ *Duma Baidya*, (1896) 19 Mad. 483, 485.

¹⁵ Act XXIV of 1855, s. 15.

¹⁶ *Ibid.*, Preamble.

¹⁷ The Prisoners' Act (V of 1871), s. 21.

imprisonment, whatever it may be.¹⁸ The definition of 'imprisonment' applies in the case of all Central Acts and Regulations made after the 14th January 1887.¹⁹

The authors of the Code had, in many cases not heinous, fixed a minimum as well as a maximum punishment. The Committee were of opinion that, considering the general terms in which offences were defined, it would be inexpedient, in most cases, to fix a minimum punishment; and they had accordingly so altered the Code as to leave the minimum punishment for all offences, except those of the gravest nature, to the discretion of the Judge who would have the means in each case of forming an opinion as to the character of the offender, and the circumstances, whether aggravating or mitigating, under which the offence had been committed. But with respect to some heinous offences—such as offences against the State, murder, attempt to commit murder, and the like—they had thought it right to fix a minimum punishment.²⁰ Circumstances which are properly and expressly recognized by the law as aggravations calling for increased severity of punishment are principally such as consist in the manner in which the offence is perpetrated; whether it be by forcible or fraudulent means, or by aid of accomplices, or in the malicious motive by which the offender was actuated, or the consequences to the public or to individual sufferers, or the special necessity which exists in particular cases for counteracting the temptation to offend, arising from the degree of expected gratification, or the facility of perpetration peculiar to the case. These considerations naturally include a number of particulars, as of time, place, persons and things, varying according to the nature of the case.²¹ Circumstances which are to be considered in alleviation of punishment are : (1) the minority of the offender; (2) the old age of the offender; (3) the condition of the offender, *e.g.*, wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when offence committed under a combination of circumstances and the influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent.²² Bentham mentions the following circumstances in mitigation of punishment which should be inflicted : (1) absence of bad intention; (2) provocation; (3) self-preservation; (4) preservation of some near friend; (5) transgression of the limit of self-defence; (6) submission to the menaces; (7) submission to authority; (8) drunkenness; (9) childhood.

The effect of imposing fine on a youthful offender is to give the parent the option of keeping the child out of jail by a moderate payment. Such a fine would probably have to be paid by the parent; but parents may reasonably be expected to restrain the activities of their children when those activities conflict with the law.²³

The maximum imprisonment that can be awarded for an offence is fourteen years (s. 55). The lowest term actually named for a given offence is twenty-four hours (s. 510), but the minimum is unlimited.

The minimum term of imprisonment, however, is fixed in the following two cases :—

(1) If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, he shall be punished with imprisonment of not less than seven years (s. 397).

(2) If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, he shall be punished with imprisonment of not less than seven years (s. 398).

An offender shall be punished with rigorous imprisonment in the cases of—

(1) Giving or fabricating false evidence with intent to procure conviction of an offence which is capital by the Code, or by the law of England (s. 194).

(2) Unlawful return from transportation (s. 226).

¹⁸ *Chanviovva Kom Shidram Shetti*, (1863) 1 B. H. C. 4; *Rama bin Rabhaji*, (1863) 1 B. H. C. 34; *Bahirji bin Krishnaji*, (1863) 1 B. H. C. 39; *Mena-zoodin*, (1864) 2 W. R. (Cr.) 33; *Sheikh Dulloo v. Zinah Bebee*, (1871) 16 W. R. (Cr.) 17; *Bayne*, (1906) 8 Bom. L. R. 414, 416, 3 Cr. L. J. 494.

¹⁹ See the General Clauses Act, X of 1897,

ss. 3 (26) and 4 (1) and (2).

²⁰ P. L. C. (1856), p. 718.

²¹ 7 Parl. Rep., p. 93.

²² Louisiana Penal Code, Arts. 431, 435.

²³ *Kamal Dattatraya*, (1943) 45 Bom. L. R. 581, 44 Cr. L. J. 786, [1943] AIR (B) 304.

(3) House-trespass in order to the commission of an offence punishable with death (s. 449).

The following offences are punishable with simple imprisonment only :—

(1) Public servant unlawfully engaging in trade; or unlawfully buying or bidding for property (ss. 168, 169).

(2) A person absconding to avoid service of summons or other proceeding, from a public servant, or preventing service of summons or other proceeding, preventing publication thereof; or not attending in obedience to an order from a public servant (ss. 172, 173, 174).

(3) Intentional omission to produce a document to a public servant by a person legally bound to produce such document; or intentional omission to give notice or information to a public servant by a person legally bound to give; or intentional omission to assist public servant when bound by law to give assistance (ss. 175, 176, 187).

(4) Refusing oath when duly required to take by a public servant; or refusing to answer a public servant authorized to question; or refusing to sign any statement made by a person himself before a public servant (ss. 178, 179, 180).

(5) Disobedience to an order duly promulgated by a public servant (s. 188).

(6) Escape from confinement negligently suffered by a public servant; or negligent omission to apprehend, or negligent sufferance of escape, on the part of a public servant in cases not otherwise provided for (ss. 223, 225A).

(7) Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding (s. 228).

(8) Continuance of nuisance after injunction to discontinue (s. 291).

(9) Wrongful restraint (s. 341).

(10) Defamation; printing or selling defamatory matter known to be so (ss. 500, 501, 502).

(11) Uttering any word, or making any sound or gesture, with an intention to insult the modesty of a woman (s. 509).

(12) Misconduct in a public place by a drunken person (s. 510).

Imprisonment till rising of the Court.—A sentence of imprisonment till the rising of the Court is a sentence which is in accordance with law. A direction by the Court that a person shall be confined in the Court premises till the Court rises constitutes imprisonment within the meaning of the Penal Code and the Criminal Procedure Code. The Court has power to pass such a sentence where the facts of a case warrant it, but it should only be imposed in very exceptional cases²⁴

5. Forfeiture.—Absolute forfeiture of property was a punishment inflicted on persons guilty of high political offences. It could also be inflicted on persons guilty of offences punishable with death. It has been abolished by Act XVI of 1921.

In England this punishment is abolished by 33 & 34 Vic., c. 23, s. 1. In America too it is done away with.

Forfeiture of specific property is still retained by a punishment in the following cases :—

(1) Whoever commits, or prepares to commit, depredation on the territories of any power at peace with the King, shall be liable, in addition to other punishments, to forfeiture of any property used, or intended to be used, in depredation, or acquired thereby (s. 126).

(2) Whoever knowingly receives property taken as above mentioned or in waging war against any Asiatic power at peace with the King, shall be liable to forfeit such property (s. 127).

(3) A public servant, who improperly purchases property, which, by virtue of his office, he is legally prohibited from purchasing, forfeits such property (s. 169).

6. Fine.—“Death, imprisonment, transportation, banishment, solitude compell-
ed labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecu-

²⁴ *Muthu Nadar*, [1945] Mad. 529, *Ramalin-gayya*, [1943] Mad. 230 and *Assan Musaliarakath*

Kanshi Bawa, (1928) 56 M. L. J. 550, 30 Cr L. J. 247, [1929] AIR (M) 227, overruled.

niary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich zemindar. . . . Punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of . . . forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought . . . to be so fined as to reduce him to poverty."²⁵

The Code sanctions either a term of imprisonment or a fine or both, and it is left to the discretion of the Court whether to inflict a sentence of imprisonment or a fine or both. It is only in very exceptional circumstances that it is suitable and appropriate to inflict a fine as well as a substantial term of imprisonment. It is only suitable in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine, but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused, or in cases where it is desired to compensate the complainant or in cases where the accused has profited financially by his misdeeds.¹ The Court should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment. It is not proper, in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused person being able to pay and for default in payment of which he will have to undergo a yet further term of imprisonment; and especially so, in cases where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the section under which he is convicted.² A Magistrate is not justified in inflicting heavy fines on poor persons, on the mere supposition that they are backed up by influential persons.³

Fine is the only punishment in the following cases :—

(1) Unlimited—

- (a) The person for whose benefit a riot has been committed, not having duly endeavoured to prevent it (s. 155).
- (b) The agent or manager of such person under like circumstances (s. 156).
- (c) False statement in connection with an election (s. 171G).

(2) Limited to Rs. 1,000—

- (a) The owner or occupier of land on which a riot or unlawful assembly is held, and any person having or claiming any interest in such land, and not using all lawful means to prevent such riot or unlawful assembly, is punishable with fine not exceeding Rs. 1,000 (s. 154).
- (b) Whoever publishes any proposal to pay any sum or to deliver any goods, or to do or forbear doing anything for the benefit of any person, or any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure, in any such lottery, shall be punished with fine not exceeding Rs. 1,000 (s. 294A).

(3) Limited to Rs. 500—

- (a) A person in charge of a merchant vessel, negligently allowing a deserter from the Army, Navy or Air Force to obtain concealment in such vessel, is liable to a fine not exceeding Rs. 500 (s. 137).
- (b) Voluntarily vitiating the atmosphere so as to render it noxious to the public health, is punishable with a fine of Rs. 500 (s. 278).
- (c) Illegal payment in connection with an election (s. 171H).
- (d) Failure to keep election accounts (s. 171-I).

(4) Limited to Rs. 200—

- (a) Offences relating to fictitious stamps (s. 263A).
- (b) Obstructing a public way or line of navigation, is punishable with fine not exceeding Rs. 200 (s. 283).
- (c) Committing of a public nuisance, not otherwise punishable, is punishable with fine not exceeding Rs. 200 (s. 290).

²⁵ Note A, pp. 97, 98.

¹ *Islam*, (1931) 35 C. W. N. 519, 53 C. L. J. 455, 33 Cr. L. J. 81, [1931] AIR (C) 710 (2); *Ramalingayya*, [1943] Mad. 230.

² *Mehdi Ali*, [1941] All. 608.

³ *Bhilya*, (1891) Unrep. C. C. 556, Cr. R. No. 252 of 1891.

When payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or any one of them, and, if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent.⁴

7. Whipping.—This form of punishment is added by the Whipping Act⁵ under which offenders are liable to whipping—

- (a) As an alternative punishment when offences under ss. 378, 380, 382, 443, 444, 445 and 446 of the Penal Code are committed.
- (b) As an alternative or additional punishment when offences under ss. 375, 377, 390 and 391 of the Penal Code are committed.
- (c) When they are juvenile offenders and commit certain offences specified in s. 5 of the Whipping Act.

It should be employed at the discretion of the Judge in all cases in which the offence involves cruelty in the way of inflicting pain, or in which the offender's motive is lust. The man who cruelly inflicts pain on another should be made to feel what it is like. The man who gratifies his own passions at the expense of a cruel and humiliating insult inflicted on another should be himself shamefully and painfully humiliated.

Whipping should be inflicted in cases where there is a certain amount of aggravation in the commission of the offence.⁶

Concurrent sentences of whipping on conviction for two offences at one trial are illegal.⁷ Section 35, Criminal Procedure Code, authorises the passing of concurrent sentences of imprisonment only.

In France, Germany, and the United States corporal punishment has been abolished.

8. Detention in Reformatories.—Juvenile offenders sentenced to transportation or imprisonment may be detained in a Reformatory School for a period of three to seven years.⁸ See the Madras Borstal Schools Act, Mad. Act V of 1926, the Bombay Borstal Schools Act, Bom. Act XVIII of 1929, the Central Provinces Borstal Schools Act, C. P. Act IX of 1928.

PRACTICE.

Procedure.—Death.—When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.⁹ When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.¹⁰ If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.¹¹

Transportation.—No sentence of transportation shall specify the place to which the person sentenced is to be transported.¹² The Governor-General in Council is empowered to fix places in British India to which persons sentenced to transportation may be sent. It is the duty of the local Government to make arrangements for the removal of such person.¹³

Imprisonment.—A sentence of imprisonment cannot be suspended to take effect at a future period, but must commence from the time that the sentence is passed. Where a Deputy Magistrate postponed the execution of a sentence of imprisonment for

⁴ *Ratnagiri Magistrate's Letter*, (1875) Unrep. Cr. C. 90.

⁵ Act IV of 1909. See the Appendix where it is set out in full. In Burma, see the Burma (Amendment) Act (VIII of 1927), s. 3; in the Punjab Frontier Districts, in the North-West Frontier Province and Baluchistan, see the Punjab Frontier Crimes Regulation (III of 1901), ss. 6 and 12 (2).

⁶ *Badri Prasad*, (1922) 44 All. 538, 540.

⁷ *Eng Gyaung*, (1911) 6 L. B. R. 22, 12 Cr. L. J. 465; *Venkataswamy*, [1937] Ran. 366.

⁸ See Act VIII of 1897, s. 8.

⁹ Criminal Procedure Code, s. 368 (1).

¹⁰ *Ibid.*, s. 381.

¹¹ *Ibid.*, s. 382.

¹² *Ibid.*, s. 368 (2).

¹³ Section 33 of the Prisoners' Act (V of 1871) as substituted by s. 2 of Act IX of 1882.

a stated period at the request of the accused, to allow him to appeal, it was held that the sentence was bad in law and could not be carried into execution.¹⁴

A Judge has no jurisdiction after the discharge of the jury and in the absence of the accused to alter the sentence recorded at the trial, even if the term of imprisonment is not effectively altered though distributed among the counts so as to avoid exceeding the maximum punishment on some of them.¹⁵

Bombay Circulars.—(1) The Honourable the Chief Justice and Judges have had under consideration the question of the proper treatment of young or adolescent criminals, and they desire to impress upon all Magistrates the necessity of making themselves fully acquainted with the powers which they possess by law to deal suitably with such cases.

(2) The relevant legislation is contained in section 562 of the Code of Criminal Procedure, the Reformatory Schools Act, 1897, the Whipping Act, 1909, and in places where it has been extended, the Bombay Children Act, 1924. As to section 562, no definite limit of age is imposed. The Reformatory Schools Act is applicable in the case of male offenders under fifteen years of age, or, in the special case of section 31, to offenders of either sex under fifteen years of age. But that limit of age has been raised to sixteen years in places to which the Bombay Children Act has been applied. Those places are at present the City of Bombay and the Municipal Borough of Lonavla. The Bombay Children Act applies to children under fourteen years of age or young persons between the ages of fourteen and sixteen. The Whipping Act deals both with adult male offenders and with male offenders under sixteen years of age.

(3) In the majority of these cases short sentences of imprisonment are undesirable and should not be inflicted unless special reasons exist for doing so. Magistrates should therefore consider carefully whether the case falls within the provisions of section 562 of the Code of Criminal Procedure, or section 31 of the Reformatory Schools Act, and if so, whether the procedure laid down by those sections is not appropriate. If the Magistrate feels that the case cannot properly be dealt with under those sections and that a sentence of fine is inappropriate, he should then consider whether section 2 of the Whipping Act, 1909, or, in the case of juvenile offenders, that section or section 5 does not furnish a suitable penalty, or whether it may not be better to have recourse to sections 8 and 9 of the Reformatory Schools Act. In places where the Bombay Children Act, 1924, is in force, and no Children's Court has been constituted, the provisions of that Act should also be remembered.¹⁶

When any person serving in the Military Department is convicted in a Criminal Court, such Court shall inform the Officer Commanding the Regiment or Corps to which the convict belongs.¹⁷

Whenever an Indian Military Pensioner is convicted and sentenced to a term of imprisonment by a Criminal Court, a copy of the judgment in the case should in future be forwarded without delay to the Deputy Controller of Military Accounts (Pensions), Lahore. The copy should be supplied free of charge and the place from where the pensioner last drew his pension should be stated in the forwarding letter.¹⁸

When a reservist of the Indian Army is sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months, the facts of the case should be reported, without delay, by such Court to the Officer Commanding the appropriate Reserve Centre (*vide Bom. Gov. Gaz.* for 1932, Part I, p. 120).¹⁹

All Criminal Courts shall in future supply to the Defence Department (Army Branch) of the Government of India copies of judgments in all cases in which Commissioned Officers and British other ranks are tried by them for criminal offences. (*Vide Bom. Gov. Gaz.* for 1940, Part IV-C, p. 1261).²⁰

Patna Circular.—(a) Sessions Judges and Magistrates will forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that Department are convicted in a Criminal Court.

(b) In the case of a reservist of the Native Army who may be sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three

¹⁴ *Kishen Soonder Bhattacharjee*, (1869) 12 W. R. (Cr.) 47.

¹⁵ *Lawrence v. The King*, [1933] A. C. 699.

¹⁶ B. H. C. Cr. C., (1931) Ch. V, s. 98, p. 61.

¹⁷ *Ibid.*, s. 103, p. 65.

¹⁸ *Ibid.*, s. 104, p. 65.

¹⁹ *Ibid.*, s. 105, p. 65.

²⁰ *Ibid.*, s. 105A, p. 65.

months, a report should be made to the Adjutant-General, India (Home Department letter No. 220, Judicial, dated 18th—25th February 1910).²¹

Burma Circular.—Imprisonment for a fraction of a day should not be awarded unless it is the only period that can legally be imposed. There is, however, no objection to a sentence of imprisonment until the rising of the Court, where only a nominal sentence is called for.²² While it is not desired to impinge in any way upon the discretionary powers possessed by Magistrates in sentencing offenders, it is, however, necessary to emphasise the evils arising from sentencing offenders to short terms of imprisonment of three months or less. Particularly in the case of the labouring classes, the deterrent effect of such sentences is small, as vaccination, inoculation, etc., take up three weeks and the convict has then only a short time to serve and cannot be put to any work demanding continuity of effort. As a rule he is employed in menial tasks connected with the domestic economy of the Jail, and generally has an easy time. On the other hand, the moral effect of prison life is generally bad, while the associations are degrading, and the loss of character and self-respect involved in even the shortest term of imprisonment often tends to create a criminal. It is recognised that in some cases no other form of punishment than a short term of imprisonment can be imposed, and a short sentence of imprisonment should not be avoided by passing a sentence for a longer term than the circumstances of the case really require. But in every case the Magistrate, before passing a sentence of imprisonment for a term of three months or less, should first consider whether some other order such as the imposing of a fine or a sentence of whipping, release on probation under section 562, Criminal Procedure Code, or the granting of time under section 388, in which to realise the amount of fine imposed, may not suitably be passed. A sentence of a short term of imprisonment should not be passed until all other possible alternatives have been considered. Second and third class Magistrates should freely make use of the provisions of section 349, Criminal Procedure Code, by forwarding the accused to the District or Sub-divisional Magistrate to receive a punishment different in kind from or more severe than that which can be imposed by them.²³

To assist the Courts in deciding when sentences of simple imprisonment may fitly be passed the following orders of the Government of India are reproduced :—

“It has been brought to notice that in one province at least it is a common practice for the Courts to pass a sentence of simple imprisonment, not because a minor degree of moral turpitude is involved in the crime committed, but in view of the prisoner's presumed unfitness for labour. The Government of India believe that it is not the practice for the Courts to take into consideration any question of the physical fitness of a convict to labour. It is for the jail authorities to ascertain what labour is appropriate to a prisoner's strength and to put him to that only; the Courts have merely to consider the amount and nature of the imprisonment appropriate to the offence, and the character and status of the offender, and they would realize that by selecting simple instead of rigorous imprisonment they make a very essential difference in the way in which a prisoner will be treated on his admission to jail”.²⁴

Fine.—A sentence of fine where more prisoners than one are punished by fine must define by a specific sum the individual liability of each prisoner.²⁵

Ordinarily a criminal appeal abates on the death of the appellant. Section 431, Criminal Procedure Code, has, however, been amended so as to provide that this rule will not apply when the appeal is from a sentence of fine. The fines imposed on the deceased may, if the convictions are allowed to stand, be realised from his legal representatives. It is undesirable that this should be so, when there is no more reason to maintain his convictions.¹

Whipping.—As to the mode of executing this sentence, see ss. 390-396 of the Code of Criminal Procedure.

²¹ Pat. H. C. Cr. C., para. 59, p. 22.

²² B. C. M., s. 693, p. 287.

²³ *Ibid.*, s. 694, p. 287.

²⁴ Home Department Resolution No. 4 (Jails, 183-194, dated 4th April, 1889); B. C.

M., s. 695, p. 288.

²⁵ (1869) 5 M. H. C. Appx. 5; 1 Weir 30.

¹ *Ramdhani Gope v. Jageshar Mahto*, (1941) 42 Cr. L. J. 653, [1941] AIR (P) 526.

54. In every case in which sentence of death shall have been passed, the Central Government or the Provincial Government of the Province within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

COMMENT.

See the observations of the authors of the Code set out under the next section. This section empowers the Government to commute the sentence of death "for any other punishment provided by this Code". It was once thought that s. 402 of the Criminal Procedure Code limited this power as it provided that the Central Government or Provincial Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:—death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine. But by the Criminal Procedure Code Amending Act XVIII of 1923, a sub-section has been added to s. 402—" (2) Nothing in this section shall affect the provision of section 54 or 55 of the Indian Penal Code." This amendment shows that the power given by this section is not restricted by s. 402 of the Criminal Procedure Code.

Postponement of capital sentence on pregnant woman.—Section 382 of the Criminal Procedure Code says: "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life".

Amendment.—The words "the Central Government or the Provincial Government of the Province" were substituted for the words "the Government of India or the Government of the place" by the Government of India (Adaption of Indian Laws) Order, 1937. In Burma the word "Governor" was substituted for the words "Government of India or the Government of the place within which the offender shall have been sentenced", by the Government of Burma (Adaptation of Laws) Order, 1937.

55. In every case in which sentence of transportation for life shall have been passed, the Provincial Government of the Province within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

COMMENT.

Under this section the Provincial Government has power to commute the sentence of transportation for life to punishment for imprisonment of either description for a term not exceeding fourteen years without the consent of the prisoner. But where the sentence has not been commuted under this section the prisoner could be lawfully kept for twenty years in one of the jails in India appointed for transportation of prisoners and be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment.²

1. 'Without the consent of the offender'.—The authors of the Code say: "It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote provinces of the empire in which convict settlements are established, and the way in which the interest of those provinces may be affected by any addition to the convict population, are matters which

² *Kishori Lal*, (1944) 47 Bom. L. R. 625, 72 I. A. 1.

lie together out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide.”³

Amendment.—The words “the Provincial Government of the Province” were substituted for the words “the Government of India or the Government of the place” by the Government of India (Adaptation of Indian Laws) Order, 1937. In Burma the word “Governor” was substituted for the words “Government of India or the Government of the place within which the offender shall have been sentenced” by the Government of Burma (Adaptation of Laws) Order, 1937.

PRACTICE.

Procedure.—See ss. 401 and 402 of the Criminal Procedure Code which provide for suspensions, remissions, and commutations of sentences.

A distinction is to be observed between the powers conferred by s. 55 of the Penal Code and those conferred by s. 401 of the Criminal Procedure Code. If the accused, after he is transported for life, has his punishment commuted under s. 55 of the Code to imprisonment for fourteen years, he cannot, upon his release, be regarded thereafter as “being under sentence of transportation for life.” But where the sentence of transportation has been remitted under s. 401 of the Criminal Procedure Code, the accused must be regarded as still “being under sentence of transportation for life” after his release from jail.⁴

Madras Rule.—Courts of Sessions sentencing an offender who is not less than 16 and not more than 21 years of age to transportation for life shall consider whether a recommendation should be made to the Provincial Government that the offender be detained in a Borstal School.⁵

55A. Nothing in section fifty-four or section fifty-five shall derogate from the right of His Majesty, or of the Governor-General if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respite or remissions of punishment.

Saving for Royal prerogative.

56. Whenever any person being an European¹ or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude instead of transportation according to the provisions of Act XXIV of 1855 :

Sentence of Europeans and Americans to penal servitude.

Provided that, where an European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

Proviso as to sentence for term exceeding ten years, but not for life.

COMMENT.

The punishment of penal servitude is only applicable to Europeans and Americans.⁶

1. ‘European’.—This word, as used in Act XXIV of 1855, shall be understood to include any person usually designated an European British subject (s. 15). ‘European British subject’ means, (i) any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British Islands or any colony, or (ii) any subject of His Majesty who is the child or grand-child of any such person by legitimate descent.⁷

Proviso.—This was added by Act XXVII of 1870, s. 3.

³ Note A, p. 95.

⁴ *Po Kun*, [1939] Ran. 44.

⁵ M. H. C. B. P. (1931 edn.), s. 172-A.

⁶ *Duma Baidya*, (1896) 19 Mad. 483.

⁷ Criminal Procedure Code, s. 4 (1) (i).

PRACTICE.

Procedure.—For the special procedure for the trial of European British subjects, Europeans or Americans, see the Code of Criminal Procedure, Ch. XXXIII, s. 443, *et seq.*

To make out a plea to the jurisdiction on the ground that the accused is a British-born subject, it is necessary to prove not only legitimate descent but also nationality. Hearsay evidence is not admissible to prove nationality.⁸

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

COMMENT.

For calculating fractions of terms of punishments this section provides that transportation for life shall be reckoned as equivalent to transportation for twenty years. But it nowhere provides that for other purposes transportation for life is to be treated as transportation for only twenty years. The sentencing Court must regard a sentence of transportation for life as a sentence for transportation for the whole of the remaining period of the convicted person's natural life. As a matter of fact, Government treats such a sentence as a sentence of transportation for a certain number of years.⁹

The Privy Council have held that a life sentence of transportation must not in all cases be treated as one of not more than twenty years, or that a convict was necessarily entitled to remission.¹⁰

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

Offender sentenced to transportation how dealt with until transported.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards¹, it shall be competent to the Court which sentences² such offender, instead of awarding sentence of imprisonment,³ to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment⁴.

Transportation instead of imprisonment.

COMMENT.

Object.—Under the Penal Code as originally prepared, the power of passing sentence of transportation instead of imprisonment was vested in the Government, and not in the Courts. "At the time when the Penal Code was prepared by the Indian Law Commissioners, it was a rule of the Court of Directors of the East India Company that no native should be sentenced to transportation for a period less than for life, it being the opinion at that time that a native of India, if once transported, should never be allowed to return to this country. The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as punishment for any period short of life, and it did not give power to the Government to commute a sentence of imprisonment for seven years into transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth. But, when the Penal Code came to be altered, a different rule was thought necessary. It was thought reasonable

⁸ *Turnbull*, (1870) 2 Weir 11.

⁹ *Nga Tha Byit*, (1893) P. J. L. B. 13. See *Sumar Khamiso*, (1932) 33 Cr. L. J. 870, 26 S. L. R. 256, [1932] AIR (S) 168, where trans-

portation for life is considered as imprisonment for twenty years.

¹⁰ *Kishori Lal*, (1944) 47 Bom. L. R. 625, 72 I. A. 1.

that natives of India as well as Europeans and others should be sentenced to transportation for periods less than for life, and that the reason for not allowing a native, who had once been transported, to return to India, no longer held good, and, therefore, as the Penal Code as prepared by the Indian Law Commissioners did not provide transportation as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact" this section as a general clause.¹¹

Though this section was introduced when the Bill was before the Council, yet no alteration appears to have been made in the language of the several sections which prescribed transportation as a punishment. Thus, in the majority of instances, the words used are:—"shall be punished with transportation for life or with imprisonment which *may* extend, etc." While the Court has an option in determining the duration of the term of imprisonment, it has no option in determining the duration of the term of transportation.¹² In no section of the Code which prescribes transportation as a punishment, with the exception of this section and ss. 121A and 124A, is the language used such as to leave the Court any option regarding the duration of the term.

Principle.—This section only enacts a general rule to the effect that in the case of offences for which no transportation is specially mentioned as a punishment and which are punishable with imprisonment for a term of seven years or upwards, it is competent to the Judge to substitute a sentence of transportation as a substantive sentence for that of imprisonment.¹³ The term of transportation under it cannot exceed the term of imprisonment provided by the section under which a conviction is had.¹⁴ It cannot be less than seven years.

Scope.—This section "applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to imprisonment for seven years."¹⁵ It necessarily gives power to a Court which could sentence a prisoner to seven years' imprisonment to sentence him to seven years' transportation in lieu of it: but it does not intend to give this power to a Court, which could not sentence to imprisonment for more than two years to transport for seven.¹⁶ The section, no doubt, goes out of the ordinary course adopted in other parts of the Code and, instead of defining the punishment, gives a certain power to the Court, which passes the sentence, to award a different kind of punishment from that specified in the Code.¹⁷

1. 'In every case in which an offender is punishable with imprisonment for a term of seven years or upwards'.—The punishment awarded for one offence alone must be imprisonment for seven years or upwards. It cannot be made up by adding two sentences together and then commuting the amalgamated period to transportation.¹⁸ A general sentence of transportation for two or more offences, when only one of the punishments awarded is seven years' imprisonment, is illegal.¹⁹

2. 'It shall be competent to the Court which sentences'.—That is, it shall be competent to the Court, which has power to sentence the prisoner to imprisonment for a term of seven years or upwards, to sentence him to transportation instead of imprisonment. If the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, then it has also jurisdiction, under this section, to pass a sentence of transportation for seven years.²⁰

3. 'Instead of awarding sentence of imprisonment'.—The proper procedure is to pass a sentence of imprisonment for the term fixed by law for the particular offence and then, under this section, direct that the prisoner be transported for that

¹¹ Per Peacock, C. J., in *Bodhooa*, (1868) 9 W. R. (Cr.) 6, 10, Beng. L. R., Sup. Vol., 869, F.B.

¹² *Naiada*, (1875) 1 All. 43, 45, F.B.

¹³ *Kunhussa*, (1882) 5 Mad. 28.

¹⁴ *Arura*, (1903) P. R. No. 31 of 1903.

¹⁵ *Bodhooa*, (1868) 9 W. R. (Cr.) 6, 7, Beng. L. R. Sup. Vol., 869, 872, F.B.

¹⁶ Per Peacock, C. J., in *ibid.*, p. 11, Beng. L. R. Sup. Vol., 869, 878, F.B.

¹⁷ *Ibid.*, p. 10, Beng. L. R. Sup. Vol., 869, 877, F.B.

¹⁸ *Prem Chand Ousowal*, (1864) W. R. (Gap No.) (Cr.) 35; *Moolkee Kora*, (1865) 2 W. R. (Cr.) 1; *Tonooram Malee*, (1865) 3 W. R. (Cr.) 44; *Salar Bakhsh*, (1901) P. R. No. 27 of 1901; *Sunda*, (1866) P. R. No. 63 of 1866; *Bahadar*, (1886) P. R. No. 14 of 1886; *Mussammatt Mathro*, (1885) P. R. No. 4 of 1886; *Nga Meik*, (1905) U. B. R. (P. C.) 11, 2 Cr. L. J. 473.

¹⁹ *Shonaullah*, (1866) 5 W. R. (Cr.) 44.

²⁰ *Bodhooa*, (1868) 9 W. R. (Cr.) 6, 8, 11, Beng. L. R. Sup. Vol. 869, 878, F.B.; *Nuran*, (1880) P. R. No. 17 of 1880.

period.²¹ The Court may, in passing sentence for the offence, commute the imprisonment to transportation; but it cannot commute the sentence after the sentence of imprisonment has been passed.²²

4. 'Transportation for a term not less than seven years, and not exceeding...imprisonment'.—A transportation awarded under this section cannot exceed the imprisonment for which the prisoner might have been sentenced, even though it would have been open to the Court to award a longer period of transportation under the section appropriate to the crime. Thus, where the law gives the alternative punishments of death, transportation for life, and rigorous imprisonment extending to ten years, and the Court does not inflict the extreme penalty of transportation for life, it cannot award more than ten years' transportation.²³ When an offence is punishable with transportation for life or imprisonment for a term of ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely; ten years. Where, therefore, the accused, on conviction for an offence under s. 395, was sentenced to transportation for fifteen years, the High Court reduced the sentence to transportation for a term of ten years, that being the period of imprisonment provided for the offence.²⁴ No sentence of transportation for a shorter period than seven years can be passed on any charge.²⁵ Where the accused was convicted on separate charges of giving false evidence in a judicial proceeding under s. 193 and of forgery under s. 467, and sentenced to seven years' transportation for the first offence, and a further period of transportation for three years for the second offence, the second conviction was quashed as illegal.¹

Where the accused was convicted of an attempt to commit rape and sentenced, under this section, to seven years' transportation, the sentence was set aside on the ground that, as rape was only punishable with ten years' imprisonment, under s. 511 only five years' imprisonment could be awarded for an attempt to commit such an offence. At the same time it was held that as rape was punishable with transportation for life—transportation for twenty years (s. 57)—the sentence of seven years' transportation being less than one-half of twenty years would have been legal if passed independently of this section.²

Sentence under special or local law.—The section does not apply to sentences under a special or local law and transportation cannot, therefore, be ordered in the case of offences punishable under such law.³

Transportation cannot be substituted for imprisonment in default of fine.—This section does not authorise the substitution of transportation for the imprisonment to which a Court can sentence an offender in default of payment of fine.⁴

PRACTICE.

Procedure.—In commuting a sentence of imprisonment to one of transportation, s. 35, Criminal Procedure Code, must be read together with the sections of the Penal Code, which prescribe the limits of punishment for different offences.⁵

Lahore Rule.—Section 59 of the Indian Penal Code empowers Courts to award transportation instead of imprisonment in cases in which offenders are punishable with imprisonment for a term of seven years or upwards, and Sessions Judges and Magistrates of districts, exercising enhanced powers, are informed that, in order to bring this

²¹ *Rughoo*, (1864) W. R. (Gap No.) (Cr.) 30.

²² *Prem Chund Ousowal*, (1864) W. R. (Gap No.) (Cr.) 35.

²³ *Rughoo*, (1864) W. R. (Gap No.) (Cr.) 30; *Keifa Singh*, (1865) 3 W. R. (Cr.) 16; *Mohanundo Bhundary*, (1866) 5 W. R. (Cr.) 16; *Joseph Meriam*, (1868) 1 Beng. L. R. (A. Cr. J.) 5, 10 W. R. (Cr.) 10; *Naiada*, (1875) 1 All. 43, F.B.; *Arura*, (1903) P. R. No. 31 of 1903; *Muhammad Sahrif*, (1915) P. R. No. 14 of 1915, 16 Cr. L. J. 554; *Sayyapureddi Chinnayya*, (1920) 48 I. A. 35, 44 Mad. 297, 23 Bom. L. R. 705.

²⁴ *Alla-ud-din*, (1919) 20 Cr. L. J. 561, [1919] AIR (A) 327.

²⁵ *Gour Chunder Roy*, (1867) 8 W. R. (Cr.) 2; *San Da*, (1906) 4 L. B. R. 65, 6 Cr. L. J. 290.

¹ *Gour Chunder Roy*, *ibid.* See to the same effect *San Da*, (1906) 4 L. B. R. 65, 6 Cr. L. J. 290, where a sentence of three years' transportation was passed under s. 440 of the Penal Code but was held to be illegal.

² *Joseph Meriam*, *sup.*

³ *Muthuramalingam*, (1901) 11 M. L. J. 127, 1 Weir 30.

⁴ *Kunhussa*, (1882) 5 Mad. 28; *Nuran*, (1880) P. R. No. 17 of 1880; *Yusuf*, (1882) 2 A. W. N. 116; *Nga Tha Zan*, (1902) 1 L. B. R. 292, overruling *Nga Shwe Lan*, (1898) P. J. L. B. 482.

⁵ *Nga Po Seik*, (1898) P. J. L. B. 478.

section into operation, the punishment awarded for one offence alone must be seven years or upwards. The term of seven years cannot be made up by adding two sentences together and then commuting the amalgamated period of imprisonment to one of transportation. The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under s. 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment.

2. The restriction placed on the transportation of term convicts by Government of India Resolution No. 2032, dated December 28, 1868, on which the Courts were instructed to refrain from exercising the power vested in them by s. 59 of the Indian Penal Code of substituting transportation for imprisonment, has since been withdrawn by the Government of India, except in the case of females.

3. No sentence of transportation should specify the place to which the person sentenced is to be transported. When any Court passes a sentence of transportation for a term it should at the same time express an opinion, on which the Provincial Government could act under the powers conferred by s. 55 of the Indian Penal Code, as to the amount of imprisonment suitable in lieu of the sentence of transportation, should it be found impracticable for the convict to be transported beyond seas. Such opinion should be expressed by the Court in a separate note which should be forwarded confidentially by the Court to the Inspector-General of Prisons, Punjab, immediately after the judgment has been pronounced. If the convict is not eligible for transportation under paragraph 721 of the Jail Manual or if the Committee referred to in paragraph 726 of the Manual is unable to certify him as fit for transportation the Inspector-General of Prisons will report the case to the Provincial Government for orders under s. 55 of the Indian Penal Code or under s. 402 of the Code of Criminal Procedure, as the case may be, and will attach the relevant note. Particular care should be taken that the separate note relating to a convict does not form part of the record of the case, *e.g.* the note should not be recorded in continuation of the judgment.⁶

Bengal Rule.—The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under s. 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment, simple or rigorous, as the case may be.⁷

The Central Province Circular.—When term-transportation is allowed, Sessions Judges and Magistrates with special powers should pass term-sentences of transportation in cases in which [such sentence may legally and suitably be passed. The correct procedure is to sentence the offender to transportation under the section under which the offence is punishable read with s. 59 of the Indian Penal Code.⁸

Burma Circular.—(1) Sentences of transportation are not carried out in practice, and prisoners are not deported to the Andamans unless they volunteer to go as colonists or in a clerical or menial capacity. Consequently Sessions Judges and Magistrates exercising Special Powers should not exercise the option which they possess under section 59 of the Indian Penal Code except in very serious cases, such as offences under sections 121-180 of the Code, and a sentence of transportation should not ordinarily be passed unless it is essential under the Code, *e.g.* in the case of life sentences.

(2) Under section 59 of the Indian Penal Code, a sentence of imprisonment is not commuted to one of transportation. The correct procedure is to sentence the offender to transportation under the section under which the offence is punishable read with section 59 of the Indian Penal Code.⁹

Mode of sentencing.—The sentence should run thus:—"The Court directs, under the provisions of section—and s. 59 of the Indian Penal Code, that the said—be" (sentence).

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

⁶ L. H. C. R. & O., (1942 edn.) Vol. III, Ch. 19-F.

⁷ C. H. C. R. & O., Vol. I, Ch. I, r. 64, p.

²⁵ See *Rughoo*, (1864) W. R. (Gap No.) (Cr.) 30.

⁸ C. P. Cr. C. No. 23 (4), p. 37.

⁹ B. C. M., s. 697, p. 289.

shall be rigorous and the rest simple.

COMMENT.

Where an offence is punishable with imprisonment, a sentence of imprisonment must be awarded. A sentence of imprisonment for the period passed in lock-up is illegal, but a sentence of imprisonment until the rising of the Court is good in, and fulfils the requirement of, the law.¹⁰

As to the application of ss. 60 and 63-74 to sentences passed in the Punjab Frontier District, in the North-West Frontier Province, or in Baluchistan, see the Frontier Crimes Regulation.¹¹

As to the application of ss. 60, 63, 64, 65, 68 and 74 to the Sindh Frontier, see the Sindh Frontier Regulation.¹²

PRACTICE.

Procedure.—Lahore Rule.—The Indian Penal Code provides for imprisonment of two kinds, *viz.*, simple and rigorous, and the Court must choose one or the other form in view of all the circumstances. In certain Local and Special Acts, it will be found that the Legislature has not specified the kind of imprisonment which may be awarded. Under section 3 (26) of the General Clauses Act, 1897, such imprisonment may be simple or rigorous. In the case of many offences under the Indian Penal Code and other Acts, it is provided that the offender *shall* be punished with imprisonment up to a certain term and *shall also be liable to fine*. In such cases the offender must be sentenced to some period of imprisonment (however small), but it is not obligatory to impose fine in addition, as supposed by some Magistrates.

2. Simple imprisonment is suitable where a fine will not suffice and a very short term of imprisonment has to be imposed. This ensures casual offenders being kept apart from the contamination of hardened criminals.

3. The Indian Penal Code provides for "solitary confinement" being awarded up to a certain limit (*vide* section 73). This form of punishment is appropriate in the case of the more heinous class of offences. It should be borne in mind, however, that solitary confinement can be awarded in the case of offences under the Indian Penal Code only and not in the case of offences under Special or Local Acts.¹³

Madras Rule.—The Government consider the awarding of short-term imprisonments as undesirable and Magistrates, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead, or the provisions of s. 562, Criminal Procedure Code, applied in favour of accused persons.¹⁴

61. [*Sentence of forfeiture of property.*] Repealed by s. 4 of Act XVI of 1921.

62. [*Forfeiture of property, in respect of offenders punishable with death, transportation or imprisonment.*] Repealed by s. 4 of Act XVI of 1921.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

COMMENT.

In criminal cases the measure of punishment must be carefully regulated and in the imposition of a fine due proportion must be preserved with regard to the nature of the offence and the means of the offender.¹⁵ The description of fine which it was the object of this section to prohibit, was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence.¹⁶

On this point the authors of the Code observe: "Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally

¹⁰ *Baghel Singh*, (1906) 2 P. W. R. (Cr.) 21, 5 Cr. L. J. 217.

¹¹ III of 1901, ss. 13(2), 61.

¹² III of 1892, s. 28(1).

¹³ L. H. R. O. (1942 edn.), Vol. III, Ch. XIX-C.

¹⁴ M. H. C. R. P. (1931 edn.), s. 102, p. 34.

¹⁵ *Vengalasawmy*, (1900) U. B. R. (1897-1901) (Cr.) 244.

¹⁶ *Abdoor Ruhman*, (1867) 7 W. R. (Cr.) 37; *Mohna*, (1895) P. R. No. 20 of 1895.

disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich Zamindar. It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich. There are many millions in India who would be utterly unable to pay a fine of fifty rupees; there are hundreds of thousands from whom such a fine might be levied, but whom it would reduce to extreme distress; there are thousands to whom it would give very little uneasiness; there are hundreds to whom it would be a matter of perfect indifference, and who would not cross a room to avoid it. The number of the poor in every country exceeds in a very great ratio the number of the rich. The number of poor criminals exceeds the number of rich criminals in a still greater ratio. And to the poor criminal it is a matter of absolute indifference whether the fine to which he is liable be limited or not, unless it be so limited as to render it quite inefficient as a mode of punishing the rich. To a man who has no capital, who has laid by nothing, whose monthly wages are just sufficient to provide himself and his family with their monthly rice, it matters not whether the fine for assault be left to be settled by the discretion of the Courts, or whether a hundred rupees be fixed as the maximum. There are no degrees in impossibility. He is no more able to pay a hundred rupees than to pay a lac. A just and wise judge, even if intrusted with a boundless discretion, will not, under ordinary circumstances, sentence such an offender to a fine of a hundred rupees. And the limit of a hundred rupees would leave it quite in the power of an unjust or inconsiderate judge to inflict on such an offender all the evil which can be inflicted on him by means of fine. . . .

"It appears to us that the punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity, of forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three-fourths of his property, a property which may be very large and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment, than encouraged by seeing him, after his liberation, enjoying the far larger part of his wealth."¹⁷

Magisterial fines.—In a Calcutta case it has been doubted whether this section applies to fines inflicted by a Magistrate, as the power of a Magistrate to fine is, in all cases, under the Penal Code and the Criminal Procedure Code, limited to Rs. 1,000, and it is only the Court of Session and the High Court that can inflict fines to an unlimited extent.¹⁸

Statutory application of ss. 63-70.—The provisions of ss. 63 to 70 apply to all fines imposed under any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule, or bye-law contains an express provision to the contrary.¹⁹

¹⁷ Note A, pp. 97, 98.

¹⁸ *Abdoor Rahman*, (1867) 7 W. R. (Cr.) 37.

¹⁹ General Clauses Act, X of 1897, s. 25. Under s. 26 of the Bombay General Clauses Act, I of 1904, the provisions of ss. 63-70 apply to all fines imposed under any Bombay Act, or any rule or by-law made under any Bombay Act. (See *Puna Laxman Bhal*, (1904) 6 Bom. L. R. 357, 1 Cr. L. J. 327). The Bengal General Clauses Act (I of 1899), s. 26, makes ss. 63-70 applicable to all Bengal Acts. Under s. 19 of the Madras General Clauses Act (I of 1891) the provisions of ss. 63-70 shall apply to all fines imposed under the authority of any Madras Act. The United Provinces General Clauses Act (I of 1904), s. 25, and the Punjab

General Clauses Act (I of 1898), s. 28, make ss. 63-70 applicable to all fines under any local Acts. The Burma General Clauses Act (I of 1898), s. 25, and the Assam General Clauses Act (Assam Act II of 1915), s. 28, the Bihar and Orissa General Clauses Act, 1897, and the Central Provinces General Clauses Act (C. P. Act I of 1914), s. 24, contain similar provisions. These sections are also held applicable to Frontier Crimes Regulation (III of 1901), s. 61; to the Andaman and Nicobar Islands Regulation (III of 1876), s. 35; to the Arakan Hill District Laws Regulation (IX of 1874), s. 18; to the Ajmere Forest Regulation (X of 1874), s. 13.

PRACTICE.

Procedure.—Whenever a fine is imposed, the Court may issue a warrant for levy of fine as provided in the Code of Criminal Procedure.²⁰ The whole or any part of the fine recovered is to be applied (a) in defraying expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a civil Court; and (c) in compensating any *bona fide* purchaser of property acquired in the commission of certain offences for the loss if such property is restored to its owner.²¹

Joint offenders.—Where more persons than one are fined on conviction for a joint offence, the sentence must impose a specific fine on each accused.²²

Daily fine.—An order for payment of a daily fine is illegal as it is an adjudication in respect of an offence which has not been committed when such order is passed.²³

Amount of fine.—A fine should be fixed with due regard to the circumstances of the case in which it is imposed and the condition in life of the offender, and not with the object of extending to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying a case.²⁴

Lahore Rule.—This is the lightest form of punishment which a criminal Court can impose, but care should always be taken to see that the fine is not excessive with reference to the means of the offender. Indiscriminate imposition of fines without due regard to the capacity of the convict to pay it only results in waste of time of the Courts and the police in attempting to realise it, and harassment to the convict and his dependents. Courts are empowered to impose imprisonment in default of payment of fine, for such imprisonment can only be awarded subject to the limitations prescribed in ss. 64 to 67.²⁵

Burma Circular.—Sentences of fine should never be passed without due regard to the means of the person fined to pay the fine. Excessive fines are prohibited by law and should be carefully avoided.¹

The Central Provinces Circular.—Fines should be regulated so as to accord with the circumstances of the offender and should not under any circumstances be excessive (s. 68 of the Penal Code). Fines are sometimes imposed which are manifestly impossible of realization, while there is reason to fear that many fines which are imposed in petty cases, though realized, are paid only with difficulty. It would appear that in dealing with petty cases some Magistrates fall into a way of fixing the fines at particular amounts as a matter of course, without much thought as to how they will be felt by the particular individual on whom they are imposed. It is a first principle in inflicting this mode of punishment that it is necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. Fines should never in any case be imposed which are not likely to be realized at all, and they should never be imposed in petty cases with such severity as not to be easily realizable.²

64. In every case of an offence¹ punishable with imprisonment

Sentence of imprisonment for non-payment of fine. as well as fine,² in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent³ to the Court which sentences such offender

²⁰ Criminal Procedure Code, s. 386.

²¹ *Ibid.*, s. 545.

²² (1869) 5 M. H. C. Appx. 5, 1 Weir 30.

²³ *Ram Krishna Biswas v. Mohendra Nath Mozumdar*, (1900) 27 Cal. 565; *W. N. Love*, (1872) 18 W. R. (Cr.) 44, 9 Beng. L. R. (App.) 35; *Chairman of the Municipal Commissioners, Calcutta v. Aneesuddeen Meha*, (1878) 20 W. R. (Cr.) 64, 12 Beng. L. R. (App.) 2; *Kristodhone*

Dutt v. Chairman, Suburban Municipality, (1876) 25 W. R. (Cr.) 6.

²⁴ *Subhan*, (1878) P. R. No. 18 of 1878; *Abdullah*, (1922) 5 L. L. J. 271, 24 Cr. L. J. 278, [1924] AIR (L) 81.

²⁵ L. H. C. R & O. (1942 edn.), Vol. III, ch. 19-B.

¹ B. C. M., s. 712, p. 293.

² C. P. Cr. C. No. 25, p. 40.

to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

COMMENT.

Under this section the term of imprisonment in default must not exceed one-fourth of the maximum term of imprisonment fixed for the offence, if the offence is punishable *with imprisonment as well as fine*. This rule applies whether imprisonment is actually awarded or not. It applies to cases where imprisonment or fine, but not both, can be awarded, no less than to cases in which both imprisonment and fine can be imposed. In cases punishable with imprisonment as well as fine, the Court may award, in default of payment of the fine, imprisonment up to the limit of its ordinary powers. For example, in a case of simple theft under s. 379, if fine only is imposed, a Magistrate of the First Class may award, in default of payment, imprisonment for nine months, a Magistrate of the Second Class, imprisonment for six months, and a Magistrate of the Third Class, imprisonment for one month.

Where a Court passes a sentence of imprisonment and fine, the period of imprisonment awarded in default of payment of the fine cannot exceed one-fourth of the period which the Court has power to impose substantively. Thus, in a case of simple theft a Magistrate of the First Class cannot award more than six months, a Magistrate of the Second Class, more than one month and a half, and a Magistrate of the Third Class, more than one week.

"The wording of (this section) . . . is not happy, but . . . the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed".³

Scope.—Offences punishable with death or transportation are excluded from the operation of this section.

1. '**Offence**'.—This word here means anything punishable under the Code or any special or local law.⁴ See s. 25 of the General Clauses Act (X of 1897).

2. '**Imprisonment as well as fine**'.—The words 'as well as' do not mean here *and*, as will be seen from the concluding words of the first clause, viz., 'whether with or without imprisonment'. The words 'imprisonment as well as fine' include (a) offences punishable with imprisonment or fine in the alternative, and (b) offences punishable with imprisonment or fine, or both, cumulatively.⁵

3. '**It shall be competent**'.—It is not imperative to award a term of imprisonment in default of payment of the fine.⁶ It is merely permissive.

Amendment.—The first two clauses of this section were substituted for the words "in every case in which an offender is sentenced to fine" by Act VIII of 1882, s. 2; and the words "with imprisonment or fine, or" in the second clause were inserted by Act X of 1886, s. 21(2).

PRACTICE.

Award of imprisonment in default of payment of fine.—The Nagpur High Court has held that section 22 of the Cattle Trespass Act (I of 1871) does not empower a Magistrate to pass a sentence of imprisonment in default of payment of compensation.⁷

Where a conviction has been had under two sections of the Code in one of which

³ Per Benson, J., in *Yakoob Sahib*, (1898) 22 Mad. 238, 240.

⁴ Section 40 as amended by Act VIII of 1882. (1886) 3 M. H. C. Appx. 9; (1870) 5 M. H. C. Appx. 21; (1870) 5 M. H. C. Appx. 23; (1871) 6 M. H. C. Appx. 40, and (1872) 7 M. H. C. Appx. 12, 2 Weir 159, are thus over-

ruled. See *Rappel*, (1895) 18 Mad. 490.

⁵ *Yakoob Sahib*, (1898) 22 Mad. 238, 240; *Tirumalai*, (1894) 1 Weir 31.

⁶ *Beni Pershad*, (1878) P. R. No. 30 of 1878; *Anon.*, (1870) 1 Weir 31.

⁷ *Ramdularey v. Manohar*, (1929) 26 N. L. R. 158, 31 Cr. L. J. 278, [1930] AIR (N) 149.

only an alternative sentence of imprisonment or fine is allowed, a sentence of fine cannot be passed.⁸

Imprisonment to be in proportion to fine.—The sentence in default of payment of fine should bear a reasonable proportion to the amount of the fine, regard being had to the circumstances of the convicted person.⁹

Sentence of imprisonment in default of fine not to run concurrently with other sentence of imprisonment.—Any sentence of imprisonment in default of fine has to be in excess of, and not concurrent with, any other sentence of imprisonment to which the accused may have been sentenced.¹⁰ Where a Court imposes two sentences of imprisonment on an accused person and orders him to pay fine on each of the two counts with imprisonment in default of payment of fine, it may order the substantive terms of imprisonment to run concurrently, but the terms of imprisonment inflicted in default of payment of fine must run consecutively.¹¹

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence,¹ if the offence be punishable with imprisonment as well as fine.²

Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.

COMMENT.

The authors of the Code observe: "The next question which it became our duty to consider was this: when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in gaol, appears to us to be a very objectionable course. The high authority of Mr. Livingston is here against us. He allows the criminal, if sentenced to a fine exceeding one-fourth of his property, to compel the judge to commute the excess for imprisonment at the rate of one day of imprisonment for every two dollars of fine, and he adds, that such imprisonment must in no case exceed ninety days. We regret that we cannot agree with him; the object of the penal law is to deter from offences, and this can only be done by means of inflictions disagreeable to offenders. The law ought not to inflict punishments unnecessarily severe; but it ought not, on the other hand, to call the offender into council with his judges, and to allow him an option between two punishments. In general, the circumstance that he prefers one punishment raises a strong presumption that he ought to suffer the other. The circumstance that the love of money is a stronger passion in his mind than the love of personal liberty is, as far as it goes, a reason for our availing ourselves rather of his love of money than of his love of personal liberty for the purpose of restraining him from crime. To look out systematically for the most sensitive part of a man's mind, in order that we may not

⁸ *Bhoobun Mohun*, (1869) 11 W. R. (Cr.) 39.

⁹ *Nga Cho*, (1885) S. J. L. B. 353.

¹⁰ *Chanan Singh*, [1940] Lah. 143; *Ebrahim*, (1930) 32 Cr. L. J. 637, 638. [1931] AIR (R)

51 (1).

¹¹ *Subrao Sesharao*, (1925) 27 Bom. L. R. 1351, 27 Cr. L. J. 111, [1926] AIR (B) 62 *Mithoo*, [1941] Kar. 1.

direct our penal sanctions towards that part of his mind, seems an injudicious policy.

"We are far from thinking that the course which we propose is unexceptionable; but it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days".¹²

Scope.—This section does not include punishment inflicted under s. 75 of the Code.¹³ Similarly it does not affect several sections of certain local Acts.¹⁴

1. 'The term . . . shall not exceed one-fourth of the term of imprisonment . . . fixed for the offence'.—The term of imprisonment in default of payment of a fine should not exceed one-fourth of the maximum term of imprisonment fixed for the offence. Where the accused was convicted under s. 510 of the Penal Code and sentenced to pay a fine of two annas or in default to suffer imprisonment for a day, it was held that the maximum sentence of imprisonment legally awardable was six hours.¹⁵ Accused having been found guilty of an offence under s. 3, cl. 10, of the Towns Nuisances Act (Madras Act III of 1889) punishable with a "fine not exceeding Rs. 50" or "imprisonment of either description not exceeding eight days", was sentenced to pay a fine of Rs. 8 and in default to undergo simple imprisonment for a week. It was held that the maximum imprisonment that could be awarded in default of payment of fine was two days.¹⁶ In the case of an assault (s. 352, *infra*), which is punishable with imprisonment for three months, a sentence inflicting a fine of fifty rupees, and awarding imprisonment for one month in default of payment of the fine, is illegal.¹⁷ A sentence of five months' rigorous imprisonment in default of payment of fine for an offence punishable with one year's imprisonment is illegal.¹⁸ A sentence of three months' imprisonment in default of payment of fine for an offence punishable with six months' rigorous imprisonment is illegal.¹⁹

The word 'offence', denotes here anything punishable under the Code or under any special or local law (s. 40). See s. 25 of the General Clauses Act (X of 1897).

2. 'Punishable with imprisonment as well as fine'.—These words include cases where fine and imprisonment can be awarded and also those where the punishment may be either fine or imprisonment but not both. The only cases that it does not apply to are those dealt with in s. 67 where fine only can be awarded.²⁰

PRACTICE.

Procedure.—In any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.²¹ Section 33 of the Criminal Procedure Code does not authorize a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by this section.²²

¹² Note A, pp. 98, 99. The views were generally approved of by the Law Commissioners in their 2nd Rep., ss. 489-494.

¹³ *Klawwa*, O. S. C. 175.

¹⁴ See Burma Act IV of 1907, s. 43 D; Burma Vaccination Act (Burma Act I of 1909), s. 15.

¹⁵ *Tirumalai*, (1894) 1 Weir 31.

¹⁶ *Yakoob Sahib*, (1898) 22 Mad. 238.

¹⁷ *Jehan Buksh*, (1871) 16 W. R. (Cr.) 42.

¹⁸ *Nur-ud-din*, (1924) 25 Cr. L. J. 1161, [1925] AIR (O) 109.

¹⁹ *Bhikarao*, (1898) Unrep. Cr. C. 979, Cr.

R. No. 37 of 1898.

²⁰ *Yakoob Sahib*, (1898) 22 Mad. 238, 241; *Nga Myiang Gyi*, (1898) P. J. L. B. 494. See also Comment on s. 64, sup.

²¹ Criminal Procedure Code, s. 33 (b).

²² *Venkatesagadu*, (1887) 10 Mad. 165, F.B., overruling *Muhammad Saib*, (1877) 1 Mad. 277, F.B. See *Phoolman Tewary v. Saitram Ojha*, (1866) 6 W. R. (Cr.) 51; *Darba*, (1877) 1 All. 461, F.B.; *Nga Paw*, (1896) P. J. L. B. 281; *Gokul Chandra Nandi v. Sribooth Chandra Banerji*, (1940) 21 P. L. T. 795, 41 Cr. L. J. 957, [1941] AIR (P) 48.

Madras Rule.—In awarding sentences in default of payment of fines, regard should always be had to the status of accused persons and the sentences should be so regulated as to induce them to pay them and not to evade such payment.²³

Patna Circular.—(1) The Nazir will call upon the prisoner to pay the amount of fine. If the fine be paid in full the person fined should be released unless he be also sentenced to substantive imprisonment. The Nazir will then report the fact to the Court on the foil received by him from the Bench Clerk. If the sentence be one of fine only without any imprisonment in default of payment and the fine be paid in part the prisoner will be released and the Nazir will report the fact on the foil to the Court which passed the sentence in order that a warrant may be issued for the realization of the balance. If the sentence be one of fine only and the fine be not paid at all, the Nazir shall apply for a warrant for the realization of the whole amount and other necessary orders. No person, not also under sentence of imprisonment, alternative or otherwise, shall be detained on account of inability to pay the fine. Where the sentence is one of fine, with or without a term of substantive imprisonment, but with an alternative sentence of imprisonment in default of the payment of the fine, if the fine be not wholly satisfied at once, the Nazir shall report to the Court which imposed the sentence for its orders as to the term of imprisonment proportional to the amount still unpaid which, under s. 69 of the Indian Penal Code, the convicted person has yet to undergo. In such cases the fact of the payment of fine, in whole or in part, should be noted on the warrant of imprisonment by the Magistrate who issues it.²⁴

Burma Circular.—The attention of all Courts is called to ss. 64 to 67 inclusive of the Indian Penal Code and also to s. 33 of the Code of Criminal Procedure, relating to sentences of imprisonment in default of payment of fine.

(2) Under s. 65, Indian Penal Code, the term of imprisonment in default must not exceed one-fourth of the maximum term of imprisonment fixed for the offence, if the offence is punishable with imprisonment as well as fine.

This rule applies whether imprisonment is actually awarded or not. It applies to cases where imprisonment or fine, but not both, can be awarded, no less than to cases in which both imprisonment and fine can be imposed.

(3) Subject to the rule in sub-paragraph (2), in cases punishable with imprisonment as well as fine where a sentence of fine only is passed, the Magistrate may award, in default of payment of fine, imprisonment up to the limit of his ordinary powers, *e.g.*, in a case of simple theft under s. 379, Indian Penal Code, if fine only is imposed a Magistrate of the first class may award, in default of payment, imprisonment for nine months, a Magistrate of the second class imprisonment for six months, and a Magistrate of the third class imprisonment for one month.

(4) Where a Magistrate sentences to imprisonment and fine, the period of imprisonment awarded in default of payment of the fine cannot exceed one-fourth of the period which the Magistrate has power to impose substantively. Thus in the case in sub-paragraph (3) a Magistrate of the first class cannot award more than six months, a Magistrate of the second class more than one month and a half, and a Magistrate of the third class more than one week.

(5) If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of fine—

(a) must be simple; and

(b) the term for which the Court directs the offender to be imprisoned in default of payment of fine must not exceed two months when the amount of the fine does not exceed Rs. 50, four months when the amount does not exceed Rs. 100, and six months in any other case.

In this case a Magistrate of the third class cannot award imprisonment for more than one month in default of payment of a fine.²⁵

²³ M. H. C. R. P. (1931 edn.), s. 102, p. 34.

²⁴ Pat. H. C. Cr. C., para. 8, p. 144.

²⁵ B. C. M., s. 713, p. 293.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.¹

Description of
imprisonment for
non-payment of
fine.

COMMENT.

Imprisonment awarded in default of payment of a fine may be of any kind which may be imposed for the offence.

If the offence is punishable with rigorous imprisonment then the additional imprisonment, in default of payment of fine, must be rigorous.¹

A criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently.²

1. 'Offence'.—This word denotes here anything punishable under the Penal Code, or under any special or local law (s. 40). See s. 25 of the General Clauses Act (X of 1897).

67. If the offence¹ be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

Imprisonment for
non-payment of
fine, when offence
punishable with fine
only.

COMMENT.

Object.—This section provides for the maximum term of imprisonment which could be awarded in default of payment of a fine where fine is the only punishment for the offence committed. It has no application to offences punishable either with imprisonment or with fine. Such sentences are governed by s. 65.³ The scale refers only to fines actually imposed and not to the maximum amount of fine permitted for the offence.⁴

Its principle is not affected by Ch. XXII of the Criminal Procedure Code. Section 262 of the Criminal Procedure Code, limiting the period of imprisonment in summary trials, has no application when the Magistrate acts under this section. In summary trials imprisonment exceeding three months cannot be inflicted but if imprisonment is an alternative punishment it can exceed three months.⁵

1. 'Offence'.—This word denotes here anything punishable under the Penal Code, or under any special or local law (s. 40). See s. 25 of the General Clauses Act (X of 1897).

Amendment.—The words “the imprisonment which the Court imposes in default of payment of the fine shall be simple and” were inserted by Act VIII of 1892, s. 3.⁶ In the case of hill-tribes to which the Kachin Hill Tribes Regulation (I of 1895) is applied the scale of punishment is different; see Regulation I of 1895, ss. 1 (3) and 3. See also Chin Hills Regulation (V of 1896), s. 3.

PRACTICE.

Procedure.—The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default: Provided that the term is not in excess of the Magistrate's powers under the Criminal

¹ *Srimonto Kotai*, (1867) 7 W. R. (Cr.) 31.

² *Kanda Moopan*, [1937] Mad. 362.

³ *Yakoob Sahib*, (1898) 22 Mad. 238. See *Chunder Pershad Singh*, (1868) 10 W. R. (Cr.) 30.

⁴ *Karuppannan*, [1941] 2 M. L. J. 446,

[1942] M. W. N. 427, (1941) 54 L. W. 326, 48 Cr. L. J. 121.

⁵ *Asghar Ali*, (1883) 6 All. 61.

⁶ See *Santhu bin Lakhappa Kore*, (1868) 5 B. H. C. (Cr. C.) 45.

Procedure Code (s. 33 (1) (a)). It should be noted, however, that s. 33 of the Code of Criminal Procedure does not authorize a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Penal Code.⁷

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

Imprisonment to terminate on payment of fine.

PRACTICE.

Procedure.—Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender; (b) issue a warrant to the Collector of the District authorizing him to realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter: Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.⁸ A warrant issued under s. 386, sub-s. (1), cl. (a), by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.⁹ When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and (b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once. The provisions of sub-s. (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that subsection, fails to do so, the Court may at once pass sentence of imprisonment.¹⁰ Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.¹¹

The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor. But the Court which levies the fine must be the same as the Court which imposed it.¹²

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Termination of imprisonment on payment of proportional part of fine.

⁷ *Venkatesagadu*, (1887) 10 Mad. 165, F.B.; *Darba*, (1877) 1 All. 461, F.B.

⁸ *Vide* Criminal Procedure Code, s. 386.

⁹ *Ibid.*, s. 387.

¹⁰ *Ibid.*, s. 388.

¹¹ *Ibid.*, s. 389.

¹² *Chunder Coomar Mitter v. Moghsoosoodun Dey*, (1868) 9 W. R. (Cr.) 50, F.B. See s. 559 of the Code of Criminal Procedure.

ILLUSTRATION.

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of these two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

COMMENT.

If the fine imposed on an accused is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a proportion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.¹³

PRACTICE.

Court has no power to refund fine.—Where a prisoner paid a portion of his fine, but that fact not having been communicated to the jailor, he underwent the full term of imprisonment, it was held that, under those circumstances, the Court had no power to order the fine to be refunded.¹⁴ The accused must apply in such a case to the Government.

Calcutta Rule.—Magistrates and sub-divisional officers should be very careful in all cases in which a person is sentenced to imprisonment in default of fine, to see that if the fine or a proportional part of it be paid or levied, immediate information be given to the officer in charge of the jail so that the prisoner may not be kept in illegal confinement.¹⁵

When a fine is imposed in addition to transportation and the whole or part of the fine is levied, it is the duty of the Sessions Judge to inform the authorities at Port Blair of the fact.¹⁶

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years¹ after the passing of the sentence,² and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.³

Fine leviable within six years, or during imprisonment.

Death not to discharge property from liability.

COMMENT.

Imprisonment in default of payment of fine does not liberate the offender from his liability to pay the full amount of fine imposed on him. Such imprisonment is not a discharge or satisfaction of the fine, but is imposed as a punishment for non-payment¹⁷ or contempt or resistance to the due execution of the sentence. The authors of the Code observe: "We do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment

¹³ Note A, p. 100.

¹⁴ *Natha Mula*, (1867) 4 B. H. C. (Cr. C.) 37.

¹⁵ *Bengal Govt. Letter*, No. 1060 T., 1864.

¹⁶ (1870) 5 M. H. C. Appx. 44.

¹⁷ *Sagwa*, (1901) 23 All. 497.

would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine; but his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

"It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and, after he has endured his imprisonment, to take his property by distress in order to realize the fine. But this harshness is rather apparent than real; if the offender, having the means of paying the fine, chooses rather to lie in prison than to part with his money, his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case; that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which it can, with any plausibility, be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained, in gaol, whether the fine be paid or no. The other law keeps him in confinement till the money is actually paid. It is, therefore, at least as severe as ours on his property, and is immeasurably more severe on his person... The offender who has been sentenced to fine must be considered as a debtor, and, as a debtor, not entitled to any peculiar lenity. It will be difficult to show on what principles a creditor ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice".¹⁸

1. 'May be levied at any time within six years'.—The word 'levying' means the actual realization of the fine. Although, therefore, the application is made within the prescribed period, if the fine is not realised within the period, further proceedings cannot be taken against the convicted person.¹⁹

The bar of six years may save the property of the accused but not his personal arrest. The liability for any sentence of imprisonment awarded in default of payment of fine continues after the expiration of six years.²⁰

2. 'After the passing of the sentence'.—It is the period of imprisonment to which the offender is liable under the sentence which is to count, not the period to which he might have been liable had the sentence been correctly imposed.²¹ In this case the Magistrate had illegally ordered the sentences of imprisonment in default of fine to run concurrently, and it was therefore contended that the period prescribed under this section had not expired. The Court held that the period to which the offender was liable under the sentence was to be counted and not the period to which he might have been liable.

3. 'Death of the offender does not discharge from the liability any property which would...be...liable for his debts'.—Under the amended s. 386, Criminal Procedure Code, movable as well as immovable property of the offender can be sold for realizing the fine.²² A revisional application against a sentence of fine does

¹⁸ Note A, pp. 99, 100.

¹⁹ *Mir Ahmad*, (1943) 44 Cr. L. J. 650, [1943] AIR (Pesh.) 56.

²⁰ *Ganu Sakharani*, (1884) Unrep. Cr. C. 207.

²¹ *Mir Ahmad*, supra.

²² *Lalu Karwar*, (1868) 5 B. H. C. (Cr. C.) 63, and *Sita Nath Mitra*, (1892) 20 Cal. 478, are no longer of any authority.

not abate by reason of the death of the applicant.²³

Fine once irrecoverable may be recovered if offender obtains property subsequently.—The mere fact that a Magistrate having written off a fine as irrecoverable, is no bar to his taking action to levy the fine within the time allowed by law, if it subsequently appears that the person from whom it was due has acquired the means of paying it.²⁴

PRACTICE.

Procedure.—An offender, who has undergone the full term of imprisonment to which he was sentenced in default of the payment of a fine, is still liable to have the amount levied by distress and sale of his property if the Court for special reasons to be recorded in writing considers it necessary to do so. The Court must act in accordance with the provisions of s. 386 of the Code of Criminal Procedure. The warrant issued by a Court passing a sentence, under s. 386, Criminal Procedure Code, to recover fine from an offender is to be deemed as a decree for certain purposes only, and is executed according to the mode laid down in the Civil Procedure Code, 1908, but s. 48, Civil Procedure Code, does not apply to such a warrant. The period during which such a warrant could be executed is governed by this section and by the Indian Limitation Act. A darkhast filed after six years to recover fine by sale of immovable property of the offender is, therefore, time-barred under this section.²⁵

Bombay Circular.—The attention of Sessions Judges and Magistrates is called to s. 70 of the Indian Penal Code, and ss. 386, 387 and 388 of the Code of Criminal Procedure, and to the fact that the proviso to s. 386 (1) directs that after the whole of the imprisonment awarded in default of payment of fine has been undergone, no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary to do so. In cases where further steps are required, if at any time subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine or any part of it remains unpaid, and the Court, from information gained, has reason to think that there is any movable property belonging to the offender, it should issue a fresh warrant for the attachment and sale of that property within a specified period, returnable within a certain time.¹ When any Court recovers a fine, or any portion thereof, inflicted upon a prisoner who is already in jail, or who is liable to be further detained in jail in default of payment of that fine, such Court shall be held responsible for the immediate communication to the jailor of the amount of the fine so recovered.²

Calcutta Rule.—A warrant issued under s. 386, Criminal Procedure Code, for the levy of a fine should ordinarily be directed to a police-officer (see Form No. XXXVII, Schedule V, Criminal Procedure Code); and the authority issuing it should set a time for the sale and for the return of the warrant. If no one claims the property distrained, the Police have the power of selling it within the time specified in the warrant, without any previous reference to the Magistrate; if a claimant comes forward, then the ownership of the property distrained must be determined by the Magistrate, and not by the Police. If at any time subsequent to the return of the warrant, and within the period of six years from the passing of the sentence, the fine, or any part thereof, remains unpaid (s. 70 of the Penal Code), and the Magistrate has, from information gained in any way, reason to think that any movable property belonging to the offender is within his jurisdiction, he should issue a fresh warrant for the attachment and sale of such property. Such warrant should be made returnable within a time to be definitely fixed therein.³

When a Court of Session realizes a fine imposed by it on an accused person, it shall prepare the usual warrant for the realization of the fine, and shall forward it to the Magistrate of the district concerned with an endorsement thereon to the effect that the fine has been realized.⁴

²³ *Sita Ram*, (1937) 13 Luck. 306.

²⁴ *Latif-ul-Hasan v. Mumtaz Ali Khan*, (1906) 26 A. W. N. 275, 3 A. L. J. R. 818, 4 Cr. L. J. 404.

²⁵ *Collector of Broach v. Ochhavilal Bhikhal*, (1940) 43 Bom. L. R. 122, [1941] Bom. 147.

¹ B. H. Cr. C. (1931) Ch. IX, s. 144, p. 102.

² *Ibid.*, s. 145, p. 102.

³ C. H. C. R. & O., Ch. I, r. 177, p. 41. This rule will have to be modified in the light of the new s. 386 of the Code of Criminal Procedure.

⁴ C. H. C. R. & O., Ch. I, r. 118, p. 42.

Patna Circular.—In any case when, under any special or local law, imprisonment in lieu of fine is to be taken as a full satisfaction of the penalty, if the convicted person is sentenced to undergo the imprisonment, the clerk in charge of the Fine Register shall at once obtain a certificate from the Court imposing the sentence that the fine is not to be realized, and the amount of the fine shall, if entered, be struck out of the Register of criminal fines. Nothing here laid down shall interfere with any special directions of law for the attempted realization of fine by distress or otherwise before carrying out any sentence of imprisonment upon the offender.⁵

Lahore Circular.—Fines should never be excessive with reference to the means of the offender, and the amount imposed should always be distinctly explained to the person sentenced.

2. Although section 70 of the Indian Penal Code gives the power to levy a fine at any time within six years or during the term of imprisonment of the offender, if this be more than six years, neither that section nor section 386 of the Code of Criminal Procedure requires that the power should be exercised in every case. The law is permissive and not imperative. When efforts have been made to realize a fine by distress and sale, and when the offender has undergone the imprisonment awarded in default of payment of fine, the Court should exercise its discretion, according to the circumstances of each particular case, as to whether, after the release of the prisoner, any further steps should be taken towards the realization of the fine within the period allowed by law. If there is reason to believe that the offender is able to pay and will not, preferring to undergo imprisonment, the law should be strictly enforced; but if it appears that the fine was not paid for want of means or that its full realization would be ruinous to the offender or his family, it is not desirable that further steps should be taken.⁶

71. Where anything which is an offence¹ is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Limit of punishment of offence made up of several offences.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished,² or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,³

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

ILLUSTRATIONS.

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

COMMENT.

This section governs the whole Code and regulates the limit of punishment in cases in which the greater offence is made up of two or more minor offences. It is

not a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment, and it does not, therefore, affect the question of conviction, which relates to the province of procedure.

This section contemplates separate punishments for an offence against the same law and not under different laws.⁷

The rules for assessment of punishment are laid down in ss. 71 and 72 of the Penal Code and s. 35 of the Code of Criminal Procedure.⁸ Section 35 of the Code of Criminal Procedure provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of s. 71 of the Indian Penal Code, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; and in the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. It, therefore, enhances the ordinary powers of sentences given to Magistrates by s. 32, Criminal Procedure Code.

Section 35, Criminal Procedure Code, is amended by Act XVIII of 1928. The word 'distinct' is omitted from the section. It is not therefore necessary that the offences should be distinct in order to enable a Magistrate to pass consecutive sentences, subject to the provisions of s. 71 of the Penal Code.⁹

Section 235 of the Code of Criminal Procedure contains only rules of criminal pleading in regard to joinder of charges, and it does not deal with the sentence to be passed on the charges of the offences mentioned in the several illustrations. It says:

"(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

ILLUSTRATIONS.

to sub-section (1)—

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under sections 225 and 338 of the Indian Penal Code.

(b) A commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code.

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code.

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code.

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses B of having committed an offence, knowing that there is no just or lawful

⁷ *Sukhnandan Rai*, (1917) 19 Cr. L. J. 157, [1918] AIR (P) 649; *Anantanarayanan*, (1932) 37 L. W. 476, 64 M. L. J. 351, [1933] M. W. N. 546, 34 Cr. L. J. 277, [1933] AIR (M) 337.

⁸ *Sakharam Bhau*, (1886) 10 Bom. 493, L. C.—8

496; *Nirichan*, (1888) 12 Mad. 36; *Dungar Singh*, (1884) 7 All. 29, 38.

⁹ *Hanma Timma*, (1928) 30 Bom. L. R. 383, 29 Cr. L. J. 544, [1928] AIR (B) 145; *Paw Din*, [1938] Ran. 63.

ground for such charges. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in illustrations (a) to (h) respectively may be tried at the same time.

to sub-section (2)—

(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code.

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code. A may be separately charged with, and convicted of, offences under section 471 (read with s. 466) and 196 of the same Code.

to sub-section (3)—

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code."

1. **First clause.**—The first clause of this section refers to cases similar to ill. (i) to s. 235, Criminal Procedure Code, which says that if A wrongfully strikes B with a cane, A may be separately charged with, and convicted of, offences under ss. 352 and 323 of the Indian Penal Code. Three separate acceptances of deposits from three persons at different times cannot be said to be parts of one composite offence under this clause.¹⁰

The combined effect of this clause and clause (1) of s. 235, Criminal Procedure Code, is exemplified in *Nilmony Poddar's* case,¹¹ discussed hereafter.

The word 'offence' denotes a thing punishable under the Code or under any special or local law (s. 40).

2. **Second clause.—First provision.**—This clause has two provisions. The first refers to cases mentioned in cl. (2) of s. 235, Criminal Procedure Code, and the second, to cases covered by cl. (3) of that section. The first provision provides for an act which presents different aspects according to the view which may be taken of the various circumstances constituting the act and which therefore fall within two or more separate definitions of offences.

Where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. The applicant was accused of having abetted the personation of a voter at a municipal election in that, not being himself acquainted with the person who came forward to vote, he had, on the advice of others, put his name to a "signature sheet" in token that the thumb-mark made by the voter was that of the person entitled to vote under a certain name

¹⁰ *Clifford*, (1913) 7 L. B. R. 143, F.B., on appeal to Privy Council, (1913) 40 I. A. 241,

41 Cal. 568, 16 Bom. L. R. 1.
¹¹ (1889) 16 Cal. 442, F.B.

on the electoral roll. It was held that, inasmuch as the acts done by the applicant constituted the specific offence provided for by s. 171F, he could only be tried for that offence and could not be tried for abetment of the general offence provided for by s. 465.¹²

When one act constitutes two offences, separate punishment for each offence can only be inflicted if both the offences are against the same law.¹³ Section 26 of the General Clauses Act makes this point clear.

Where a person is found guilty of a criminal act which is punishable under two different sections of the Code, he may be convicted under both the sections, but he should be punished only under that section which imposes the higher penalty.¹⁴ Where a person commits house-trespass and attempts to murder an occupant of the house he may be convicted of both these offences, but a separate sentence for each offence is not justifiable.¹⁵

3. Second provision.—The second provision refers to cases falling under cl. (3) of s. 235 of the Criminal Procedure Code. Illustration (m) is an example of such cases.

'Constitute an offence'.—This phrase "must be understood to refer to the definitions of the offences as enunciated in the Code itself, irrespective of the identity or non-identity of the evidence whereby the several acts are proved".¹⁶

Section 71 of the Penal Code and s. 235 of the Criminal Procedure Code.—Reading s. 235 with s. 71 we get a four-fold result which may be stated thus.¹⁷—

I. A repetition in the same transaction of several criminal acts of exactly the same character may constitute one crime, e.g., a number of blows on one person, a number of lies in one continuous deposition, or a number of articles stolen at one house-breaking. That is a case covered by s. 71 (see ill. (a)). The greater or lesser number of criminal acts may add to or diminish the heinousness of the offence.

Cases.—Theft of property belonging to two persons.—Where the accused stole property at night belonging to two different persons from the same room of a house, it was held that he could not be sentenced separately as for two offences of theft.¹⁸ Stealing two bullocks at the same time belonging to two different owners, which were tied to the yoke of a cart, was held to constitute only one offence of theft.¹⁹ Where the accused, a guard in charge of a goods train, stole articles belonging to two different persons, from separate bags in a truck, it was held that he could not be convicted and sentenced separately for two distinct offences of theft.²⁰

Dacoity in respect of property belonging to two persons.—Where a gang of dacoits, in pursuance of a common object, viz., robbery, attacked at the same time two houses belonging to two different owners in the same village, it was held that they could not be punished separately on separate charges of dacoiting each house, but could only be punished for one offence of dacoity.²¹

Causing two deaths simultaneously.—Where a person caused the death of two children by a rash and negligent act committed at the same time and place, it was held that he could not be punished separately in respect of the death of each child.²²

II. A single transaction may give rise to either—

(1) **several offences of a different character, each complete in itself and distinct from the other, e.g., criminal breach of trust accompanied by falsification of accounts as a preliminary or a sequel to such breach; or**

¹² *Ram Nath*, (1924) 47 All. 268; *Perianna Muthirian v. Vengu Ayyar*, (1928) 30 Cr. L. J. 322, 28 L. W. 687, 56 M. L. J. 208, [1929] M. W. N. 196, [1929] AIR (M) 21.

¹³ *Rahmatulla*, (1916) P. L. W. 340, 18 Cr. L. J. 321, [1916] AIR (P) 86 (1).

¹⁴ *Lavji Mandan*, (1939) 41 Bom. L. R. 980, [1939] AIR (B) 452; *Bhagat Singh*, (1930) 31 P. L. R. 73, 31 Cr. L. J. 290, [1930] AIR (L) 266; *Thimmappa*, (1907) 7 Cr. L. J. 181.

¹⁵ *Barkat*, (1920) 22 Cr. L. J. 198, [1920] AIR (L) 312 (1).

¹⁶ Per Mahmood, J., in *Wazir Jan*, (1887) 10

All. 58, 69.

¹⁷ *Mahadeogir*, (1912) 9 N. L. R. 26, 29, 14 Cr. L. J. 135, 137.

¹⁸ *Sheikh Moneeah*, (1869) 11 W. R. (Cr.) 38.

¹⁹ *Krishna Shahaji*, (1897) Cr. R. No. 33 of 1897, Unrep. Cr. C. 927; *Nga Po*, (1882) S. J. L. B. 168; *San Hla*, (1889) S. J. L. B. 475.

²⁰ *Har Dial*, (1905) P. R. No. 58 of 1905, 2 Cr. L. J. 708.

²¹ *Nga San Dun*, (1889) S. J. L. B. 444.

²² *Bali Nagappa*, (1896) Cr. R. No. 96 of 1896, Unrep. Cr. C. 852.

(2) several offences of the same character but affecting different persons, e.g., a single gun shot fired with criminal intent which injures two or more persons.

Each such offence is separately indictable and punishable. See sub-section (1) of s. 235 and ill. (b) to s. 71 and ill. (a); (f) and (g) to s. 235.

Where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the Court to impose separate and accumulative sentences.²³ But separate sentences cannot be passed under ss. 323 and 326 in the case of an assault upon a single person.²⁴

Cases.—House-breaking to commit mischief and assault, and mischief and assault.—An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault, and punished separately for each offence. These offences formed part of one transaction. It was held that the sentences were legal.²⁵

House-breaking to commit theft and theft in a house.—A person can be convicted of house-breaking by night to commit theft (s. 457) and of theft in a building (s. 380) and punished separately for the two offences.¹

House-breaking after making preparation for causing hurt or assault and committing of rape.—Where the accused committed house-breaking by night after making preparation to cause hurt or assault (s. 458) and then committed rape (s. 376), it was held that separate sentences for both the offences were legal.²

Criminal intimidation to three persons at one time.—An accused person, who threatened three witnesses, was convicted and sentenced to four months' imprisonment for the threat to each witness. It was held that if a person at one time criminally intimidates three different persons, and each of those persons brings a separate charge against him, he may be convicted for an offence as against each person and be punished separately for each offence.³

Resistance to taking of property by public servant, and assaulting him.—Where the accused objected to accompany a constable who had been directed to produce him before the Court, seized the constable by the arm, and resisted his carrying away a pony which the accused was charged with having misappropriated, it was held that he was guilty of separate offences under ss. 358 and 183, and the infliction of separate sentences for each offence was not prevented by this section.⁴

Rioting and hurt, and rescuing from custody.—The accused were charged with, and convicted of, rioting and causing hurt, the common object of the unlawful assembly being the rescue of the first accused who was detained in lawful custody and the first accused was further convicted of and punished for escape under s. 224 and the other accused for rescue under s. 225. It was held that the punishments under ss. 224 and 225 inflicted in addition to those for rioting and hurt were proper, inasmuch as the offences of rioting and escape and rescue were distinct offences, though parts of the same transaction, and did not come within the meaning of this section.⁵ Where the accused in the course of rioting caused hurt also, it was held that they could be convicted of rioting as well as of causing hurt (s. 323) and separate sentences could be passed.⁶ It has been held that separate convictions are legal under ss. 147 and 353,

²³ *Bateshar*, (1915) 37 All. 628; *Pira*, (1925) 27 P. L. R. 347, 27 Cr. L. J. 818.

²⁴ *Devi Sahai*, (1927) 1 Luck. C. 199, 28 Cr. L. J. 662, [1927] AIR (O) 318.

²⁵ *Nirichan*, (1888) 12 Mad. 36. In this case, *Noujan*, (1874) 7 M. H. C. 375, was not followed. But so far as the question of punishment goes these two cases can be reconciled in view of the amended s. 35 of the Code of Criminal Procedure.

¹ *Kashinath*, (1886) Unrep. Cr. C. 228; *Sital*, (1941) 17 Luck. 518.

² *Labh Singh*, (1922) 6 L. L. J. 111, 24 Cr. L. J. 877, [1923] AIR (L) 291, *Malu*, (1899) 1 Bom. L. R. 142, 23 Bom. 706, F.B., distinguished.

³ *Goolzar Khan*, (1868) 9 W. R. (Cr.) 30.

⁴ *Joyah Mohun Chunder*, (1870) 14 W. R. (Cr.) 19.

⁵ *Anon.*, (1894) 1 Weir 34. Separate sentences for causing hurt and rescuing cattle may be passed: *Anthoni Udaiyan v. Royapudayar*, (1927) 53 M. L. J. 653, [1927] M. W. N. 850, 28 Cr. L. J. 982, [1928] AIR (M) 18.

⁶ *Kakwaru Rai*, (1917) 39 All. 623; *Faqiria*, (1928) 30 Cr. L. J. 295; *Ramdasran Mahton*, (1929) 10 P. L. T. 136, 30 Cr. L. J. 634, [1929] AIR (P) 206; *Sahabraj Singh*, [1933] A. L. J. R. 1178, 34 Cr. L. J. 1099, [1933] AIR (A) 819; *Parmeshwar*, (1940) 16 Luck. 51; *Pesh Mohamad*, (1942) 23 P. L. T. 185, 43 Cr. L. J. 742, [1942] AIR (P) 319.

Penal Code, even when assault is committed in furtherance of the common intention of the unlawful assembly.⁷

Rioting and house-trespass.—Separate sentences for rioting under s. 147 and for house-trespass after preparation for causing hurt under s. 452 can be passed.⁸

Theft and receiving gift to recover stolen property.—Where a person was proved to have committed a theft and also the offence under s. 215, it was held that he might be convicted and sentenced for each of such offences, for the offences were distinct transactions capable of being proved independently of each other. But where the theft is proved not by direct evidence but by inference drawn from the facts which proved the commission of the offence under s. 215 separate convictions and sentences should not be passed.⁹

Theft and lurking house-trespass.—It is possible to commit the offence of lurking house-trespass without stealing anything at all just as it is possible to commit theft in a building without committing lurking house-trespass. The offences are, therefore, quite distinct and hence separate sentences can be passed for each offence.¹⁰

Theft and mischief.—The accused stole a bullock from a jungle, where it was put to graze by its master, a cartman, and then killed it for food. He was convicted of the offence of theft and mischief at one trial and was sentenced separately for each offence. It was held that the sentences were legal.¹¹

Wrongful confinement and assault.—The accused were convicted under ss. 352 and 342 and sentenced separately for each of the offences, the acts found against them being that they seized, dragged, and pushed the complainant to a certain place in order to punish him. It was held that what the accused had been punished for was the whole series of acts, and that series of acts came within the definition both of wrongful confinement and of using criminal force, and, accordingly, the case fell within the second paragraph of this section.¹² Separate sentences may be passed for making a false charge under s. 211 and for giving false evidence under s. 193;¹³ or for kidnapping (s. 363) and for selling for purposes of prostitution (s. 372).¹⁴

Abduction and rape.—Where the accused had forcibly carried away the complainant and had subsequently raped her, it was held that he had brought himself within the purview of s. 366, the moment he forcibly carried her away with the intention required by that section, and the infliction of a separate additional sentence under s. 376 was not contrary to the provisions of this section.¹⁵

Criminal conspiracy and dacoity.—Where a person was convicted for criminal conspiracy (s. 120B) and sentenced to three years' rigorous imprisonment and for dacoity (s. 395) and sentenced to four years' rigorous imprisonment, it was held that this section was not contravened.¹⁶

Rioting and grievous hurt.—The question as to whether a member of an unlawful assembly, some members of which have caused grievous hurt, can be punished for the offence of rioting, as well as for the offence of causing grievous hurt, has led to a divergence of opinion between the High Courts of Calcutta, Patna and Madras on the one hand, and the High Courts of Bombay, Allahabad and Rangoon on the other. All these High Courts, except the Lahore High Court, have unanimously held that where an accused is guilty of riot and has also by his own hands caused grievous hurt, separate sentences may be passed for each of the two offences without regard to the limit of the combined sentences. For the offence of voluntarily causing hurt or of

⁷ *Gendo Uraon*, (1927) 6 Pat. 828; *Prokash Chandra Kundu*, (1914) 41 Cal. 836.

⁸ *Sheo Nath*, (1926) 3 O. W. N. 92 (Sup.), 27 Cr. L. J. 1172.

⁹ *Nga Shein*, (1902) 1 L. B. R. 203.

¹⁰ *Natesa Mudaliar*, (1945) 47 Cr. L. J. 157, [1945] 1 M. L. J. 179, [1945] M. W. N. 106 (1), (1945) 58 L. W. 75 (1), [1945] AIR (M) 330.

¹¹ *Paw Din*, [1937] Ran. 63; *Bhawan Surji*, (1935) 38 Bom. L. R. 164, 60 Bom. 627. Contra, *Rathi*, (1901) 14 C. P. L. R. (Cr.) 159; *Hussain Buksh Mian*, (1924) 3 Pat. 804.

¹² *Eakira Khan*, (1905) 4 C. L. J. 90, 4 Cr.

L. J. 69.

¹³ *Pir Mahomed*, (1885) 10 Bom. 254; *Abdool Azeez*, (1867) 7 W. R. (Cr.) 59.

¹⁴ *Doorga Doss*, (1867) 7 W. R. (Cr.) 68. See also (1869) 4 M. H. C. Appx. 27; *Musst. Mina Nuggerbhatin*, (1865) 3 W. R. (Cr.) 19; *Callachand*, (1867) 7 W. R. (Cr.) 60; *Durzoolla*, (1868) 9 W. R. (Cr.) 33; *Gobind Chunder Roy*, (1871) 16 W. R. (Cr.) 60; *Sorbrai Gwallah*, (1873) 20 W. R. (Cr.) 70.

¹⁵ *Ghulam Muhammad*, (1926) 7 Lah. 484.

¹⁶ *Ghulam Husain*, [1945] All. 127.

voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences. In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences.¹⁷ But where the accused is convicted of rioting and of hurt which he has not himself committed, but for which he is liable under s. 149, there is a difference of opinion. The decision of the Privy Council in *Barendra Kumar Ghosh's case*¹⁸ that s. 149 creates a specific offence upholds the view of the Calcutta High Court in *Nilmony Poddar's case*.¹⁹

The Calcutta High Court in *Nilmony's case* laid down that separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code.²⁰ Where an Excise Sub-Inspector, on receiving information that some persons were illicitly distilling liquor in some jungles, proceeded thither unaccompanied by a police-officer and, finding his information correct, arrested some persons, and took them to a neighbouring village and asked for the assistance of the Panchayat who, instead of giving assistance, collected men and rescued them from custody and assaulted the Excise Sub-Inspector, it was held that separate sentences should not be passed for rioting and assaulting a public servant in execution of his duty when practically the offence of assaulting the public servant was the common object of the unlawful assembly, the members of which committed such rioting.²¹ In this case their Lordships solved the difficulty by considering the separate sentences passed under ss. 147, 353 and 225 as one consolidated sentence so as to meet the offence of which the accused were convicted. Where the accused was sentenced to two years' rigorous imprisonment under s. 147 and a further sentence of three years' imprisonment under s. 325 read with s. 149, both sentences being directed to run concurrently, Sanderson, C. J., held that the infliction of separate punishments for the two offences was illegal under para. 1 of this section and it did not make any difference that the sentences were directed to run concurrently. Cuming, J., expressed the opinion that the prohibition in this section against punishing an accused with the punishment of more than one of the offences was obviously met by making all the sentences which had been imposed run concurrently and that where two separate sentences had been passed the illegality did not necessarily attach to the sentence which was passed second in point of time.²² Where a person was charged with rioting under s. 147 and then by reason merely of being a party to the riot or unlawful assembly became liable under s. 304, by the operation of s. 149, on account that one of the other members of the unlawful assembly committed a fatal assault upon another person in prosecution of the common object, it was held that the case came under para. 1 of this section, and separate sentences on each of the two charges were illegal. The sentence on the charge under s. 147 was set aside.²³

¹⁷ *Bana Punja*, (1892) 17 Bom. 260, F.B.; *Chandra Kant Bhattacharjee*, (1885) 12 Cal. 495; *Mohur Mir*, (1889) 16 Cal. 725; *Ferasat*, (1891) 19 Cal. 105; *Ram Angutha Singh*, (1913) 40 Cal. 511; *Dungar Singh*, (1884) 7 All. 29; *Pershad*, (1885) 7 All. 414, F.B.; judgments of Oldfield and Duthoit, JJ., in *Ram Sarup*, (1885) 7 All. 757, F.B.; *Sothavalan v. Rama Kone*, (1932) 56 Mad. 481, dissenting from *Kunnammal Mayan*, (1927) 53 M. L. J. 656, 28 Cr. L. J. 1004, [1927] AIR (M) 970. Contra, *Bishma*, (1922) 24 Cr. L. J. 629, [1922] AIR (L) 405.

¹⁸ (1924) 52 I. A. 40, 52, 52 Cal. 197, 27 Bom. L. R. 148.

¹⁹ (1889) 16 Cal. 442, F.B.

²⁰ *Nilmony Poddar*, (1889) 16 Cal. 442, F.B., overruling *Loke Nath Sarkar*, (1885) 11 Cal. 349, and approving *Ram Partab*, (1883) 6 All. 121; *Sahadev Ahir*, (1903) 8 C. W. N. 344, 1 Cr. L. J. 199; *Keamuddi Karikar*, (1923) 51 Cal. 79; *Basiruddin alias Basir*, (1927) 31 C. W. N. 532, 28 Cr. L. J. 484, [1927] AIR (C)

981; *Kitabdi*, (1930) 35 C. W. N. 184, 32 Cr. L. J. 890, [1931] AIR (C) 450; *Harendra Barman*, (1930) 35 C. W. N. 345, 33 Cr. L. J. 1, [1931] AIR (C) 606. See *Hansa Pathak v. Bansilal Das*, (1901) 8 C. W. N. 519, 1 Cr. L. J. 449, where an effort is made to distinguish *Nilmony's case*, and an opinion is expressed that the latter decision does not apply to the case of separate sentences for unlawful assembly and theft. This is opposed to the ruling in *Mithoo Singh v. Gopal Lal*, (1899) 8 C. W. N. 761.

²¹ *Hriday Mondal or Bangal v. Jagananda Das*, (1899) 4 C. W. N. 245.

²² *Keamuddi Karikar*, (1923) 51 Cal. 79, followed in *Basiruddin alias Basir*, (1927) 31 C. W. N. 532, 28 Cr. L. J. 484; [1927] AIR (C) 931, not followed in *Raghubar*, (1938) 40 Cr. L. J. 217, [1939] O. W. N. 27, [1939] AIR (O) 91.

²³ *Kitabdi*, (1930) 35 C. W. N. 184, 32 Cr. L. J. 890, [1931] AIR (C) 450.

The Patna High Court has adopted the view of the Calcutta High Court.²⁴ It has, however, held that if the common object of the accused is to commit an assault, but, in prosecution of that object, grievous hurt or death is caused by the members thereof, this section will not apply and separate sentences under s. 147 or s. 148 and s. 324 or s. 325 read with s. 149 will not be illegal.²⁵

The Madras High Court has followed the Calcutta High Court.¹ It has held, after discussing the opposite views of the Calcutta and the Bombay High Courts, that separate sentences for an offence under ss. 147 and 323 on the one part and ss. 149 and 325 on the other or indeed any constructive offence with reference to s. 149 are illegal under the first paragraph of this section, even though the sentences are made to run concurrently. Accused were convicted of offences under ss. 147 and 323 and under ss. 149 and 325. For each of the convictions under ss. 147 and 323 each of them was sentenced to six months' rigorous imprisonment, and for each of the convictions under ss. 149 and 325 each of them was sentenced to six months' rigorous imprisonment, and the sentences were made to run concurrently. It was held that the separate convictions in such cases were proper, but that the separate sentences though made to run concurrently should not have been passed.²

A Full Bench of the Bombay High Court has decided that where a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of s. 149, it is not illegal to pass two sentences, one for riot, and another for hurt; provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences.³ The Bombay view will require reconsideration as the Privy Council has observed that s. 149 creates a specific offence.⁴

Under the amended s. 35 of the Criminal Procedure Code it is competent to a Court to pass separate sentences for offences punishable under ss. 148 and 326, provided the sentences so passed could be passed under any of the two sections, and provided they are not in excess of the powers of the Court passing them.⁵ In this case the application of s. 149 did not arise. The Madras High Court has dissented from this case and held that separate sentences for an offence under ss. 147 and 323 on the one part and ss. 149 and 325 on the other or indeed any constructive offence with reference to s. 149 are illegal under the first paragraph of this section, even though the sentences are made to run concurrently.⁶

The several decisions of the Allahabad High Court are not unanimous on this question. In an early case *Straight, J.*, held that a member of an unlawful assembly, some members of which had caused grievous hurt, could not lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt.⁷ This case was distinguished and the point was not decided in the full bench case of *Ram Sarup*⁸ because it was found there as a fact that the accused persons had besides taking part in the unlawful assembly committed individual acts of violence with their own hands; but the judgment of *Broadhurst, J.*, expresses a contrary opinion. In two subsequent cases, however, the ruling in *Ram Partab's* case was not approved of. In the first case,⁹ the facts were that one M, in prosecution of the common object of an unlawful assembly, caused grievous hurt with his own hand. M and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting (s. 147) and grievous hurt (s. 325), and were each sentenced to separate terms of imprisonment for each offence. It was held that the sentences were not illegal as the combined periods of imprisonment did not exceed the maximum punishment which could have been awarded under s. 325. *Edge,*

²⁴ *Pattu Singh*, (1918) 3 P. L. J. 641, 20 Cr. L. J. 37, [1918] AIR (P) 227; *Nemdhari Singh*, (1920) 2 P. L. T. 91, 22 Cr. L. J. 449, [1921] AIR (P) 432; *Bajo Singh*, (1928) 8 Pat. 274; *Ramnath Rai*, (1921) 2 P. L. T. 549, 22 Cr. L. J. 460, [1921] AIR (P) 374.

²⁵ *Mathura Rai*, (1921) 2 P. L. T. 316, 22 Cr. L. J. 702, [1921] AIR (P) 323 (2).

¹ *Krishna Ayyar*, [1918] M. W. N. 526, (1918) 8 L. W. 225, 20 Cr. L. J. 145, [1919] AIR (M) 353.

² *Ponniiah Lopes*, (1938) 57 Mad. 643, not followed in *Raghubar*, (1938) 40 Cr. L. J. 217, [1939] O. W. N. 27, [1939] AIR (O) 91; *Mekraj*

Allisahib, [1939] 2 M. L. J. 36 (1), [1939] M. W. N. 609, (1938) 50 L. W. 918, 41 Cr. L. J. 17, [1939] AIR (M) 787.

³ *Bana Punja*, (1892) 17 Bom. 260, F.B.; *Tokha*, (1895) P. R. No. 8 of 1895.

⁴ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 52, 52 Cal. 197, 27 Bom. L. R. 148.

⁵ *Piru Rama*, (1925) 27 Bom. L. R. 1371, 49 Bom. 916.

⁶ *Ponniiah Lopes*, (1938) 57 Mad. 643.

⁷ *Ram Partab*, (1888) 6 All. 121.

⁸ (1885) 7 All. 757, F.B.

⁹ *Bisheshar*, (1887) 9 All. 645, 650.

C. J., said: "The object of s. 149, as I think, in such a case as the present, is to make it clear that an accused who comes within that section, cannot put forward as a defence that it was not his hand which inflicted the grievous hurt". In the second case¹⁰ *Mahmood, J.*, said: "It seems to me that where certain acts constitute more than one offence, whether such offences do or do not fall under the purview of s. 71 of the Indian Penal Code, and the accused is charged and tried for more than one offence and the evidence establishes those offences, the Court is bound to convict him of those offences, though in awarding punishment the provisions of s. 71 of the Indian Penal Code and of s. 35 of the Code of Criminal Procedure would of course have to be duly kept in view". Subsequently in a case,¹¹ *Walsh, J.*, observed: Whether "...there are different definitions of the same offence, or whether the same offence is provided for in different sections or by separate and different provisions in the Code, care should be taken that under no circumstances should the accused be sentenced to a greater punishment than the highest penalty contained in one of the provisions under which he may be convicted. He may be convicted of rioting and also of causing grievous hurt by mere membership of an unlawful assembly, provided the sentence ultimately passed on him does not exceed that provided in section 325". In a subsequent case¹² the Court has adopted the Bombay view. It has held that where more injuries than one are caused by the members of an unlawful assembly they can be convicted of offences both under s. 147 and under s. 323 read with s. 149. In such a case, as soon as the first injury is caused to any person, force is used and the offence of rioting is complete. Subsequent injuries, though inflicted in pursuance of the same common object, would be distinct injuries justifying a conviction under s. 323.

The Rangoon High Court adopting the Bombay view has held that in cases of rioting under s. 147, resulting in grievous hurt, convictions and separate sentences under s. 325 are legal against all the accused who actually join in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are, under s. 149, liable for all the results.¹³

The former Chief Court of the Punjab distinguished the Calcutta Full Bench case of *Nilmony Poddar in Nur Khan*,¹⁴ in which it held that separate sentences under ss. 147 and 325 were legal inasmuch as each of the offenders might have been convicted individually under s. 325, and further under ss. 149 and 325. It also held that this section was inapplicable to the case of convictions and separate sentences under s. 147 and ss. 149 and 325.¹⁵ On the question going before a full bench, the following two propositions were laid down: (1) Separate sentences for the offence of rioting and grievous hurt cannot be legally imposed upon a member of an unlawful assembly where the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting. (2) Separate sentences cannot be awarded where the first clause of this section applies, and the offence committed is made up of parts—any of which part is itself an offence, but they can be legally awarded where distinct offences not made up of parts are proved to have been committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or where the members of it knew that such offences were likely to be committed in prosecution of that object.¹⁶ The Lahore High Court has held that separate sentences under ss. 147 and 323 are not illegal,¹⁷ although in practice it is undoubtedly better to give a single sentence for all the offences or to order the sentences to run concurrently.¹⁸ The application of s. 149 did not arise in these cases.

¹⁰ *Wazir Jan*, (1887) 10 All. 58, 63.

¹¹ *Dharamdeo Singh*, (1916) 14 A. L. J. R. 738, 740, 17 Cr. L. J. 418, 419, [1916] AIR (A) 49.

¹² *Chhida*, (1925) 24 A. L. J. R. 178, 27 Cr. L. J. 287, [1926] AIR (A) 225.

¹³ *Nga Son Min*, (1923) 3 B. L. J. 49, 25 Cr. L. J. 1305, [1924] AIR (R) 291.

¹⁴ (1893) P. R. No. 31 of 1894.

¹⁵ *Tokha*, (1895) P. R. No. 8 or 1895.

¹⁶ *Bhugwan Singh*, (1900) P. R. No. 4 of 1901, F.B.; *Mangal Singh*, (1916) P. R. No. 31 of 1916, 18 Cr. L. J. 372, [1917] AIR (L)

358. In *Manak Chand*, (1926) 27 Cr. L. J. 834, [1926] AIR (L) 581, separate sentences under ss. 147 and 353 were declared illegal. The Oudh Chief Court is of opinion that separate sentences under ss. 147 and 452 are legal; *Sheo Nath*, (1926) 27 Cr. L. J. 1172, 3 O. W. N. 92 (Sup.).

¹⁷ *Rahman*, (1926) 27 Cr. L. J. 824, [1926] AIR (L) 521.

¹⁸ *Ali Akbar*, (1928) 30 Cr. L. J. 575, [1929] AIR (L) 670; *Kehar Singh*, (1934) 35 P. L. R. 587, 36 Cr. L. J. 294, [1934] AIR (L) 614.

The Nagpur High Court has held that under s. 71 separate sentences for offences under ss. 148 and 325 read with s. 149 cannot be passed against the members of the unlawful assembly except against the particular member who actually caused grievous hurt; such member would be liable to two separate punishments.¹⁹

The Chief Court of Sind has held that it is not correct to say that s. 71 relates not to sentences but to punishments. As the punishment is the sentence, no distinction can be drawn between the two. Section 149 creates a separate offence. Consequently in case of rioting and hurt, where s. 149 is applied, s. 71 must apply, and though separate convictions may be recorded for these separate offences for which a man may be charged and tried at the same trial, according to the provisions of s. 235, Criminal Procedure Code, separate sentences should not be passed.²⁰

The Oudh Chief Court has held that separate sentences under ss. 147, 426/149, 452/149, 325/149 are not illegal.²¹

III. The same series of acts may constitute different offences. All may be charged, but only one offence can be regarded as committed for the purpose of inflicting punishment, e.g., a person who sets fire to a warehouse. Here his act is an offence under s. 435, and also under s. 436, and, though he may be charged for both, he cannot be punished for more than one of these offences. Only one offence has been committed and the punishment must not exceed that applicable to the graver offence. See cl. 2 of s. 71 and sub-s. (2) s. 235.

It is a general rule that when, in the same penal Statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it be so expressly provided.²²

Cases.—An accused person cannot be punished at the same time for committing an offence of mischief by fire with intent to destroy a warehouse (s. 436) and for the offence of mischief by fire (s. 435).²³ Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, it was held that she could not be convicted and punished under s. 304 and also under s. 317, but under s. 304 only.²⁴

A person cannot be punished for rioting and also for being a member of an unlawful assembly;²⁵ for rioting and for wrongful confinement, when the common object of the unlawful assembly is the wrongful confinement;¹ for rioting and assaulting a public servant in execution of his duty when the offence of assaulting is the common object of the unlawful assembly;² for rioting with the common object of causing hurt and also for causing hurt;³ for rioting (s. 147) and rescuing a prisoner (s. 225) when the common object of the unlawful assembly was to commit the offence under s. 225;⁴ for counterfeiting coin (s. 232) and for possessing materials for counterfeiting (s. 235);⁵ for rioting with the common object of committing theft and also for theft;⁶ for driving on a public road so rashly as to endanger human life (s. 279) and causing grievous hurt by such rash driving (s. 338);⁷ for causing grievous hurt by a dangerous weapon (s. 326), and for committing robbery or dacoity with attempt to cause grievous hurt (s. 397);⁸ for causing hurt in committing robbery (s. 394) and for using any deadly weapon in committing dacoity (s. 397);⁹ for wrongful confinement (s. 332) and for robbery (s. 392)

¹⁹ *Baldeo Singh*, [1940] N. L. J. 46, (1939) 41 Cr. L. J. 360, [1940] AIR (N) 120.

²⁰ *Haji*, [1948] Kar. 132.

²¹ *Dulan (Dulam) Dayal Singh*, [1944] O. W. N. 275, 46 Cr. L. J. 587.

²² Per West, J., in *Dod Basaya*, (1874) 11 B. H. C. 13, 15; *Francis Xavier*, (1890) Unrep. Cr. C. 506.

²³ *Dod Basaya*, (1874) 11 B. H. C. 13.

²⁴ *Banni*, (1879) 2 All. 349.

²⁵ *Meelan Khalifa v. Dwarakanath Goopto*, (1864) 1 W. R. (Cr.) 7.

¹ *Alim Sheikh v. Shahazada Singh Burkundaz*, (1904) 8 C. W. N. 483, 1 Cr. L. J. 365; *Ameeruddi Pramanick*, (1924) 40 C. L. J. 306, [1925] AIR (C) 217.

² *Hriday Mondal or Bangal v. Jagananda*

Das, (1899) 4 C. W. N. 245.

³ *Hardit Singh*, (1911) 12 P. L. R. 588, 12 Cr. L. J. 236; *Nemdhari Singh*, (1920) 2 P. L. T. 91, 22 Cr. L. J. 449, [1921] AIR (P) 432; *Mathura Rai*, (1921) 2 P. L. T. 316, 22 Cr. L. J. 702, [1921] AIR (P) 323.

⁴ *Sarat Chandra Ghosh*, (1922) 37 C. L. J. 171, 24 Cr. L. J. 851, [1923] AIR (C) 408.

⁵ *Bishan Das*, (1922) 24 Cr. L. J. 326, [1924] AIR (L) 78.

⁶ *Prayag Gope*, (1924) 3 Pat. 1015.

⁷ *Nageswara Rao*, [1935] M. W. N. 924.

⁸ *Kottaiyadai*, [1915] M. W. N. 544, 16 Cr. L. J. 615, [1916] AIR (M) 582.

⁹ *Mamrez*, (1924) 26 Cr. L. J. 1350, [1926] AIR (L) 47.

when but for wrongful confinement a conviction for robbery could not be made;¹⁰ for adultery (s. 497) and for enticing for the purpose of illicit intercourse (s. 498);¹¹ for culpable homicide and for being a member of an unlawful assembly armed with deadly weapons;¹² for abetment of abduction of a woman (ss. 109 and 498) and for her wrongful confinement (s. 343);¹³ for dishonestly receiving stolen property (s. 411) and for assisting in the concealment of stolen property (s. 414);¹⁴ for dishonestly receiving or retaining stolen property (s. 411) which he has obtained by committing criminal breach of trust (s. 409);¹⁵ for abducting a child with intent dishonestly to take movable property (s. 369) and also for the theft of a part of the movable property (s. 379) which he intended dishonestly to take by means of the abduction;¹⁶ for kidnapping with intent secretly and wrongfully to confine a person (s. 365) and also for putting a person in fear of death or of grievous hurt in order to commit extortion;¹⁷ for distilling spirit and possessing the spirit obtained by such distillation;¹⁸ for performing a part in the process of counterfeiting King's coin (s. 232) and for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coin.¹⁹

IV. An act, in itself an offence, may become either an aggravated form of that offence, or a different offence, when combined with some other acts, innocent or criminal. Here we have a compound offence which, as well as its component minor offence, may be charged under s. 235, sub-s. (3). But if the compound offence is made out, no punishment can be awarded beyond that which can be given in respect of it in virtue of s. 71. For instance, upon the same facts a person may be charged for using criminal force under s. 352 and under s. 152 for the same force against a public servant. But though convicted on both charges, he could not receive a higher punishment than that which is provided by the latter section.

In *Malu Arjun's* case²⁰ a Full Bench of the Bombay High Court held (1) that a person, who has committed house-breaking in order to commit theft (s. 457) and theft (s. 380), can be charged with, and convicted of, each of these offences; (2) that a Court, in awarding punishment (under this section), should pass one sentence for either of the offences in question, and not a separate one for each offence; (3) that if two sentences are nevertheless passed, and the aggregate of them did not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an *irregularity* only, and not an *illegality*. The Court pointedly remarked: "We are also of opinion that, looking at the illustration and explanation added to section 35 of the Criminal Procedure Code, 1898, it is the intention of the legislature that a Court, in awarding punishment under the provisions of section 71, Indian Penal Code, should pass one sentence for either of the offences in question, and not a separate one for each offence." The illustration and explanation added to s. 35 by Act V of 1898 are now repealed by Act XVIII of 1923 and the word 'distinct' in s. 35 is also deleted. The Statement of Objects and Reasons stated: "The existing Explanation and Illustration to s. 35 have occasioned considerable misunderstanding. It is therefore proposed to omit them and state definitely that s. 35 must be read subject

¹⁰ *Mattaparti Panda Subbadu*, (1889) 1 Weir 445.

¹¹ *Pochun Chung*, (1865) 2 W. R. (Cr.) 35.

¹² *Rubbeeoolah*, (1867) 7 W. R. (Cr.) 18.

¹³ *Ishwar Chandra Jogee*, (1864) W. R. (Gap No.) (Cr.) 21.

¹⁴ (1868) 4 M. H. C. Appx. 13.

¹⁵ *Shunkur*, (1870) 2 N. W. P. 312.

¹⁶ *Noujan*, (1874) 7 M. H. C. 375.

¹⁷ *Po Lan*, (1912) 6 L. B. R. 160, 6 B. L. T. 77, 14 Cr. L. J. 167.

¹⁸ *Nga San Dun*, (1904) U. B. R. (P.C.) 1, 1 Cr. L. J. 552.

¹⁹ *Hayat*, (1904) 5 P. L. R. 404, 1 Cr. L. J. 946. See also *Ganu Ladu*, (1864) 2 B. H. C. (Cr. C.) 126; *Zora Karubeg*, (1867) 4 B. H. C. (Cr. C.) 12; *Bhyrub Seal*, (1864) W. R. (Gap No.) (Cr.) 27; *Sheikh Muddun Ally*, (1864) 1 W. R. (Cr.) 27; *Bassoo Rannah*, (1865) 2 W. R. (Cr.) 29; *Sreemunt Adup*, (1865) 2 W. R. (Cr.) 63; *Bichuk Aheer v. Auhuck Bhooonea*, (1866) 6 W. R. (Cr.) 5; *Kashee Nath Chungo*, (1867) 8 W. R. (Cr.)

84; *Shama Sheikh*, (1867) 8 W. R. (Cr.) 35; *Juglal*, (1868) 9 W. R. (Cr.) 5; *Radhakanth Paul*, (1868) 9 W. R. (Cr.) 12; *Seeb Churn Haree*, (1869) 11 W. R. (Cr.) 12; *Chander Kani Lahoree*, (1869) 12 W. R. (Cr.) 2; *Niruttun Sein*, (1871) 16 W. R. (Cr.) 45; *Kalisankar Sandyal*, (1869) 3 Beng. L. R. (A. Cr. J.) 14; *Dina Sheikh*, (1868) 3 Beng. L. R. (A. Cr. J.) 15n., 10 W. R. (Cr.) 63; *Ramdihal*, (1898) 3 C. W. N. 174; (1871) 6 M. H. C. Appx. 47; *Veerawami*, (1899) 2 Weir 35; *Lalawan Singh*, (1886) 1 Agra 31; *Budh Singh*, (1879) 2 All. 101; *Mungroo*, (1874) 6 N. W. P. 298.

²⁰ (1899) 1 Bom. L. R. 142, 143, 23 Bom. 706, 709, F.B., followed in *Wadhawa*, (1917) P. R. No. 46 of 1917, 18 P. L. R. 424, 19 Cr. L. J. 223, [1918] AIR (L) 297. See *Anwar-ihhan valad Gulshan*, (1872) 9 B. H. C. 172, F.B.; *Gulam Abas*, (1875) 12 B. H. C. 147; *Tukaya bin Tamana*, (1875) 1 Bom. 214; *Sakharam Bhau*, (1886) 10 Bom. 408.

to s. 71". Points (2) and (3) of the decision in *Malu Arjun* are rendered obsolete by the amendment of s. 35, Criminal Procedure Code. The result of the amendment is to restore the view taken in *Bana Punja's* case.²¹ The Court may now award separate sentences for offences under s. 380 and s. 454,²² or under s. 382 and s. 457. The Chief Court of Oudh has held likewise.²³

The Calcutta High Court held that house-breaking by night and theft form a single and an entire offence and cannot be punished separately.²⁴ In one case²⁵ it held that a person may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though, if the Judge considers the punishment for the first sufficient, he need not award any additional sentence for the second. But the infliction of separate punishments does not violate the law, provided that the aggregate punishment awarded is not in excess of what the Court could inflict for either of the offences.¹ These decisions are no longer of any authority in view of the amended s. 35 of the Code of Criminal Procedure. The Calcutta High Court has considered the effect of the amendment of s. 35, Criminal Procedure Code, and held that where a person is convicted at one trial of the offence of house-breaking with intent to commit theft (s. 457) and of the commission of theft after such house-breaking (s. 380), he can be sentenced to separate sentences in respect of each of those offences. The Court observed: "It would seem...that under the Code of 1898 the Court would not have had power to punish the offender for more than one of these offences. But under the present Code no reference is made to distinct or separable offences, and it is not necessary to consider whether the offence of house-breaking with intent to commit theft and the commission of theft after such house-breaking are distinct offences. For the application of s. 35 we have not only to consider whether the offences are of the nature described in s. 71 of the Indian Penal Code so that the punishment for more than one of the offences is forbidden by that section. Section 71 is in the following terms. The first paragraph provides...It cannot be said that either the house-breaking by night with intent to commit an offence or theft from a dwelling house are offences made up of parts. The offence of house-breaking with intent to commit theft is complete as soon as the house-breaking with that intent is committed. The offender would be liable to conviction even if he was frightened away after breaking into the house without committing theft. Also theft from a dwelling house can be committed without breaking into the house. The next paragraph of s. 71 is as follows...Here there is no case of offences falling within two or more separate definitions. The third paragraph is...Here also the several acts of house-breaking and theft when combined do not constitute a different offence. The case is not covered by the last two paragraphs with reference to which it is provided that the offender shall not be punished with a more severe punishment than the Court which tries him can award for any one of such offences. It would therefore appear that there is nothing in s. 71 of the Indian Penal Code that in any way restricts the power of Court under s. 35 of the Code of Criminal Procedure of 1923, and under that section the punishments for two offences of which a person is convicted at one trial are to commence one after the expiration of the other unless the Court directs that such punishment shall run concurrently".²

The Patna High Court has held that as s. 35, Criminal Procedure Code, now stands, there is nothing to prevent the Court passing separate sentences for offences under ss. 457 and 380 of the Penal Code. But the question is not of much practical importance as in an overwhelmingly large number of cases the punishment provided for any of these two offences will be sufficient, and if the Court of appeal finds that the trial Court has wrongly passed two separate sentences but the sentences taken together are not excessive, they can be consolidated.³

²¹ (1892) 17 Bom. 260, F.B. *Dhondi Bapu Bhaphkar*, (1906) 8 Bom. L. R. 850, 4 Cr. L. J. 445, is no longer of any authority.

²² *Yeshaba Sakhoba*, (1938) 40 Bom. L. R. 927, 40 Cr. L. J. 48, (1938) AIR (B) 463; *Idris*, (1939) 20 P. L. T. 736, 40 Cr. L. J. 751, [1939] AIR (P) 349.

²³ *Sital*, (1941) 17 Luck. 513.

²⁴ *Tonaokoch*, (1865) 2 W. R. (Cr.) 63; *Chytum Bowra*, (1866) 5 W. R. (Cr.) 49; *Jogeen Pullee v. Nobo Pullee*, (1865) 6 W. R. (Cr.) 48; *Mus-sahur Daoudh*, (1866) 6 W. R. (Cr.) 92; *Sahrae*, (1867) 8 W. R. (Cr.) 31.

²⁵ *Tincouree*, (1864) W. R. (Gap No.) (Cr.) 31.

¹ *Fakira Khan*, (1905) 4 C. L. J. 90, 4 Cr. L. J. 69.

² *Kanechan Malla*, (1925) 41 C. L. J. 563, 565, 26 Cr. L. J. 1253, [1925] AIR (C) 1015.

³ *Idris*, (1937) 40 Cr. L. J. 751, 20 P. L. T. 736, [1939] AIR (P) 349. In an earlier decision it had held that an accused person convicted of house-breaking followed immediately by theft is liable to punishment under s. 457 only: *Makhra Dusadh*, (1926) 5 Pat. 464, [1926] AIR (P) 367.

The Madras High Court has held that an accused, convicted under s. 369 for abducting a child with intent dishonestly to take movable property, cannot also be punished for the theft of a part of the movable property which he intended dishonestly to take through means of the abduction.⁴ Under the present law he can be punished separately and the decision is obsolete.

The Allahabad High Court has held that where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, he could not receive a punishment more severe than might have been awarded for either of such offences. Turner, J., said: "This provision of the law does not,...prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offences collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination".⁵ This view was approved of in a later case in which it was laid down that where more offences than one are proved in respect of which the accused has been charged and tried, a conviction for each offence must follow, whether this section applies to the case or not; and, subject to the provisions of this section, a separate sentence must be passed in respect of each such conviction. In this case the accused were tried for offences under ss. 170 and 383, committed in the same transaction, and it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion. It was held that the former offence was completed before the latter had begun; and that separate sentences for each offence were not illegal.⁶ The view taken by Straight, J., in *Ajudhia's* case⁷ was not approved of. In *Ajudhia's* case, Straight, J., observed: "Where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved". In this case a person who broke into a house by night and committed theft therein was charged with and tried for offences under ss. 380 and 457, and was convicted of both those offences, and punished for each with rigorous imprisonment for eighteen months. The High Court convicted him of the offence under s. 457 and sentenced him to rigorous imprisonment for three years, and acquitted him of the offence under s. 380. This case was decided under the Criminal Procedure Code of 1872 (Act X of 1872). In a case decided under the Criminal Procedure Code of 1882 (Act X of 1882) by Straight and Broadhurst, JJ., it was held that, under ss. 35 and 235 of the Criminal Procedure Code, a Magistrate might legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, for house-breaking in order to the commission of theft, and theft, the two offences forming part of the same transaction and being tried together. But a Sessions Judge trying such a case would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454, and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed thefts.⁸ These decisions are no longer of any authority in view of the amended s. 35 of the Code of Criminal Procedure.

The Allahabad High Court had held that when a man is found guilty of a major offence it is unreasonable that he should also be severely punished for a minor offence included in it.⁹ The offence of a public servant framing an incorrect document with intent to cause injury under s. 167 is included in the offence of forging a document and using it as genuine under ss. 467 and 471 and a conviction both under the provisions of s. 167 and ss. 467-471 is not maintainable.¹⁰

The Chief Court of Sind has held that as s. 149 of the Code creates a separate

⁴ *Noujan*, (1874) 7 M. H. C. 375.

⁵ *Budh Singh*, (1879) 2 All. 101, 104.

⁶ *Wazir Jan*, (1887) 10 All. 58.

⁷ (1880) 2 All. 644, 646.

⁸ *Zor Singh*, (1887) 10 All. 146.

⁹ *Mahmud Ali Khan*, (1933) 55 All. 557.

¹⁰ *Gulzari Lal*, (1926) 3 O. W. N. 760, 28 Cr. L. J. 90, [1926] AIR (O) 615.

offence, in cases of rioting and hurt, where s. 149 is applied, s. 71 must apply, and that, therefore, though separate convictions may be recorded for these separate offences for which a man may be charged and tried at the same trial, according to the provisions of s. 235 of the Criminal Procedure Code, separate sentences should not be passed. The appellate Court would not interfere if the sentences passed were concurrent and any one did not exceed the sentence which could lawfully be passed for any such offence; that would be a mere irregularity not calling for interference from the appellate Court.¹¹

Amendment.—The last three clauses of the section were added by Act VIII of 1882, s. 4.

Attempt and abetment.—A person cannot be separately punished for attempting as well as for abetting the same offence.¹²

PRACTICE.

A Magistrate of the second class convicted the accused under several sections and sentenced them to several terms amounting to nine months. It was held that this section did not apply and the Magistrate was empowered to pass separate sentences for different offences.¹³

Lahore Rule.—Where a person is convicted of an offence which is made up of parts each of which constituted an offence or when a person is convicted of more offences than one, the limitations imposed by section 71, Indian Penal Code, and section 35, Code of Criminal Procedure, must be adhered to. When a person is convicted of more than one offence, the Court should be careful to pass a separate sentence for each offence, so that if the conviction is set aside on appeal with respect to one of the offences, there will be no room for doubt as to the sentences passed with respect to the rest. The Court has a discretion to make such sentences run concurrently, and this discretion should be exercised so as to make the effective sentence proportionate to the gravity of the offence. Under section 397 of the Criminal Procedure Code (as amended in 1923), the Court has now power to order, in the case of an accused person, who is already undergoing imprisonment for another offence, that a subsequent sentence of imprisonment passed on him shall take effect at once and run concurrently with the sentence he is undergoing.

It happens at times that a sentence which a judge or magistrate can pass under the law is unsuitable in view of all the circumstances of the case. In such cases all that can be done is to make a recommendation to the Provincial Government to take action under sections 401 and 402 of the Criminal Procedure Code. When a Sessions Judge or a Magistrate passing a sentence wishes a case to be brought to the notice of the Provincial Government for remission or commutation of the punishment, he should submit the recommendation with his proceedings through the High Court; otherwise the High Court may hear in appeal a case in which Government has remitted or commuted punishment, without knowing of such remission or commutation.¹⁴

Burma Circular.—When a person is convicted at one trial of two or more distinct offences, it is not necessary for the Court to pass a separate sentence for each offence; the first sentence of sub-section 1 of s. 35 (Code of Criminal Procedure) is permissive, not mandatory.¹⁵

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful¹ of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.

COMMENT.

This section applies only to cases where the actual facts of the commission of one of several offences are established but there is doubt as to the application of the law to the proved facts.

¹¹ *Haji*, [1943] Kar. 132, 147.

¹² *Fatehkhani*, (1906) 8 Bom. L. R. 855, 4 Cr. L. J. 450.

¹³ *Dharam Das*, (1910) 33 All. 48.

¹⁴ L. H. C. R. & O. (1942) Vol. III, Ch. 19A,

p. 3.

¹⁵ B. C. M., s. 717, p. 294.

The authors of the Code observe : "This provision is intended to prevent an offender whose guilt is fully established from eluding punishment, on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

"Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences, neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder; but which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that it is exactly consonant to the truth of the facts. If the Court find both A and B guilty of murder, or of aiding murder, the Court affirms that which is not literally true; and on all occasions, but especially in judicial proceedings, there is a strong presumption in favour of literal truth. If the Court finds that A has either murdered Z or aided B to murder Z, and that B has either murdered Z or aided A to murder Z, the Court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment.

"It is chiefly in cases where property has been fraudulently appropriated that the necessity for such a provision as that which we are considering will be felt. It will often be certain that there has been a fraudulent appropriation of property; and the only doubt will be, whether this fraudulent appropriation was a theft or a criminal breach of trust. To allow the offender to escape unpunished on account of such a doubt would be absurd. To subject him to the punishment of theft, which is the higher of the two crimes, between which the doubt lies, would be grossly unjust. The punishment to which he ought to be liable is evidently that of criminal breach of trust; but that a Court should convict an offender of a criminal breach of trust, when the opinion of the Court perhaps is, that it is an even chance, or more than an even chance, that no trust was ever reposed in him, seems to us an objectionable mode of proceeding. We will not, in this stage of our labours, venture to lay it down as an unbending rule that the tribunals ought never to employ phrases which, though literally false, are conventionally true. Yet we are fully satisfied that the presumption is always strongly in favour of that form of expression which accurately sets forth the real state of the facts. In the case which we have supposed, the real state of the facts is, that the offender has certainly committed either theft or criminal breach of trust, and that the Court does not know which. This ought, therefore, in our opinion, to be the form of the judgment"¹⁶

1. 'Doubtful'.—This section does not apply to a case where the doubt is only as to the existence of particular facts. It applies to cases in which the law applicable to a certain set of facts is doubtful, by reason of the nature of the single act or series of acts done, and in which it is charged, or found proved, that the act or series of acts constitutes one or more or some one of several offences, the doubt being on a matter of law only.¹⁷ To authorize a conviction under this section the doubt must, therefore, be as to which of the offences the accused has committed, not whether he has committed either.

P R A C T I C E .

Procedure.—The Criminal Procedure Code¹⁸ says: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences". The illustrations clearly bring out the purport of this section. A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust

¹⁶ Note A, pp. 105, 106.

¹⁷ *Khan Muhammad*, (1887) P. R. No. 111

of 1887; *Jamurha*, (1875) 7 N. W. P. 187.

¹⁸ Section 236.

or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating. A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

When the conviction is under the Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative.¹⁹

Punishment.—When an accused person is convicted in the alternative, one of the offences of which he might be guilty being murder, punishable under s. 302, this section so far overrides s. 302 as to admit in such a case of a less punishment than transportation for life being inflicted.²⁰ Where the charge is framed in the alternative in respect of offences under ss. 302 and 201, the position may arise as contemplated by this section. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty. Such a finding is in accordance with s. 367 (3) of the Criminal Procedure Code, and will have the consequence that under this section the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.²¹

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment,¹ the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion² or portions of the imprisonment to which he is sentenced, not exceeding three months³ in the whole, according to the following scale, that is to say—

a time not exceeding one month⁴ if the term of imprisonment shall not exceed six months :

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year :

a time not exceeding three months if the term of imprisonment shall exceed one year.

COMMENT.

Solitary confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners.

This section gives the scale according to which solitary confinement may be inflicted. In England the power to impose solitary punishment, though it was very rarely exercised by a criminal Court as part of its sentence, has been done away with by 56 & 57 Vic., c. 54. Under the section solitary confinement can only be inflicted where the Court has power to sentence an offender to rigorous imprisonment.

1. 'Offence for which under this Code the Court has power to sentence him to rigorous imprisonment'.—A sentence of solitary confinement can be inflicted only for offences under the Penal Code. It cannot be awarded for offences under Special or Local Acts.²²

2. 'Any portion'.—These words imply that the solitary confinement if inflicted for the whole term of imprisonment is illegal.²³ A prisoner was convicted of hurt and

¹⁹ Section 367 (3), Criminal Procedure Code.

²⁰ *Sahel Singh*, (1906) 26 A. W. N. 93, 3 Cr. L. J. 364.

²¹ *Nebti Mandal*, (1939) 19 Pat. 369.

²² *Gholam Hoosain*, (1866) P. R. No. 120 of 1866; *Hurnarain*, (1870) P. R. No. 20 of 1870; *Munawar*, (1874) P. R. No. 4 of 1875; *Mukh*

Ram, (1879) P. R. No. 24 of 1879; *Gurdit Singh*, (1889) P. R. No. 17 of 1889; *Nga Kun Ba*, (1899) P. J. L. B. 554; *Bidha*, (1923) 46 All. 114; *Nazir Sing*, (1923) 25 Cr. L. J. 120, [1924] AIR (L) 667.

²³ *Nyan Suk Mether*, (1869) 3 Beng. L. R. (A. Cr. J.) 49.

sentenced to fourteen days' rigorous imprisonment, the whole of which was ordered to be passed in solitary confinement. The High Court quashed the order as illegal.²⁴

3. '**Not exceeding three months**'.—In the case of simultaneous convictions, the award of separate terms of solitary confinement, which in the aggregate exceed three months, is legal;²⁵ but, as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence. And, in a later case,¹ in which none of these cases was referred to, it was held that such a sentence should not be passed.² The Rangoon High Court has laid down that cumulative sentences of solitary confinement are contrary to the intention of this section.³ Solitary confinement must be a portion of the substantial sentence of rigorous imprisonment, and if the substantive sentences are to be consecutive the periods of solitary confinement cannot possibly be concurrent.⁴

4. '**One month**'.—One month signifies thirty days.⁵

Summary trial.—It is not illegal to impose solitary confinement as a part of the sentence in a case tried summarily.⁶

Solitary confinement for imprisonment in lieu of fine.—Where imprisonment does not form part of the substantive sentence, solitary confinement cannot be awarded;⁷ so also, it cannot be awarded as part of the imprisonment in lieu of fine.⁸

Solitary confinement for imprisonment in lieu of whipping.—An award of solitary confinement to a person sentenced to rigorous imprisonment in lieu of whipping is not illegal.⁹

Solitary confinement as part of imprisonment in default of furnishing security for good behaviour.—The imprisonment which a person may be ordered to undergo in default of furnishing security for good behaviour cannot be made to include solitary confinement.¹⁰

Amendment.—The words "shall not exceed one year" were substituted for "be less than a" by Act VIII of 1882, s. 5.

PRACTICE .

Though it is not illegal, yet, as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence.¹¹

Cumulative sentences of solitary confinement are contrary to the intention of this section.¹²

A Magistrate has no power to direct that solitary confinement should be executed in the first week of every month.¹³

It is not enough for a Court to say that the accused is sentenced to the authorized amount of solitary confinement, but the exact period should be clearly mentioned.¹⁴ The Court has no power to order when in each month the sentence shall be inflicted.

The Madras High Court has opined that solitary confinement should not be ordered unless there are special features appearing in evidence such as extreme violence or brutality in the commission of the offence. In the case of a habitual thief such sentence was abrogated.¹⁵

74. In executing a sentence of solitary confinement; such confinement shall in no case exceed fourteen days at a time, with intervals¹ between the periods of solitary

Limit of solitary confinement.

²⁴ *Nyan Suk Meither*, (1869) 3 Beng. L. R. (A. Cr. J.) 49.

²⁵ *Nihala*, (1877) P. R. No. 11 of 1877; *Khushal*, (1877) P. R. No. 13 of 1877.

¹ *Ibrahim*, (1897) P. R. No. 7 of 1897; *Dangar Khan*, (1922) 5 L. L. J. 224, 23 Cr. L. J. 593, [1923] AIR (L) 104.

² *Abdulla Jan*, (1905) P. R. No. 37 of 1905, 2 Cr. L. J. 707.

³ *Nga Sein Po*, (1923) 1 Ran. 306; *Nga Po Thaing*, (1897) P. J. L. B. 596; *Nga Kaing*, (1898) 1 U. B. R. (1897-1901) 247; *Ratiram*, (1882) 5 C. P. L. R. (Cr.) 23.

⁴ *Nga Sein Po*, (1923) 1 Ran. 306.

⁵ *Fatta*, (1878) P. R. No. 7 of 1878.

⁶ *Annun Khan*, (1883) 6 All. 13.

⁷ *Umr Singh*, (1869) P. R. No. 20 of 1869; *Bunsi*, (1882) P. R. No. 9 of 1882.

⁸ *Jita*, (1873) P. R. No. 26 of 1873; *Jamdad*, (1887) P. R. No. 53 of 1887.

⁹ *Gaman*, (1899) P. R. No. 14 of 1899.

¹⁰ *Kundan*, (1914) 36 All. 495; *Phakkar*, (1927) 28 Cr. L. J. 534, [1927] AIR (A) 472; *Sundar Lal*, [1933] A. L. J. R. 777, 35 Cr. L. J. 218, [1933] AIR (A) 676.

¹¹ *Ibrahim*, (1897) P. R. No. 7 of 1897.

¹² *Nga Sein Po*, (1923) 1 Ran. 306.

¹³ *Jiman*, (1882) 5 C. P. L. R. (Cr.) 17.

¹⁴ *Rajada*, (1869) P. R. No. 33 of 1869.

¹⁵ *Ramanjulu Naidu*, [1947] 1 M. L. J. 410, 60 L. W. 332.

confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month² of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

COMMENT.

Solitary confinement if continued for a long time is sure to produce mental derangement. This section is, therefore, enacted to limit the punishment to fourteen days at a time.

1. 'Fourteen days at a time, with intervals'.—Solitary confinement must be imposed at intervals. A sentence inflicting solitary confinement for the whole term of imprisonment is illegal, though not more than fourteen days is awarded;¹⁶ because the last section provides that the offender shall be kept in solitary confinement for a portion of the imprisonment to which he is sentenced. The whole gist of this section is to prevent any prisoner being kept in solitary confinement continuously or without some break in his punishment.

2. 'Shall not exceed seven days in any one month'.—This provision limits the solitary confinement, when the substantive sentence exceeds three months, to seven days in any one month. A sentence adjudging that a period of three months out of a term of punishment for one year and one day be passed in solitary confinement was held to be illegal, and the Madras High Court reduced the sentence of solitary confinement to eighty-four days.¹⁷ But the former Chief Court of the Punjab held in a case, in which the accused was sentenced to four months' rigorous imprisonment, of which one month was to be passed in solitary confinement, and a fine of Rs. 25 or one month and a half's further rigorous imprisonment in default, that the sentence of one month's solitary confinement was legal notwithstanding that the accused could not lawfully be subjected to more than twenty-eight days' solitary confinement, if the imprisonment continued for only four months.¹⁸

PRACTICE.

Procedure.—Burma Circular (1).—The attention of all Courts is called to ss. 73 and 74 of the Indian Penal Code, which provide for sentences of solitary confinement. These sections should be given effect to in all cases in which it is desired to impose a more severe form of punishment than ordinary rigorous imprisonment.

(2) When any person has undergone a sentence of rigorous imprisonment without the punishment having had a deterrent effect, if he is again convicted and sentenced to rigorous imprisonment, solitary confinement should form part of the sentence, unless there is any special reason for not awarding such punishment.

(3) Solitary confinement may also be awarded upon a first conviction for a serious offence. It is usually preferable to impose a moderate term of imprisonment with solitary confinement rather than a longer term without such addition to enhance the severity of the imprisonment. Sentences of solitary confinement passed for separate offences, whether at the same or more than one trial, should not in the aggregate exceed three months.¹⁹

75. Whoever, having been convicted,¹—

Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.

(a) by a Court in British India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards,² or

(b) by a Court or tribunal in any Indian State acting under the general or special authority of the Central Government or of the

¹⁶ *Nyan Suk Mether*, (1869) 3 Beng. L. R. (A. Cr. J.) 49.

¹⁷ *Anon.*, (1879) 1 Weir 35.

L. C.—9

¹⁸ *Fatta*, (1878) P. R. No. 7 of 1878.

¹⁹ B. C. M., s. 696, p. 288.

Crown Representative, of an offence which would, if committed in British India, have been punishable under those Chapters of this Code with like imprisonment for the like term,³

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence⁴ to transportation for life⁵, or to imprisonment of either description for a term which may extend to ten years.

COMMENT.

This section was introduced by Act III of 1910 in the place of the old one. In introducing the Bill to amend the old section it was said : "The object of the Bill is to amend s. 75 of the Indian Penal Code so as to enable Courts in British India to recognise, for the purposes of that section, previous convictions by the various Courts or tribunals in the territories of Indian States which exercise their jurisdiction under the general or special authority of the [Central Government or of the Crown Representative]. As the law at present stands, a person who, having been convicted by any such Court, is subsequently convicted by a Court in British India, is not liable to the punishment to which he would have been liable if the previous conviction had been obtained in British India.

"This state of the law has been found to cause serious practical difficulties more specially in dealing with habitual offenders, and the amendment proposed in the Bill is designed to remove these difficulties by including convictions by such Court within the scope of the section referred to."²⁰

Object.—The object of this section is to provide for an additional sentence, not for a less severe sentence on a second conviction. Recourse should not be had to it if the punishment provided for the offence is itself sufficient.²¹ The section only enables a Court to pass a sentence commensurate with the gravity of the offence.²²

This section only provides for a maximum sentence, it does not provide for a minimum.²³

Scope.—This section applies to cases in which it is intended to pass sentences more severe than those provided in the Code for the particular offence charged. But that does not involve a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limits fixed by the Code.²⁴

The section is not to be employed to enhance enormously the heinousness of petty offences.²⁵ Thus a person having previous convictions cannot be sentenced to transportation for life for stealing a small amount by picking a pocket,¹ or for stealing a tin of *ghee* (clarified butter),² or for stealing a *khas* (cloth garment) worth Rs. 4.³

The previous offence must have been committed since the Penal Code came into operation.⁴

Principle.—This section does not constitute a separate offence, but only imposes a liability to enhanced punishment. The meaning of the section is that when an offender having been convicted

(a) by a Court in British India, or

(b) by a Court in any Indian State acting under the authority of the Central Government or of the Crown Representative

²⁰ G. I., 1910, Part V, p. 1.

²¹ *Sheo Saran Tato*, (1883) 9 Cal. 377; *Harmohan Deb*, (1942) 46 C. W. N. 846, 44 Cr. L. J. 66, [1943] AIR (C) 25.

²² *Sheikh Chamman*, (1919) 1 P. L. T. 11, 21 Cr. L. J. 143, [1920] AIR (P) 526.

²³ *Harmohan Deb*, (1942) 46 C. W. N. 846, 44 Cr. L. J. 66, [1943] AIR (C) 25.

²⁴ *Suban Sahib*, (1928) 52 Mad. 358. See *Nga Ba Shein*, (1928) 6 Ran. 391, F.B.

²⁵ *Shamjee Nashyo*, (1878) 1 C. L. R. 481; *Gulji Jena*, (1908) 12 C. W. N. lxxxiii; *Kasim Ali*, (1907) 7 Cr. L. J. 293; *Jawahir Singh*,

(1913) 15 P. L. R. 10, 15 Cr. L. J. 183, [1914] AIR (L) 476.

¹ *Maulu*, (1929) 11 Lah. 115; *Ujagar Singh*, (1932) 34 P. L. R. 903, 34 Cr. L. J. 1153, [1933] AIR (L) 147; *Kuppuswami Chetti*, [1933] M. W. N. 1259.

² *Daya Ram*, (1929) 30 P. L. R. 530, 30 Cr. L. J. 1082, [1929] AIR (L) 768.

³ *Harnam Das*, (1929) 31 P. L. R. 333.

⁴ *Kushya bin Yesu*, (1867) 4 B. H. C. (Cr. C.) 11; *Moluck Chand Khalifa*, (1865) 3 W. R. (Cr.) 17; *Hurpaul*, (1865) 4 W. R. (Cr.) 9; *Pubon*, (1866) 5 W. R. (Cr.) 66.

for an offence under Chapter XII (offences relating to coin and Government stamp) or Chapter XVII (offences against property) of the Code, punishable with three years' imprisonment, commits a similar description of offence after his release from prison, he is liable to increased punishment, on the ground that the punishment undergone has had no effect in preventing a repetition of the crime.

To bring an offence within the terms of this section—

- (1) the offence must be one under either Chapter XII or XVII of the Code ;
- (2) the previous conviction must have been for an offence therein punishable with imprisonment for not less than three years ; and
- (3) the subsequent offence must also be punishable with imprisonment for not less than three years.

1. 'Having been convicted.'—The section declares that if any person, having been convicted of any offence punishable under certain chapters (viz. XII or XVII) of the Code shall be guilty of any offence punishable under those chapters, he shall for every such subsequent offence be liable to the penalties therein declared. Where, therefore, a person committed an offence punishable under Chapter XII or XVII with imprisonment for three years, and, previously to his being convicted of such offence, had committed another such offence, it was held that he was not subject, on being convicted of the second offence, to the enhanced punishment provided by this section.⁵ Similarly, the section does not apply to offences committed at one and the same time;⁶ because it postulates the commission of the offence which forms the subject of the subsequent charge at a period subsequent to the date of the offence of which the accused was before convicted. The accused cannot be charged with a conviction for an offence committed subsequent to the date of the offence for which he is on his trial.⁷

In one case the Calcutta High Court gave a very liberal construction to the expression 'having been convicted'. It said : "The meaning of the law appears to us to be that, when an offender, after having been punished with imprisonment for a crime under Chapter XVII, again, *after his release from prison*, commits a similar description of crime or a crime punishable under the same chapter, he is liable under s. 75 to enhanced punishment, on the ground that the sentence already borne has had no effect in preventing a repetition of his crime, and has been, therefore, insufficient as a warning. But where the prisoner's conviction has taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of shewing what the effect of the first sentence would have been upon him, and it would not be just to punish him as though he were an incorrigible offender whom no comparatively light punishment could wean from evil courses."⁸ It is submitted that this interpretation is too wide and is hardly in consonance with the spirit and letter of the section.

A person found guilty of theft having one previous conviction of theft of old date is not a habitual offender.⁹ One previous conviction does not necessarily mean that the convict is a habitual criminal, though a subsequent offence, shortly upon release from jail, is a matter which entitles the Court to impose a more severe sentence than would be the case if there had been no other conviction.¹⁰ A Court may decline to order enhanced punishment where a long period has elapsed since the previous conviction.¹¹ Where the accused, who was convicted twelve years ago, was released after serving six months of his term to join the army and served the army in Mesopotamia for three and a half years, it was held that it was not proper to use his previous conviction for an enhanced sentence under this section.¹²

⁵ *Megha*, (1878) 1 All. 637; *Sakya valad Kaxji*, (1868) 5 B. H. C. (Cr. C.) 36; *Gobind*, (1882) P. R. No. 39 of 1882; *Sayad Abdul*, (1926) 28 Bom. L. R. 484, 27 Cr. L. J. 726, [1926] AIR (B) 305; *Beni Chamar*, (1894) 8 C. P. L. R. (Cr.) 17; *Chuttal Imam Bakhsh*, [1941] Kar. 450.

⁶ *Jhoomuck Chamar*, (1866) 6 W. R. (Cr.) 90.

⁷ *Anon.*, (1875) 1 Weir 39.

⁸ *Pubon*, (1866) 5 W. R. (Cr.) 66, 67.

⁹ *Nga Lu Gyi*, (1884) S. J. L. B. 291; *Ishar Singh v. Shama Dusaadh*, (1936) 17 P. L. T. 627, 38 Cr. L. J. 484, [1937] AIR (P) 131.

¹⁰ *Labh Singh*, (1926) 27 P. L. R. 267, 27 Cr. L. J. 621, [1926] AIR (L) 336.

¹¹ *Khushdil*, (1926) 28 Cr. L. J. 160, [1927] AIR (L) 647; *Kunj Lal*, (1929) 30 P. L. R. 52, 30 Cr. L. J. 376, [1929] AIR (L) 278; *Allah Din*, (1927) 29 P. L. R. 59, 29 Cr. L. J. 32; *Murido*, (1929) 31 Cr. L. J. 763, [1930] AIR (S) 58; *Jumo Indris*, (1934) 28 S. L. R. 199, 36 Cr. L. J. 326, [1934] AIR (S) 195; *Muni-swami*, [1935] M. W. N. 1091.

¹² *Ishar Singh*, (1926) 27 Cr. L. J. 944, [1926] AIR (L) 617.

2. **Clause (a).**—The conviction must have been by a Court in British India.¹³ The offence should not only be an offence under Chapter XII or Chapter XVII but it should also be punishable with imprisonment for a term of three years or upwards.¹⁴ It is not necessary that the punishment actually awarded for the first offence should have been imprisonment for three years. But both the previous and subsequent offences shall be offences of the class punishable with imprisonment for a term of three years or upwards.¹⁵

This section makes no mention of the procedure—nor does it require that the offence was punished under the Code. All that the section requires is that the offence was punishable under the Code. It is immaterial if as a matter of fact the offence is punished under a special law.¹⁶

Previous conviction before a Court-Martial cannot be taken into consideration with a view to the enhancement of punishment under this section.¹⁷

3. **Clause (b).**—Under this clause the Court or tribunal in the territory of any Indian State must be acting under the general or special authority of the Central Government or of the Crown Representative. Conviction by a Court in an Indian State which is not under such authority cannot, therefore, be taken into consideration in enhancing punishment under this section.¹⁸

4. **'Subsequent offence'.**—These words mean an offence committed subsequently to the previous conviction. A person is not liable to enhanced punishment under this section unless the subsequent conviction is for an offence committed after the previous conviction.¹⁹

5. **'Transportation for life.'**—Under this section if a sentence of transportation is awarded it must be for life. The Court can, however, under this section, sentence the offender, in the alternative, to imprisonment, for a term which may extend to ten years and thereafter under the provisions of s. 59 the Court can, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than seven years and not exceeding the term for which under the Code such offender is liable to imprisonment.²⁰

Fine.—The punishment for non-payment of fine should not exceed one-fourth of that fixed for the particular offence proved.²¹

Value of property stolen is no test.—"Too much importance is very generally attached to the value of the property stolen in awarding sentences. The value of the property stolen is very often a mere accident, and the important question is the intention of the man, and his character and attitude towards society."²²

Attempt.—This section does not apply to cases of attempts not specially made offences in Chapters XII and XVII of the Code.²³ Penal statutes are construed strictly: so Chapter XXIII relating to attempts cannot be included within the purview of this section when it specially mentions Chapters XII and XVII. This section does not,

¹³ *Muthuswamy*, (1934) 58 Mad. 707.

¹⁴ *Chandaria*, (1911) 12 P. L. R. 879, 12 Cr. L. J. 439; *Thakur Prasad Singh*, (1924) 26 Cr. L. J. 282, [1924] AIR (P) 665; *Fattu*, (1922) 6 L. J. 110, 24 Cr. L. J. 944, [1923] AIR (L) 286. A security order under s. 110, Criminal Procedure Code, or a previous conviction under s. 403, Penal Code, is irrelevant: *Khanu*, (1928) 29 Cr. L. J. 772.

¹⁵ *Anon.*, (1874) 1 Weir 88.

¹⁶ *Mazur walad Atta Mahomed*, (1917) 11 S.L. R. 46, 18 Cr. L. J. 909, [1917] AIR (S) 17.

¹⁷ *Johnson*, [1933] Cr. C. 148.

¹⁸ See *Bahawal*, (1913) P. R. No. 17 of 1913, 14 Cr. L. J. 527, in which a conviction by a Court in the Bikaner State was not taken into account in imposing enhanced sentence under this section as it was not shown that the Court was acting under the general or special authority of the Governor-General in Council or of any local Government. Followed in *Bhanwar*, (1919) 42 All. 136.

¹⁹ *Qo So*, (1917) 9 L. B. R. 77, 19 Cr. L. J.

47, [1918] AIR (LB) 121 (1).

²⁰ *Muhammad Sharif*, (1915) P. R. No. 14 of 1915, 16 Cr. L. J. 554, [1915] AIR (L) 76.

²¹ *Kulwa*, (1890) 1 O. D. 275.

²² Per Clark, C.J., in *Nur Din*, (1903) P. R. No. 28 of 1903, 1 Cr. L. J. 111.

²³ *Damu Haree*, (1874) 21 W. R. (Cr.) 35; *Nana Rahim*, (1880) 5 Bom. 140; *Ram Dayal*, (1881) 3 All. 738; *Sricharan Bavri*, (1887) 14 Cal. 357; (1868) 1 Weir 36; *Motawel Pakuran*, (1888) 1 Weir 37; *Deva Singh*, (1872) P. R. No. 27 of 1872; *Nihal Singh*, (1882) P. R. No. 37 of 1882; *Fattu*, (1884) P. R. No. 34 of 1884; *Harnam*, (1907) P. R. No. 17 of 1907, 6 Cr. L. J. 378; *Mohammed Hussain alias Fajja*, (1927), 29 P. L. R. 54, 29 Cr. L. J. 4; *Ramnath Bhoy*, (1901) 14 C. P. L. R. 72; *Banne*, (1921) 24 O. C. 260, 22 Cr. L. J. 750, [1921] AIR (O) 156 (1); *Brij Behari Lal*, (1925) 23 A. L. J. R. 926, 26 Cr. L. J. 1204, [1926] AIR (A) 44; *Nanhum*, (1933) 34 P. L. R. 906, 34 Cr. L. J. 1181, [1933] AIR (L) 433; *Cheddi*, [1942] All. 889.

therefore, apply to cases which are confined to s. 511 of the Code. The offences which fall under s. 511 must be punished entirely irrespective of this section.²⁴ The Madras High Court has held that although this section does not apply to an offence punishable under s. 511 the fact that the accused had previous convictions can be taken into account and a much higher sentence imposed for the offence under s. 511 than would be proper if there had been no previous convictions.²⁵

Abetment.—The previous conviction of an accused for an offence under Chapters XII and XVII cannot be taken into consideration at a subsequent conviction for abetment of an offence under those Chapters for the purpose of enhancing punishment under this section.¹

Offence under special or local law.—The provisions of this section are confined to offences punishable under the Code only.² Where special Acts of Legislature intend enhanced punishment after previous conviction they have specific provisions.³

Conviction under foreign law.—A conviction under the law of a foreign State which has adopted the Indian Penal Code for the guidance of its Courts is not such a conviction as is intended by this section.⁴

Amendment.—By Act X of 1886, s. 22, the words “or to imprisonment of either description for a term which may extend to ten years” were substituted for “or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not in any case be liable to imprisonment for a term exceeding ten years.”⁵ The present section was substituted by Act III of 1910.

The words “in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative” were substituted for the words “in the territories of any Native Prince or State in India acting under the general or special authority of the Governor General in Council or of any Local Government” by the Government of India (Adaptation of Indian Laws) Order, 1937. In Burma, the words “Burma outside British Burma” were substituted for “the territories of any Native Prince or State in India” and the words “General in Council or of any Local Government” were omitted by the Government of Burma (Adaptation of Laws) Order, 1937..

PRACTICE.

Evidence.—The evidence as to a previous conviction against the accused under the Penal Code must be clear and precise.⁶ It is the duty of the prosecution to bring to the notice of the Court the existence of previous convictions.⁷ A previous conviction can be proved—(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction was had to be a copy of the sentence or order, or (b) either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered; together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted.⁸

²⁴ *Bharosa*, (1895) 17 All. 123; *Ajudhia*, (1895) 17 All. 120; *Motawel Pakuran*, (1888) 1 Weir 37; *Jhamman Lal*, (1906) P. R. No. 14 of 1906, 5 Cr. L. J. 85; *Ghasita*, (1918) P. R. No. 13 of 1919, 20 Cr. L. J. 492, [1919] AIR (L) 163 (1); *Veeranna*, [1942] 1 M. L. J. 455, [1942] M.W.N. 297, (1942) 55 L. W. 297, 43 Cr. L. J. 715, [1942] AIR (M) 440.

²⁵ *Duraismami Mudali*, [1942] 1 M. L. J. 591, [1942] M. W. N. 376, (1942) 55 L. W. 297 (1), 44 Cr. L. J. 501, [1942] AIR (M) 521; *Yasin*, (1944) 45 Cr. L. J. 176, [1943] AIR (S) 172.

¹ *Kashia Antoo*, (1907) 10 Bom. L. R. 26, 7 Cr. L. J. 32.

² *Moluck Chand Khalifa*, (1865) 3 W. R. (Cr.) 17; *Hurpaul*, (1865) 4 W. R. (Cr.) 9; *Bhudhun Rujwar*, (1882) 10 C. L. R. 392; *Anon.*, (1877) 1 Weir 39; *Khan Muhammad*, (1904) P. R. No. 17 of 1904, 1 Cr. L. J. 1061; *Lalsing*, (1893) 7 C. P. L. R. 24. Contra, *Mazar*, (1917) 11 S. L. R. 46, 18 Cr. L. J. 909, [1917] AIR (S) 17.

³ *Vide* The Burma Excise Act (Burma Act V of 1917), s. 46.

⁴ *Muhammad Yar*, (1883) P. R. No. 2 of 1884; *Venkatai Shetti*, (1889) 1 Weir 40.

⁵ *Gopala Santu*, (1876) Unrep. Cr. C. 117, and *Mahadu*, (1882) 6 Bom. 690, are no longer of any authority.

⁶ *Naimuddi Sheikh alias Abbas Sheikh*, (1870) 14 W. R. (Cr.) 7; *Abdul Malik*, (1929) 52 Mad. 795.

⁷ *Prem*, [1929] A. L. J. R. 397, 30 Cr. L. J. 529, [1929] AIR (A) 270; *Said Ali*, (1934) 35 Cr. L. J. 1387, 36 P. L. R. 7.

⁸ Criminal Procedure Code, s. 511; *Tukaram Daulat*, (1871) Unrep. Cr. C. 52; *Feroze Khan*, (1925) 26 P. L. R. 843, 28 Cr. L. J. 961, [1925] AIR (L) 268; *Daya Ram*, (1929) 30 P. L. R. 530, 30 Cr. L. J. 1082, [1929] AIR (L) 768; *Chundi Perugadu*, (1901) 2 Weir 393; *Yasin* (1901) 28 Cal. 689.

An accused person, though he has several convictions behind him, is entitled to have his case treated as if it was not a foregone conclusion that he is guilty.⁹

Evidence of previous convictions cannot be allowed except where, after the accused has been found guilty, it is necessary to receive it for the purpose of this section, or where the accused having given evidence of good character, the prosecution desires to advance evidence of previous convictions as proof of his bad character.¹⁰

Procedure.—The following procedure is to be observed in the case of trial of persons previously convicted of offences against coinage, stamp-law or property—

(1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall, if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted: Provided that, if any Magistrate in the district has been invested with powers under s. 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) When any person is committed to the Court of Session or High Court under sub-s. (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under s. 209.¹¹

(1). When any person having been convicted—

(a) by a Court in British India of an offence punishable under s. 215, s. 489A, s. 489B, s. 489C, or s. 489D of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or Tribunal in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) The Provincial Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.

(5) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.¹²

Record of previous conviction.—Records of previous conviction should not be put in until the close of the trial as they can only be used after conviction in determining the measure of punishment.¹³ In the case of a trial by a jury or with the aid of assess-

⁹ *Goli*, [1930] A. L. J. R. 82, 31 Cr. L. J. 8, [1930] AIR (A) 17.

¹⁰ *Dumling*, (1903) 5 Bom. L. R. 1034.

¹¹ Criminal Procedure Code, s. 348.

¹² *Ibid*, s. 565.

¹³ *Shiboo Mundle*, (1865) 3 W. R. (Cr.) 38; *Jehan Mullick*, (1866) 5 W. R. (Cr.) 67.

sors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure shall be...as follows, namely:—

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,

(i) he has been convicted of the subsequent offence, or

(ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.

(b) in the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.¹⁴

But evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.¹⁵

In order to prove the previous convictions standing against an accused person for the purposes of this section it is necessary that the provision of law as contained in s. 511, Criminal Procedure Code, should be observed. A Magistrate who includes in the charge previous convictions without first bringing on the record a formal proof of them and questions the accused in respect of these convictions at the time of explaining the charge acts irregularly and against law.¹⁶

The Lahore High Court lays down the following procedure when a previous conviction is to be proved. When it is proposed to charge an accused person with previous convictions under this section, no evidence on the point should be led before the charge is framed. The accused should not be questioned about his previous convictions when examined under s. 342, as clearly that is only for the purpose of enabling him to explain matters appearing in evidence against him and his previous convictions should not have appeared in evidence against him at this stage. When, however, the Magistrate considers it fit to frame a charge under s. 254 in respect of the substantive offence, he should then have recourse to s. 221 (7) and in that charge should include the previous convictions. He should then ask the accused to plead to that charge making it clear to him that he is pleading to the previous convictions distinctly from the original offence. Then comes s. 255A and under that section if the accused admits his previous conviction or convictions, they do not have to be proved separately and the Magistrate can take them into consideration in convicting and sentencing him for the main offence. If, however, the accused does not admit his previous convictions, the Magistrate has to proceed to judgment on the substantive charge and if that is a judgment of conviction, he has then to take evidence according to law, i.e., under s. 511 of the Code as to the previous convictions and then come to a separate finding upon them after which he will pass the proper sentence under the substantive section read with this section.¹⁷

Jurisdiction.—A Magistrate cannot award punishment beyond his powers (as specified in s. 32, Criminal Procedure Code) because the offender has been previously convicted.¹⁸ If he considers that a more severe sentence than he is empowered to pass is necessary, he should commit the prisoner to the Court of Session.¹⁹ The difference should be noted in a case of previous convictions where under this section enhanced punishment is to be imposed and a case where previous convictions are only to be taken into account for the purpose of necessary punishment imposed by a Magistrate within the limits of the maximum punishment with which the offence is ordinarily punishable.²⁰

Summary trial.—A summary trial under s. 260, Criminal Procedure Code, in a case in which a charge under this section could be framed, is not necessarily bad in law, but a summary trial in such a case is not appropriate and is inexpedient.²¹

¹⁴ Section 310, Criminal Procedure Code.

¹⁵ Section 311, *ibid.*

¹⁶ *Said Ali*, (1934) 36 P. L. R. 7, (35) Cr. L. J. 1387.

¹⁷ *Dalip Singh*, [1943] Lah. 477; *Raim*, (1946) 49 P. L. R. 93.

¹⁸ *Vithya*, (1871) Unrep. Cr. C. 49; *David Narsu*, (1904) 6 Bom. L. R. 548, 1 Cr. L. J.

607; *Anon.*, (1807) 6 M. H. C. Appx. 2; *Anon.*, (1865) 1 Weir 36; *Gulab Hamir*, (1894) Unrep. Cr. C. 688; *Bahadur Khan*, (1872) P. R. No. 31 of 1872; *Nga Tha*, (1894) P. J. L. B. 78.

¹⁹ *Ganu Ladu*, (1864) 2 B. H. C. 126; *Khalak*, (1889) 11 All. 393.

²⁰ *Pokar*, [1941] Kar. 808, 315.

²¹ *Shivbux*, [1941] Kar. 805.

Bengal Rule.—*Date of previous conviction and sentence to be stated in judgment.*—Whenever an enhanced sentence is passed on conviction on a charge within the terms of s. 75 of the Indian Penal Code, the Sessions Judge or Magistrate shall state in his judgment the date of each previous conviction and the sentence passed, as well as the particular offence charged.²²

Allahabad Rule.—In a case to which the provisions of s. 75 of the Indian Penal Code apply, the Court, if it convicts the accused, shall set forth in its judgment each previous conviction, proved against or admitted by the accused, specifying the date of the conviction, the section under which it was had, and the sentence imposed.²³

Patna Circular.—Whenever an enhanced sentence is passed upon an accused on conviction on a charge within the terms of s. 75 of the Indian Penal Code, the Sessions Judge should enter in the column for remarks the date of each previous conviction, the offence charged, and the sentence passed on each occasion.²⁴

Burma Circular.—Under the provisions of s. 221 (7) of the Code of Criminal Procedure as amended, in every case in which there are *prima facie* grounds for believing the accused to have been previously convicted of an offence, by reason of which previous conviction he is liable to enhanced punishment or punishment of a different kind under the provisions of section 75 of the Penal Code or of any other law, he must be charged with the previous conviction. Form Criminal 82 should be used for this purpose. This rule applies in all cases to which section 75 of the Penal Code or any provision of law allowing enhanced punishment for a second or subsequent offence is applicable, even if the Court does not propose to pass a sentence heavier than the maximum sentence allowed by the substantive section under which the accused is charged.

The accused should be required to plead to the charge of the previous conviction, and if he does not admit it the charge should be tried at the conclusion of the trial for the substantive offence. The charge must be proved in the manner laid down in section 511 of the Code of Criminal Procedure, and the Court should record a finding in the judgment as to whether the accused has been previously convicted or not.

The charge of previous conviction, if omitted at the time of framing the charge for the substantive offence, may be added at any time before sentence is passed.

In many cases in which the accused has been previously convicted of a similar offence or of some other offence indicating moral turpitude, but to which no special provision of law allowing enhanced punishment in the case of the second or subsequent conviction applies, it is nevertheless expedient to pass a more severe sentence than would be passed on a first offender in a similar case. In such cases the record must show clearly that the previous convictions have been either admitted or proved.

When the trial is concluded, but before sentence is passed, the Court should proceed to try the previous convictions. Form Criminal 83 should be used for this purpose.²⁵

Oudh Rule.—3. In a case to which the provisions of section 75 of the Indian Penal Code apply, the Court, if it convicts the accused, shall set forth in its judgment each previous conviction proved against or admitted by the accused, specifying the date of the conviction, the section under which it was had, and the sentence imposed.

4. The following persons shall be liable to be classified as "habitual criminals," namely :—

(i) any prisoner convicted of an offence, whose previous conviction or convictions under Chapter XII, XVI, XVII or XVIII of the Indian Penal Code, taken by themselves or with the facts of the present case show that he habitually commits an offence or offences punishable under any or all of those chapters.

(ii) any person committed to or detained in prison under section 123 (read with section 109 or section 110) of the Code of Criminal Procedure ;

(iii) any person convicted of any of the offences specified in (i) above when it appears from the facts of the case, even although no previous conviction has been

²² C. H. C. R. & O., Vol. I, Ch. I, s. 99.

²³ A. H. C. G. R. (Cr.), (1984 edn.) Ch. 8, r. 3.

²⁴ Pat. H. C. Cr. C. Para. 40, p. 18.

²⁵ B. C. M., ss. 674, 675, pp. 280, 281.

proved, that he is by habit a member of a gang of dacoits or of thieves or a dealer in slaves or in stolen property ;

(iv) any member of a criminal tribe ;

(v) any person convicted of an offence and sentenced to imprisonment under the corresponding section of the Indian Penal Code and the Code of Criminal Procedure as applied by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, or by the authority of any Prince or State in India ;

(vi) any person convicted by a Court or tribunal acting outside India under the general or special authority of His Majesty of an offence which would have rendered him liable to be classified as an habitual criminal if he had been convicted in a Court established in British India.

Explanation.—For the purposes of this definition the word “conviction” shall include an order made under section 118 read with section 110 of the Code of Criminal Procedure.

5. The classification of a convicted person as an habitual criminal should ordinarily be made by the convicting Court, but if the convicting Court omits to do so, such classification may be made by the District Magistrate, or in the absence of an order by the convicting Court or District Magistrate, and pending the result of a reference to the District Magistrate, by the officer in charge of the jail where such convicted person is confined :

Provided that any person classed as an habitual criminal may apply for a revision of the order.

6. The convicting Court or the District Magistrate may, for reasons to be recorded in writing, direct that any convicted person or any person committed to or detained in prison under section 123 read with section 109 or section 110 of the Code of Criminal Procedure shall not be classified as an habitual criminal and may revise such direction.

7. Convicting Courts or District Magistrates, as the case may be, may revise their own classifications, and the District Magistrate may alter any classification of a prisoner made by a convicting Court or any other authority ; provided that the alteration is made on the basis of facts which were not before such Court or authority.¹

Punishment.—No distinct sentence of imprisonment is awardable on account of a previous conviction as it is not in itself an offence. It is merely a circumstance rendering the offender, convicted of a subsequent offence, liable to a larger measure of punishment.² Although the fact of previous conviction is an element in determining the sentence, essential regard must be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case. In the case of a simple theft without any aggravating circumstances a sentence of rigorous imprisonment for one year would more than meet the ends of justice even though the accused might have been convicted on several prior occasions under s. 379.³ The accused, after four previous convictions for theft, was sentenced for a fifth theft of property of no great value to seven years transportation. It was held that the sentence was not excessive.⁴ A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions had against them. This section and s. 221 of the Code of Criminal Procedure are not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction.⁵ This section gives no authority for passing a sentence of whipping in addition to any other punishment.⁶ Where the previous convictions are not stated in the charge, they cannot be used for the purpose of enhancing the sentence.⁷

Proof of previous conviction not contemplated by this section may be adduced

¹ O. Cr. R. (1943) c. VIII, p. 12.

² (1868) 1 Weir 36; (1878) 1 Weir 37; *Galab Hamir*, (1894) Unrep. Cr. C. 688; (1870)

⁶ M. H. C. Appx. 2.

³ *Munuswamy*, [1947] 1 M. L. J. 386.

⁴ *Nga Kan Tha*, (1895) 1 U. B. R. (1892-1896) 147.

⁵ *Po Nyein*, (1917) 9 L. B. R. 167, 19 Cr. L. J. 655, [1918] AIR (LB.) 60 (2); *Abdul Gani*, (1936) 59 Mad. 995; *Kamsala Adimoorthy*, [1937] M. W. N. 787.

⁶ *Nga Tun Tha*, (1894) P. J. L. B. 78.

⁷ *Annaji Krishna*, (1878) Unrep. Cr. C. 70.

after the accused is found guilty, as an element to be taken into consideration in awarding punishment.⁸

In assessing punishment, the Court may take into consideration the accused's character and antecedents or the state of crime in the country or locality. The imposing of a sentence is, within the wide limits allowed by the law, a matter of discretion and not a matter of proof. It is a matter within the sphere of penology, not of evidence.⁹

A Sessions Judge cannot (under this section or otherwise) by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has last been convicted.¹⁰

Where a previous conviction is proved, the prisoner cannot be dealt with under s. 35, Criminal Procedure Code, as if he had been convicted of two offences.¹¹

Charge.—If the accused having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed.¹² But it cannot do so after it is passed.¹³ The fact, date and place, of the previous conviction must be stated severally otherwise the accused is not amenable to the terms of this section.¹⁴ A charge of having committed the offence after a previous conviction, therefore, should contain an allegation that the offence has been committed after a previous conviction. A statement in a count that, at the time when the prisoner committed the offence (no offence having been mentioned specifically in the count), he had been previously convicted of offences punishable under Chapter XVII of the Penal Code, is not sufficient.¹⁵ A separate charge under s. 75 of the Penal Code must be framed and recorded if the prisoner is to be tried for an offence punishable under it.¹⁶

The charge after a previous conviction should run thus :—

I (*name and office of the Magistrate, etc.*) hereby charge you (*name of accused*) as follows :

That you, on or about the——day of——, at——, committed——and thereby committed an offence punishable under section——of the Indian Penal Code and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And you, the said——, stand further charged that you, before the committing of the said offence, had been convicted on the——day of——in Calendar No.——of——on the file of——of an offence punishable under Chapter XII (*or XVII*) of the Indian Penal Code with imprisonment for a term of three years, to wit, the offence of——, which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under s. 75 of the Indian Penal Code.

And I hereby direct that you be tried by the said High Court (*or the Court of Session*) on the said charge.

In all cases in which previous conviction of any offence would render an accused person liable, if convicted on the charges for which he is under trial, to the penalty of whipping as an additional punishment, and it is intended to prove such previous conviction for the purpose of affecting the punishment to be awarded, the Court trying

⁸ *Ismail Ali Bhai*, (1914) 39 Bom. 326, 16 Bom. L. R. 934; *Roshun Doodadh*, (1880) 5 Cal. 768; *Shivbux*, [1941] Kar. 305.

⁹ *Nga Ba Shein*, (1928) 6 Ran. 391, F.B.

¹⁰ *Sakya Kavi*, (1868) 5 B. H. C. (Cr. C.) 36.

¹¹ *Khalak*, (1889) 11 All. 393.

¹² Section 221 (7), Criminal Procedure Code. An omission to state in the charge the fact of previous convictions does not render the conviction illegal if the sentence awarded is within the competency of the Court under the ordinary

provisions of the Penal Code: *Abdul Karim*, (1933) 29 N. L. R. 309, 34 Cr. L. J. 1166, [1933] AIR (N) 315.

¹³ *Rajcoomar Bose*, (1873) 19 W. R. (Cr.) 41.

¹⁴ *Haidar*, (1883) 3 A. W. N. 110; *Abbulu*, (1909) 11 Cr. L. J. 217.

¹⁵ *Sheik Jakir*, (1874) 22 W. R. (Cr.) 39.

¹⁶ *Dorasami*, (1886) 9 Mad. 284; *Dungri*, (1911) 12 P. L. R. 516, 12 Cr. L. J. 233; *Subramanian*, [1916] 1 M. W. N. 327, (1916) 3 L. W. 403, 17 Cr. L. J. 288, [1917] AIR (M) 968.

the accused person shall draw up a distinct charge specifying the liability to whipping as an additional punishment and how it arises.

The charge should be to the following effect :—

That at the date previous to the date of the offence of—now charged against you—viz., on the—you—were convicted by the Court of—of the offence of—specified in s. 3 or 4 of the Whipping Act (IV of 1909) and that this conviction of—is still in full force and effect and being a conviction for the same specific offence as that now charged against you, renders you liable in case you should now be again convicted of—to the punishment of whipping in addition to the punishment provided for the said offence by the Indian Penal Code.

Madras Rule.—If it is proposed to prove several previous convictions against an accused person for the purpose of affecting his punishment, they should not be lumped in one head of charge, but should be set forth separately each under a distinct head of charge.¹⁷

The Criminal Rules of Practice require that Magistrates and Judges should append to their judgments a list of previous convictions of the accused. Where the Sessions Judge referred only to one previous conviction, whereas it appeared clear from the fact that the previous conviction was one under this section, and that there were other previous convictions, it was held that the Sessions Judge should have included those previous convictions in his charge under this section and get the accused to plead to them and should then have set them out in a tabular form at the end of his judgment.¹⁸

Burma Circular.—(a) Under the provisions of section 221 (7), Criminal Procedure Code, in every case in which there are *prima facie* grounds for believing the accused to have been previously convicted of an offence, by reason of which previous conviction he is liable to enhanced punishment or punishment of a different kind for a second or subsequent offence he must be formally charged with the previous conviction. Form Criminal 82 should be used for this purpose. This rule applies in all cases to which section 75 of the Penal Code or any other provision of law allowing enhanced punishment for a second or subsequent offence is applicable, even if the Court does not propose to pass a sentence heavier than the maximum sentence allowed by the substantive section under which the accused is charged.

(b) If the charge of the previous convictions is omitted at the time when the charge of the substantive offence is framed, it may be added at any time before sentence is passed.

(c) Examples of cases in which enhanced punishment may be awarded for a second or subsequent offence, other than under the Penal Code, are section 4 of the Metal Tokens Act, 1889, sections 11 and 12 of the Burma Gambling Act, 1899, and section 46 of the Burma Excise Act, 1917.¹⁹

The Central Provinces Circular.—It seems necessary to point out that all convictions on record at the date of the charge are not always to be reckoned as previous convictions for the purposes of s. 75 of the Indian Penal Code or ss. 3 and 4 of Act VI of 1864. A previous conviction for the purpose of affecting the punishment which a Court is competent to award is a conviction the penalty following which had been undergone by the accused (in whole or in part) at the time when he committed the offence for which he is being tried.

When a person has been convicted at or about the same time of more offences than one and after undergoing accumulated penalties for those offences commits another offence and is again convicted, each of the previous convictions is a separate conviction in relation to the present conviction.

It is not necessary to state previous convictions in the charge unless it is intended to prove them for the purpose of affecting the punishment which the Court is competent to award, that is, in order to render the accused liable to a sentence which could not otherwise have been passed under the law, such as an enhanced sentence under the

¹⁷ M. H. C. R. P., (1931 edn.), s. 70.

¹⁸ *Pasupuleti Venkata Subbayya*, [1948] 1 M. L. J. 192, [1948] M. W. N. 126, (1942) 56 L.

W. 107, 44 Cr. L. J. 585, [1948] AIR (M) 418.

¹⁹ B. C. M., s. 459, p. 195.

provisions of s. 75 of the Indian Penal Code, or a sentence of whipping, in addition to other punishment under Act VI of 1864.

Where previous convictions are used, not for the purpose of affecting the punishment to which the accused is *legally* liable, but merely to influence the Court in determining the amount of punishment which it shall award though they need not be stated in the charge, they should be formally proved if they are not admitted. In using them for this limited purpose the Magistrate should be guided by the analogy of s. 310, Criminal Procedure Code. The judgment should be temporarily closed as soon as the conclusion that the accused is guilty has been arrived at therein. The order sheet should then show that the accused is questioned as to certain previous convictions alleged but not up to that stage admissible in evidence, the actual questions and answers being recorded as a postscript to the examination made under s. 342, Criminal Procedure Code. Whether these convictions are admitted or denied, the documents constituting legal proof of them will of course be filed with the record. Finally, the judgment will be completed and the printed sheet for finding and sentence will then be filled up.²⁰

²⁰ C. P. (Cr. C.) (1929), Part I, Cir. 20, ss. 4, 5, 6 and 7.

CHAPTER IV.

GENERAL EXCEPTIONS.

"THIS chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions...Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters...It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter".¹

The word 'offence' in this Chapter denotes a thing punishable under the Code, or under any special or local law (s. 40). The chapter applies to offences punishable under ss. 121A, 124A, 225A, 225B, 294A and 304A.²

Onus of proving exception lies on accused.—Section 105 of the Indian Evidence Act says that when a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.³ The Bombay High Court in a Full Bench case has held that this section does not relieve a Judge, even where the accused has not pleaded that his case comes within any particular exception, from pointing out to the jury such facts in the evidence as might justify the jury in taking the view that the accused's case was covered by one or other exception.⁴

Where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions he cannot, in appeal, set up a case, upon the evidence taken at his trial, that his act came within such general exception. Circumstances which would bring the case of an accused person within any of the general exceptions can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record. In the absence of such evidence the Court is not competent to assume the existence of those circumstances, more particularly when the pleas taken are inconsistent with the assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption and the accused ought to be given the benefit of the doubt.⁵

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact¹ and not by reason of a mistake of law² in good faith believes himself to be, bound by law³ to do it.

Act done by a person bound, or by mistake of fact believing himself bound, by law.

ILLUSTRATIONS.

(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

COMMENT.

No more is meant by this section than to excuse a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good

¹ Note B, p. 106.

² Act XXVII of 1870, s. 13, as amended by Act XII of 1891.

³ The Indian Evidence Act, I of 1872; *Shibo Prosad Pandah*, (1878) 4 Cal. 124; *Dwijendra Chandra Mukherjee*, (1915) 19 C. W.

N. 1043, 16 Cr. L. J. 724, [1916] AIR (C) 633; *Chandu Lal*, (1923) 21 A. L. J. R. 776, 25 Cr. L. J. 348, [1924] AIR (A) 186.

⁴ *Hasan Abdul Karim* (No. 2), (1944) 46 Bom. L. R. 566, F.B.

⁵ *Wajid Hussain*, (1910) 32 All. 451.

faith that he was commanded by law to do it. It is based on the maxim *ignorantia facti excusat*. See Comment on s. 79, *infra*.

Scope.—This and the following three sections leave untouched the liability in a civil suit of the persons who claim their benefit.

1. 'Mistake of fact'.—See Comment under s. 79, *infra*.

2. 'Mistake of law'.—See Comment under s. 79, *infra*.

3. 'In good faith believes himself to be, bound by law'.—In reference to this section, Rattigan, J., observed: "To entitle a person to claim the benefit of that section [s. 76] it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the latter expression with reference to Section 52, ...that the person to whom the order was given was bound by law to obey it. Thus in the case of a soldier, the Penal Code does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment, and unless the actual circumstances are of such a character that he may have reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible like any other sane person for his act, although he may have committed it under the erroneous supposition that his superior was by law authorized to issue the order. His mistake in short must be a mistake entertained in good faith on a question of fact. Such a construction of the law may indeed subject the soldier to military penalties, and, in certain cases, place him in the serious dilemma of either refusing to obey an order which he believed to be unjustifiable in fact, thereby rendering himself liable to military law, or, by obeying it, to subject himself to the general criminal law of the land. But on a balance of considerations the Legislature has deemed it wise for the safety of the community that no special exemption should be allowed to a soldier who commits what would ordinarily be a penal offence from that enjoyed by any other person, who does the same act believing in good faith that he is bound by law to do it. A mistake of law in either case would afford no protection, though it might go in mitigation of punishment, and thus military discipline, while it regulates the conduct of the soldier in military matters, is made subject to a higher law in favour of public safety, when the act which the military discipline attempts to enforce or to justify is one which affects the person or property of another. In such a case the *civil* law looks to the surrounding circumstances to see whether they are of such a character as would lead a man of ordinary intelligence to entertain a reasonable belief that he is bound by law to obey the command of his superior".⁶ Obedience to an illegal order can only be used in mitigation of punishment but cannot be used as a complete defence.⁷

Alison, in his Principles of the Criminal Law of Scotland,⁸ says: "The express command of a Magistrate or officer will exonerate an inferior officer or soldier, unless the command be to do something plainly illegal, or beyond his known duty. If through gross ignorance, or neglect, or design, a Judge or Magistrate pronounce an unlawful sentence, what shall be said of the officers or others who carry it into execution? ...If the order or warrant was plainly illegal, as, for example, to strangle a prisoner in jail, or to poison him, or the like, certainly the mere possession of such a warrant will not prevent the officer who wickedly yields it obedience from being held as art and part in the legal murder, and suffering for its commission. But, on the other hand, if the error was in such a part of the proceedings, as the officer entrusted with its execution has no opportunity of seeing, and is not called upon in duty to examine, and if the warrant put into his hands be fair and in ordinary form, certainly he will not be answerable for any illegality or vice in the previous and to him inscrutable proceedings.

"The same distinction is applicable to the case of a soldier acting in obedience to the orders of his superior officer, with this additional circumstance in his favour, that he is not only in a much humbler station, and trained to more implicit obedience than a legal functionary, but subject to a peculiar and peremptory Code of laws, armed with powers of extraordinary severity, for the express purpose of enforcing on his part the most implicit obedience to command. It will require, therefore, the very

⁶ *Niamat Khan*, (1883) P. R. No. 17 of 1883, p. 39.

⁷ *Chaman Lal*, [1940] Lah. 521.

⁸ First Edition, p. 673.

strongest case to subject a soldier to punishment for what he does in obedience to the distinct commands of his commanding officer. But still this privilege must have its limits; it is confined to what is commanded in the course of official duty, and which plainly and evidently does not transgress its limits. For what if an officer command a private soldier to commit murder or to steal, or to aid him in a rape, or if he order file of soldiers to fire on an inoffensive multitude, certainly in none of these cases will the privates be exempt from punishment if they yield obedience to such criminal mandates."

For illegal acts, however, neither the orders of a parent nor those of a master will furnish any defence. Section 132 of the Criminal Procedure Code protects a soldier against prosecution for any act done in obedience to any order he is bound to obey.

Liability of private persons to assist police.—Private persons bound to assist the police under s. 42 of the Code of Criminal Procedure would be protected under this section.

CASES.

Lawful arrest of wrong person.—A police-officer came to Bombay from Kanara with a warrant to arrest a person. After reasonable inquiries he arrested the complainant believing in good faith that he was the person to be arrested. The complainant prosecuted the police-officer for wrongful confinement. It was held that the police-officer was protected by this section and was guilty of no offence.⁹

Act done under superior's order.—Nothing but fear of instant death is the defence for a policeman who tortures any one by the order of a superior. The maxim *respondeat superior* has no application in such a case.¹⁰ Where a naik and three sepoy of a regiment were found on the facts to be guilty of culpable homicide not amounting to murder, in that they fired upon a mob which was threatening them under circumstances which did not render the act excusable under this section, and two men were shot dead, it was held that the sepoy, who had fired in obedience to the naik's order, were not protected by this section, as they were cognizant of all the circumstances of the quarrel, and, there being no room for a mistake of fact, they must be taken to have known that the naik was wrong in law in firing upon the mob, and that they were not bound to obey his illegal order.¹¹ A constable verbally ordered two other police constables to arrest bad characters on a road and to fire if resisted. The accused challenged two men and then fired as one of them did not stop and killed one man. It was held that the accused acted unlawfully and should not have been acquitted on a charge of culpable homicide not amounting to murder. A police-officer who commits a wrongful act under the order of his superior officer is liable to punishment as his mistake of law in supposing him authorized cannot be accepted as a good defence though it may be a ground for mitigation of punishment.¹²

English cases.—A gun discharged in the ordinary and regular course of ball practice by an artilleryman in a garrison town, missed the mark, and killed a man who was lawfully passing near the spot in a boat, the place being a public one and open to all people. The artilleryman who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the Major-General. It was held that the Major-General was not guilty of manslaughter.¹³ A sailor was ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and had ammunition given him for that purpose. Boats having persisted, after repeated warnings, in approaching the ship, he fired at one and killed a person. It was held that this was murder although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship.¹⁴ A soldier, who commanded the Guards at the trial and execution of Charles I, pleaded at his trial that all he did was as a soldier by the command of his superior officer whom he must obey or die. It was resolved that that was no excuse, for his superior was a

⁹ *Gopalra Kallaiya*, (1928) 26 Bom. L. R. 138, 25 Cr. L. J. 797, [1924] AIR (B) 333.

¹⁰ *Latiffkhan*, (1895) 20 Bom. 394.

¹¹ *Gurdi Singh*, (1888) P. R. No. 16 of 1888; *Allahrakhio*, (1922) 17 S. L. R. 132, 26

Cr. L. J. 142, [1924] AIR (S) 33. —

¹² *Nga Myat Tha*, (1882) S. J. L. B. 164.

¹³ *Hutchinson*, (1864) 9 Cox 555.

¹⁴ *Thomas*, (1815) 4 M. & S. 442.

traitor, and all who joined with him in that act were traitors and where the command is traitorous the obedience to that command is also traitorous.¹⁵

Bound by law.—Where a defamatory statement was made by a person as a witness in a case, but the person was not bound by law to go into the witness box and make it, it was held that this section did not apply.¹⁶ On an indictment against the engine driver and fireman of a railway train for the manslaughter of persons killed while travelling in a preceding train by running into it, it appeared that on the day in question special instructions had been issued to them, which altered the signal for danger so as to make it mean not 'stop' but 'proceed with caution'. It was held that if the prisoners honestly believed that they were observing them and they were not obviously illegal, they were not criminally responsible.¹⁷

PRACTICE.

Punishment.—Though ignorance of law is not a defence in law, yet it is a matter to be considered in mitigation of punishment.¹⁸

77. Nothing is an offence which is done by a Judge¹ when acting judicially² in the exercise of any power which is, or which in good faith⁸ he believes to be, given to him by law.

COMMENT.

This section protects Judges from criminal process just as the Judicial Officers' Protection Act¹⁹ saves them from civil suits. Section 1 of that Act says: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of."

The exception in this section is in favour of a Judge only; whereas the Judicial Officers' Protection Act protects every "Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially."

Under this section a Judge is exempted not only in those cases in which he proceeds irregularly in the exercise of a power which the law gives him, but also in cases where he in good faith exceeds his jurisdiction and has no lawful powers.

In a Calcutta case²⁰ Markby, J., said: "The duties which he (a Magistrate) usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any person whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be. This has been so held in England²¹ and I do not see any reason to doubt that the same would be held here."

Scope.—This section does not cover the case of remarks made by a Judge or a Magistrate in the course of his office so as to exempt him from any liability for defamation under s. 500. In such a case the exceptions to s. 499 will apply.²²

1. 'Judge'.—See s. 19, *supra*.

2. 'Judicially'.—"The word 'judicial' has two meanings. It may refer to

¹⁵ *Axtell*, (1661) Keyling 13.

¹⁶ *Bhagwan Singh v. Arjun Datt*, (1920) 18 A. L. J. R. 846, 21 Cr. L. J. 564, [1920] AIR (A) 232 (2).

¹⁷ *Trainer*, (1864) 4 F. & F. 105.

¹⁸ *Esop*, (1836) 7 C. & P. 456.

¹⁹ Act XVIII of 1850, s. 1.

²⁰ *Chunder Narain Singh v. Brij Bulub Gooyee*, (1874) 14 Beng. L. R. 254, 257, 21 W. R. 391.

²¹ *Tozer v. Child*, (1857) 7 E. & B. 377.

²² *Kamla Patel v. Bhagwandas*, (1934) 30 N. L. R. 234, 35 Cr. L. J. 947, [1934] AIR (N) 123.

the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, as, for instance, levying a rate.²³ It is not merely in respect of acts in Court, acts *sedente curia*, that a Judge has an immunity, but in respect of all acts of a judicial nature.²⁴ An order under the seal of a criminal Court to bring a person in that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it, or not, would be dispunishable by ordinary process at law.²⁵ If it be once established that the act in question emanated from, and was appropriate to, the legal duties of the office of a Judge, it must stand as an act purely judicial. Whether such act be done by the Judge in chamber or *sedente curia*, the privileges connected with the duties of the Judge's situation, and which are given for the public safety and advantage, in which the security and independence of the Judge are interwoven, must necessarily await upon such acts, as if they are judicial.¹

If a party bona fide, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the Legislature intended for him although he has done an illegal act.²

When there is jurisdiction, but the jurisdiction is exercised under a misapprehension, either with reference to a person not within it or in excess of the power of the tribunal, in such cases the persons acting with judicial authority would not be criminally responsible; but supposing there is no jurisdiction at all, that the whole proceeding is *coram non iudice*, that the judicial functions are exercised by persons who have not judicial authority or power, and a man's life is taken, that is murder.³

3. 'Good faith'.—See s. 52, *supra*. Where a criminal information is applied for against a Magistrate, the question for the Court is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive or corrupt motive, or from mistake or error only.⁴

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order¹ of, a Court of Justice,² if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction³ to pass such judgment or order, provided the person doing the act in good faith⁴ believes that the Court had such jurisdiction.

Act done pursuant to the judgment or order of Court.

COMMENT.

This section is merely a corollary to s. 77. It affords protection to officers acting under the authority of a judgment or order of a Court of Justice. It differs from s. 77 on the question of jurisdiction. Under it the officer is protected in carrying out an order of a Court which may have no jurisdiction at all, if he believed that the Court had jurisdiction; whereas under s. 77 the Judge must be acting within his jurisdiction to be protected by it. It was Lord Hale's opinion that the order of a Court, having a colour of jurisdiction, though acting erroneously, is enough to justify the ministerial officer.

Mistake of law can be pleaded as a defence under this section.

²³ Per Lopes, L. J., in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q. B. 431, 452.

²⁴ *John Calder v. Robert Craigie Halket*, (1842) 2 M. I. A. 293, 308.

²⁵ *Ibid.*, p. 308.

¹ *Vide* the judgment of Lord Norbury in *Taaffe v. Downes*, (1814). This judgment was separately published at Dublin, but is not

reported in any series of Reports.

² *Richard Spooner v. Juddow*, (1850) 4 M. I. A. 353, 379.

³ *Vide* the judgment of Cockburn, C. J. in *Nelson and Brand*, (1867). This case is not reported in any series of Reports, but the Lord Chief Justice's charge to the jury is published in the form of a book.

⁴ *Borron*, (1820) 3 B. & Ald. 432.

1. 'Order'.—If the form of the order is not in accordance with law, for example, an oral order for a written one, the persons executing such order are not protected under this section. A person was arrested under s. 478 of the Code of Civil Procedure. On his being brought before the Court, the Judge orally ordered the bailiff to keep him in custody. The bailiff in turn orally ordered a process-server to take charge of him. It was held that the bailiff and the process-server were liable for wrongful confinement as s. 481 of the Civil Procedure Code only authorized a Judge to commit persons to jail under a particular form of order.⁵

2. 'Court of Justice'.—See s. 20, *supra*.

3. 'Jurisdiction'.—'Jurisdiction' means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form.⁶ A judicial officer, for instance, who, in the discharge of his judicial duties, issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction in this sense.⁷

4. 'Good faith'.—See s. 52, *supra*. The arrest under civil process of a judgment-debtor going to a Court in obedience to a citation to give evidence, and made within the precincts of that Court, and with some show of violence and contempt of Court, was held not to entitle the officers making the arrest to protection under the section.⁸

Protection from civil liability.—The Judicial Officers' Protection Act says that "no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."⁹

Protection of police-officers from prosecution or action.—The Police Act¹⁰ says: "When any action of prosecution shall be brought or any proceedings held against any police-officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate. Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate, and the defendant shall thereupon be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine: Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section."

79. Nothing is an offence which is done by any person who is justified by law,¹ or who by reason of a mistake of fact² and not by reason of a mistake of law³ in good faith,⁴ believes himself to be justified by law, in doing it.

ILLUSTRATION.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act, seizes Z, in order to bring Z before the proper

⁵ *Maung Pu*, (1908) 4 L. B. R. 253, 8 Cr. L. J. 68.

⁶ *Teyen v. Ram Lal*, (1890) 11 All. 115; *John Calder v. Robert Craigie Halket*, (1840) 2 M. I. A. 293.

⁷ *Teyen v. Ram Lal*, *supra*.

⁸ *Thakoordoss Nundee v. Shunkur Roy*, (1865) 3 W. R. (Cr.) 53.

⁹ Act XVIII of 1850, s. 1.

¹⁰ Act V of 1861, s. 43, and the Madras District Police Act (Mad. Act XXIV of 1859), s. 54. But see the Madras City Police Act (Mad. Act III of 1888), s. 81; the Bombay City Police Act (Bom. Act IV of 1902), s. 140 (3); the Bombay District Police Act (Bom. Act IV of 1890), s. 80 (3); and the Bombay Village Police Act (Bom. Act VIII of 1867), s. 120.

authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

COMMENT.

Distinction between ss. 76 and 79.—The distinction between s. 76 and this section is that in the former a person is assumed to be bound, and in the latter to be justified, by law, in other words, the distinction is between a real or supposed legal obligation and a real or supposed legal justification, in doing the particular act.

“Under both (these sections) there must be a bona fide intention to advance the Law, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law (s. 76) to do as he did, or that being empowered by Law (s. 79) to act in the matter, he had acted to the best of his judgment exerted in good faith.”¹¹

Distinction between s. 79, Penal Code, and s. 132 of Criminal Procedure Code.—Section 79 can only be applied when all the facts are known, i.e., when the trial is over; s. 132 of the Criminal Procedure Code can only operate before the trial begins. The protection given by s. 79 is a protection against conviction, while the protection given by s. 132 is a protection against trial.¹²

Application of section to special or local law.—The Madras High Court has held that the plea of justification provided by this section is available only for an offence punishable by the Code and not for offences punishable by any special or local law and hence the belief of the accused that he was justified in his act does not exculpate him from punishment for his guilt under the Forest Act.¹³ The Bombay High Court has held to the contrary in a case in which the accused, a contractor engaged by the Public Works Department, quarried stones required for a public road, from a place which was pointed out to him by the officers of that department. The place in question was in a protected forest and no permission was taken of the Forest Department for quarrying. The accused was convicted under the Indian Forest Act, but the High Court quashed the conviction on the ground that the accused was entitled to the protection under this section.¹⁴

1. ‘Justified by law’.—This phrase is used in its proper and strict sense in reference to something needing to be vindicated as being in conformity with law.

There is no justification within the meaning of this section for a husband either under the Hindu or the Mahomedan law to use force or restraint to compel his wife to live with him in spite of the general English law and the provisions of the Code in ss. 339, 340 and 350. The forcible removal of the wife amounts to an offence, and persons who join the husband in doing so are also not protected by this section.¹⁵ An advocate is not justified by the law in asking a Magistrate to return the money received by the Magistrate by way of bribe.¹⁶

2. ‘Mistake of fact’.—‘Mistake’ is not mere forgetfulness.¹⁷ It is a slip “made, not by design, but by mischance.”¹⁸ Mistake, as the term is used in jurisprudence, is an erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding of the truth, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time. It may concern either the law or the facts involved.

A mistake of fact consists in an unconsciousness, ignorance, or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing material to the transaction, which does not exist, or in the past existence of a thing which has not existed.

Under s. 76 and this section the mistake must be one of fact and not of law. At

¹¹ 1st Rep., s. 114, p. 119.

¹² *Schamnad v. Rama Rao*, [1932] M. W. N. 1225, 34 Cr. L. J. 528, [1933] AIR (M) 268.

¹³ *K. R. Lewis*, (1913) 15 Cr. L. J. 171, 1 L. W. 132, [1914] AIR (M) 277.

¹⁴ *Kassim Isab Sab*, (1912) 14 Bom. L. R. 365, 13 Cr. L. J. 530.

¹⁵ *Ramlo*, (1918) 12 S. L. R. 29, 19 Cr. L. J.

955, [1918] AIR (S) 69; *Haji Baka*, (1908) 2 S. L. R. 6, 10 Cr. L. J. 208.

¹⁶ *U San Win v. U Hla*, (1930) 32 Cr. L. J. 934, [1931] AIR (R) 83.

¹⁷ Per Lord Esher, M. R., in *Barrow v. Issacs & Son*, [1891] 1 Q. B. 417, 420.

¹⁸ Per Lord Russell, C.J., in *Sandford v. Beal*, (1894) 65 L. J. Q. B. 73, 74, 73 L. T. 406.

common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. . . . Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy.¹⁹ If a man, for instance, intending to kill a thief in his own house, kills a member of his family, he will be guilty of no offence.²⁰ "It may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence".²¹ Where, through a mistake, a man, intending to do a lawful act, does that which is unlawful, here the deed and the will act separately, there is not that conjunction between them which is necessary to form a criminal act. "...*ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary. . . . It is known in war, that it is the greatest offence for a soldier to kill, or so much as to assault his general: suppose then the inferior officer sets his watch, or sentinels, and the general to try the vigilance or courage of his sentinels comes upon them in the night in the posture of an enemy, . . . the sentinel strikes, or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offence".²² Similarly, where a man made a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, and killed a person who was not a burglar, it was held that he had committed no offence.²³ In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar.

But where an act is clearly a wrong in itself, and a person, under a mistaken impression as to facts which render it criminal, commits the act, then according to the *ratio decidendi* in *Prince's* case,²⁴ he will be guilty of a criminal offence.

Cases.—Mistake of fact.—Good defence.—The accused, a police constable, saw the complainant, early one morning, carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen, he went up to the complainant and questioned him. The complainant gave answers that were not satisfactory and refused to allow the constable to inspect the cloth, and a scuffle thereupon ensued between the two. The complainant was arrested by the constable, but was released by the Inspector of Police. The complainant then prosecuted the constable for wrongful restraint and confinement and the Magistrate convicted the constable of the said offence. The High Court held that the conviction was wrong as the constable acted under a bona fide belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant to clear up his suspicions was an indication of good faith and he was, therefore, protected by this section.²⁵ A chowkidar in good faith took the complainant for a thief and captured him. It was held that he was entitled to the benefit of s. 76 and this section. Campbell, J., said: "If there was any mistake regarding the fact of complainant's being a thief, it was a mistake of fact, and not a mistake of law".¹ Where a person believing in good faith that the object of his assault was not a human being but a ghost, caused fatal injuries on another which resulted in the death of the latter, it was held that in view of the provisions of this section, the accused was not guilty of murder or culpable homicide or even of an offence under s. 304A.² He was protected under this section. Where certain persons went to execute a warrant of arrest against their judgment-debtor, and a palanquin with closed doors was noticed to be coming out of the male apartments of the house, and they believing that the judgment-debtor was effecting his escape in it, stopped it and examined it, although the person accompanying it protested and said there was a lady in it and there turned out to be in it a *pardanishin* lady of rank, it was held that the accused were protected by this section.³

Where the act of conveying liquor without a permit was made penal by the Madras

¹⁹ Per Cave, J., in *Tolson*, (1889) 23 Q. B. D. 168, 181, 16 Cox 629.

²⁰ 1 Hale P. C., c. VI., pp. 42, 43; *Levett*, (1839) Cro. Car. 538.

²¹ Per Stephen, J., in *Tolson*, sup., p. 188.

²² 1 Hale P. C. 42.

²³ *Levett*, (1839) Cro. Car. 538.

²⁴ (1875) L. R. 2 C. C. R. 154. See *Tolson*, (1889) 23 Q. B. D. 168, 181, 16 Cox 629.

²⁵ *Bhawoo Jivaji v. Mulji Dayal*, (1888) 12

Bom. 377. See *Lawrence v. Hedger* (1810) 3 Taunt. 14.

¹ *Protab Chowkeedar*, (1865) 2 W. R. (Cr.) 9.

² *Waryam Singh*, (1826) 28 Cr. L. J. 39, [1926] AIR (L) 554; *Bonda Kuri*, (1942) 23 P.L.T. 670, 43 Cr. L. J. 787, [1943] AIR (P) 64. See *Hayat*, (1887) P. R. No. 11 of 1888 where the accused was convicted under s. 304A.

³ *Kanai Lal Govala*, (1897) 24 Cal. 885.

Abkari Act⁴ and the onus of proving that the act was not an offence was thrown by the Act upon the accused, it was held that the accused had discharged the onus by proving that they believed in good faith that they were not transporting liquor.⁵

English cases.—The prisoner was convicted of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. She believed in good faith and on reasonable grounds that her husband was dead. It was held that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong.⁶ Where a statute prohibited a licensed victualler from supplying liquor to a police constable while on duty, and a victualler did supply liquor to a constable bona fide believing that he was off duty, it was held that he had committed no offence.⁷

Bad defence.—A police-officer saw a horse tied up in B's premises, and because it happened to resemble one which his father had lost a short time previously, he jumped at once to the conclusion that B had either stolen the horse himself, or had purchased it from the thief, and compelled B to account for his possession. He found that B had bought the animal from one S; so he sent for S, charged him with the theft, and compelled him to give bail whilst an investigation was pending. The police-officer never sent for the supposed owner of the horse, or took the trouble of getting any credible information as to whether it was his father's horse or not. It was held that the police-officer had not acted in good faith, that is, with due care and attention, and that this section did not protect him.⁸

English cases.—It is no defence to an indictment for unlawfully taking an unmarried girl under the age of sixteen years out of the possession, and against the will of her father, that the accused bona fide and reasonably believed that the girl was older than sixteen.⁹ One of the grounds for this decision was that, notwithstanding such belief, the prisoner intended to do and did a wrongful or immoral act, and not an innocent act, when he took the girl away. This case may be thus distinguished from *Tolson's* case, in which the conduct of the woman was not in the smallest degree immoral, but was, on the other hand, perfectly natural and legitimate. The accused was convicted under a statute of receiving lunatics into her house, not being a house duly licensed under the statute, but it was found that though the persons so received were lunatics, the defendant honestly, and on reasonable grounds, believed that they were not lunatics. It was held that such belief was immaterial and that the conviction was right.¹⁰ It is not easy to draw a distinction between *Tolson's* case, and this case. But the decision in this case appears to have gone on the scope of the Act constituting the offence, and the object for which it was apparently passed. Where a statute made it an offence for any licensed person to sell any intoxicating liquor to any drunken person; and a publican sold such liquor to an intoxicated person who had given no indication of intoxication, and without being aware that the person so served was drunk, it was held that the prohibition was absolute, and that knowledge of the condition of the persons served with liquor was not necessary to constitute the offence.¹¹ Similarly, where a statute imposed penalties on every holder of a license who knowingly sold or delivered any intoxicating liquor to any child under fourteen for consumption by any person, excepting such intoxicating liquors as were sold or delivered in corked and sealed vessels in the prescribed manner, and a licensee delivered liquor to a child under fourteen in a vessel not corked and sealed, it was held that he was liable under the statute, although he honestly believed when he delivered the liquor that the vessel was so corked and sealed.¹²

3. 'Mistake of law'.—A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon facts as they really are. Mistake in point of law in criminal cases is no defence. "Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from

⁴ *Madras Act* I of 1886, s. 64.

⁵ *C. Kandan*, (1894) 1 Weir 40. See *Waman Dhanraj*, (1908) 10 Bom. L. R. 171, 7 Cr. L. J. 191.

⁶ *Tolson*, (1889) 23 Q. B. D. 168.

⁷ *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

⁸ *Sheo Surun Sahai v. Mohamed Fazil Khan*, (1868) 10 W. R. (Cr.) 20.

⁹ *Prince*, (1875) L. R. 2 C. C. R. 154.

¹⁰ *Bishop*, (1880) 5 Q. B. D. 259.

¹¹ *Cundy v. Le Cocq*, (1884) 13 Q. B. D. 207.

¹² *Brooks v. Mason*, [1902] 2 K. B. 743.

the penalty of the breach of it ; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do".¹³

Some of the decisions profess to see a clear and practical distinction between ignorance of law and mistake of law, and assert that much of the confusion in the books upon this subject has grown out of a confounding of the two. Ignorance, it is said, implies passiveness ; mistake implies action. Ignorance does not pretend to knowledge ; but mistake assumes to know. Ignorance may be the result of laches, which is criminal ; mistake argues diligence, which is commendable. But whatever merit this distinction may possess in academic discussion, it has been rejected by the Courts as being a refinement too subtle for application to practical affairs.

"If any individual should infringe it [the statute law of the country] through ignorance or carelessness, he must abide by the consequence of his error;...it is not competent to him to aver in a Court of Justice that he was ignorant of the Criminal Law of the land, and that no Court of Justice is at liberty to receive such a plea".¹⁴

Austin¹⁵ says "that if ignorance of law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the Court, in every case, would be bound to decide the point. . . Whether the party was *really* ignorant of the law, and was *so* ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the *cause* of his ignorance (its *reality* being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution".

Although ignorance of law does not excuse a person, who does an action which is an offence irrespectively of any guilty knowledge on the part of the alleged offender, yet, when to constitute the offence it must be shown that there was a certain knowledge, the offence is not committed by one who acts without that knowledge, and it is immaterial whether the absence of the knowledge required to constitute the offence proceeded from ignorance of law or ignorance of fact. For, though ignorance of law is no ground of defence, it is evidence of mental condition.¹⁶

The maxim *ignorantia juris non excusat*, in its application to criminal offences, admits of no exception, not even in the case of a foreigner who cannot reasonably be supposed in fact to know the law of the land.¹⁷ In a case two Frenchmen were charged with wilful murder because they had acted as seconds in a duel in which one man had met his death. They alleged that they were ignorant of the fact that by the law of England killing an adversary in a fair duel amounted to murder. . Coleridge, J., said: "We are told to lay down a different rule to what we should apply to native born subjects, because these persons are foreigners and ignorant of our law relating to duelling. But I agree with the Lord Chief Justice, that foreigners, who come to England, must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner".¹⁸

Ignorance of statute newly passed.—Although a person commits an act which is made an offence for the first time by a statute so recently passed as to render it impossible that any notice of the passing of the statute could have reached the place where the offence has been committed, yet his ignorance of the statute will not save him from punishment. In the case in which this principle has been laid down, the accused, a captain of a vessel, was indicted for maliciously shooting a mariner of another vessel. The latter vessel was sailing without colours and was so conducting herself as to give the accused reasonable ground to think that she was an enemy. However, on boarding her, he found that she was an English vessel, but for some reason he and the captain of the vessel quarrelled. The accused left her and when he got on board his own vessel he ordered three guns to be fired, one of which wounded the mariner. It was insisted on behalf of the accused that he had a right to fire upon the vessel, because the captain did not

¹³ 1 Hale P. C. 42.

¹⁴ Per Muttusami Ayyar, J., in *Fischer*, (1891)

¹⁵ *Mad.* 342, 354.

¹⁶ *Jurisprudence*, (4th Edn.), Vol. I, pp. 498,

499.

¹⁷ (1881) 1 Weir 74, 75.

¹⁸ *Esop*, (1836) 7 C. & P. 456.

¹⁹ *Barronet's Case*. (1852) Dearsly 51, 59.

produce her papers; that he did not shoot at the mariner but at the ship; and that the accused could not be found guilty of the offence with which he was charged, because the Statute 39 Geo. III, c. 37, upon which the accused was indicted, came into force on the 10th May, 1799, and the fact charged in the indictment happened on the 27th June following, when the accused could not know that any such statute existed. The jury said that they were satisfied that the accused did not fire upon the vessel for non-production of her papers, but in consequence of the quarrel which had taken place between him and the captain of the other vessel. Lord Eldon was of opinion that the guns might be considered as shot at each individual on board her; that the accused was, in strict law, guilty within the Statute 39 Geo. III, c. 37, though he could not then know that it had passed; and that his ignorance of that fact could in no otherwise affect the case than that it might be the means of recommending him to a merciful consideration. On a reference to twelve other Judges it was held that the accused could not have been tried if the Statute 39 Geo. III, c. 37, had not passed, and as he could not have known of that statute, they thought it right he should have a pardon.¹⁹ An act, though not unlawful in its commencement, becomes unlawful when a statute makes it so, notwithstanding the ignorance of the doer of the act that any such statute is in force.²⁰ But before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued.²¹

Mistake of law.—*English cases.*—A had set wires in which game was caught. B, a game-keeper, found them, and took the game and wires for the use of the lord of the manor. A demanded them with menaces, and B gave them up. It was found that A had acted under a bona fide impression that the game and wires were his property. It was held that he had committed no offence.²² Where an ignorant person found a five-pound note and appropriated it, not knowing that he was bound by law to endeavour to discover the true owner thereof before converting it to his own use, the Court directed the jury to consider the state of the finder's mind, and ruled that if the jury thought the person really believed the note to be his own by right of finding the jury should not bring in a verdict of guilty. Coleridge, J., said: "Ignorance of the law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into his state of mind; as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony".²³

Indian cases.—The accused went to the complainant's house with a bailiff to execute a distress warrant. The bailiff called out the name of the judgment-debtor, but there was no reply. The wife of the judgment-debtor, who was absent, was sitting in the verandah. The accused, who was the judgment-creditor, thereupon raised the curtain of the door. The lady inside, who was *pardanashin* lady, seeing strangers standing in front of her door which was open, went to the door to shut it. The accused gave the door a push and the lady gave a shriek and fell down. She was in great pain and unconscious. It was held that the accused was guilty under s. 352. He was not the person executing process, he was merely a person executing a decree accompanying the person executing process for the purpose of pointing out property; in the circumstances he was not entitled to push open the door; it was for the bailiff to take such action as was necessary under s. 62, Civil Procedure Code.²⁴

Mistake of fact as well as of law.—In civil causes, it seems that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole is treated as ignorance of fact, of which the party may take advantage.²⁵

4. '**Good faith.**'—See s. 52, *supra*. To satisfy the Court of his good faith, a person must show at least that he acted advisedly, and that he had reasonable ground *prima*

¹⁹ *Bailey's Case*, (1800) Russ. & Ry. 1, 4.

²⁰ *Burns v. Nowell*, (1880) 5 Q. B. D. 444, 454.

²¹ *Ibid.*

²² *Hall*, (1828) 3 C. & P. 409.

²³ *Reed*, (1842) Car. & Mar. 306, 308.

²⁴ *Kaluram Nemaram*, (1933) 34 Cr. L. J. 963.

²⁵ *Bishop's Criminal Law*, (8th Edn.), Vol. I. c. 19, s. 311.

facie for believing that he ought to do what he did.¹

"Good faith" requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution, must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question.² When a person does a thing in good faith, but subsequently commits a mistake of fact, he is entitled to the protection afforded by this section.³ The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case.

Where in a case under the Child Marriage Restraint Act, the defence put forward was that the applicants were misled by a certificate granted by the woman medical officer in charge of a hospital to the effect that the girl was not less than fourteen years of age, but according to the civil surgeon, the girl was about twelve years of age only and no evidence was produced to contradict the civil surgeon, it was held that the accused should have gone to the civil surgeon in order to obtain a certificate and that the fact of their having secured a certificate from the woman medical officer was not material although the existence of the certificate was a matter which might be taken into account in considering whether imprisonment or fine should be ordered.⁴

The defence of good faith is expressly excluded by this section in regard to a mistake on a point of law.

"Good faith" and "mistake of law" are no defences to a charge of bigamy.⁵

Act of State.—Stephen⁶ says: "I understand by an act of State an act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty; which act is done by any representative of Her Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty...

"When an act of this sort is an act of open war, duly proclaimed, there can be no doubt at all that it does not amount to a crime. However unjust a war might be, and however cruelly it might be carried on, there can be no question that the acts done in such a war by the orders of military and naval commanders do not fall under the notice of the ordinary criminal law. If England were invaded, and if, for military reasons, unarmed prisoners after resistance had ceased, were to be put to death by an English general, I do not think that a court of law would inquire whether his conduct was proper or not. As soon as it appeared that what was done was an act of war the matter would be at an end...

"The difficulty arises when acts which are in their nature warlike are done in time of peace...

"I think that if such acts are done by public authority, or, having been done, are ratified by public authority, they fall outside the sphere of the criminal law...

"I do not know that the principle has ever been tested by a criminal prosecution, but it has been repeatedly affirmed in civil cases; and if a man is not even liable civilly for an act of State, it would seem to follow *a fortiori* that he cannot be liable criminally....

"In order to avoid misconception, it is necessary to observe that the doctrine as to acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful

¹ 1st Rep., s. 114, p. 219.

² *Abdool Wadood*, (1907) 31 Bom. 293, 9 Bom. L. B. 230.

³ *Raghunath Dass*, (1920) 5 P. L. J. 129, 21 Cr. L. J. 213.

⁴ *Jwala Prasad*, (1933) 35 Cr. L. J. 667, [1934] AIR (A) 331.

⁵ *Narantakath Avullah v. Parakkal Mammu*, (1922) 45 Mad. 986.

⁶ History of the Criminal Law of England, Vol. II, pp. 61-65. See *Rajah of Coorg v. The East India Company*, (1860) 29 Beav. 300; *Doss*

v. The Secretary of State for India, (1875) L. R. 19 Eq. 509; *The Secretary of State in Council of India v. Kamachee Boye Sahaba*, (1859) 7 M. I. A. 476; *Raja Saligram v. The Secretary of State*, (1872) Sup. I. A. 119, P. R. No. 2 of 1872, 12 Beng. L. R. 167; *Sirdar Bhagwan Singh v. Secretary of State for India*, (1874) 2 I. A. 88, P. R. No. 1 of 1875. See also an exhaustive note on this subject by Sir H. S. Gour, in the *Bombay Law Reporter, Journal*, Vol. VIII, pp. 69-76 and 97-110, where the writer subjects Sir Fitz James Stephen's theory to a close criticism.

or not. On this ground the courts were prepared to examine into the legality of the acts done under Governor Eyre's authority in the suppression of the insurrection in Jamaica. The acts affected British subjects only. But as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned."

The test whether an act is or is not an act of State excluding the jurisdiction of the Courts, is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorized by the law to perform specific acts of Government, but whether it is an act of State in those external relations, which municipal or positive law addressed by political superiors to political inferiors does not profess to regulate. An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all and which could neither assert nor violate any right conferrable by law, but which must rest for its jurisdiction on considerations of external politics and inter-statal duties and rights;⁷ for instance, a seizure of territory by the British Government as a sovereign power⁸, or an act done by an agent of Government in his political capacity⁹, or an order of the Governor-General in Council deposing the ruler of a Native State.¹⁰

The acts of State of which municipal Courts in India are debarred from taking cognizance are acts done in the exercise of sovereign powers, which do not profess to be justified by municipal law. Where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power, and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil Courts.¹¹ The legality of the sovereign's acts towards his own subjects can be questioned in civil Courts.¹² A British Court may inquire into the character of the act of the Governor of a foreign State, and is not bound to accept it as an act of State.¹³

Persons carrying out an act of State under proper order will be protected by the Penal Code in the same way as if they were carrying out a lawful order under the municipal law.

To support a plea of this nature two things are essential:—(1) that the defendant had authority to act on behalf of the Crown in the matter; and (2) that in so acting, he was professing to act as a matter of policy, outside the law, and not as a matter of right within the law.

Martial law.—The proclamation of martial law is, in fact, no more than a declaration, that under circumstances of urgent public danger, *all law is for a time suspended*, and that for the safety of the State the Government deems it necessary to *set aside the ordinary rules of law* by a military force, and to proceed summarily to put down the rebellion, or to punish those who are concerned in it. Courts-martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions, by instituting an inquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion. But courts-martial so assembled have nothing in common with the tribunals bearing the same name, which, under the Mutiny Act, take cognizance of military offences, &c. Courts-martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record, which can be enforced by the military authorities, which is not the case with courts-martial assembled for the punishment of rebels, under proclamation of martial law, without the sanction of any positive enactment. Sentences of such Courts add nothing to the legality of the punishments inflicted, and serve only to show that those punishments have not been inflicted without due inquiry into the guilt of those who were subjected to them. Accordingly, it is the practice, when martial law has been exercised and punishments have been inflicted under it, that where the

⁷ *Jehangir v. Secretary of State*, (1903) 6 Bom. L. R. 131, 148.

⁸ *The Secretary of State in Council of India v. Kamachee Boye Sahaba*, (1859) 7 M. I. A. 476.

⁹ *Inhabitants of Mahalingpore v. Anderson*, (1870) 7 Beng. L. R. 452 n.

¹⁰ *Maharajah Madhava Singh v. Secretary of State for India in Council*, (1904) 31 I. A. 239, 32

Cal. 1, 6 Bom. L. R. 768.

¹¹ *The Secretary of State for India v. Hari Bhanji*, (1882) 5 Mad. 273.

¹² *Ameer Khan*, (1870) 6 Beng. L. R. 392.

¹³ *The Bombay Burma Trading Corporation, Limited v. Mirza Mahomed Ali Sheragee*, (1873) 10 Beng. L. R. 345, 19 W. R. 128.

danger is over, the legislature should be applied to for laws of indemnity for the security of those by whom these powers have been exercised, and for whom *there is no legal warrant*, however necessary it may have been to assume them."¹⁴

The civil Courts have no jurisdiction *durante bello* to interfere with the decision of a military Court sitting in a martial law area, even where a capital sentence has been pronounced, and is about to be executed, for an offence not punishable capitally under the ordinary criminal law.¹⁵ The High Court in Ireland has held that it has the power when its jurisdiction is invoked to decide whether a state of war exists which justifies the application of martial law; but once such a condition of affairs is established to the satisfaction of the Court, it cannot interfere to determine what is or what is not necessary.¹⁶

The Bombay High Court has laid down in *Emperor v. Chanappa Shantirappa* ¹⁷: "Where a state of war, or insurrection amounting to war, exists, it is competent for the Crown, in the exercise of its prerogative, to place the country affected under martial law. Martial law in that sense, . . . is no law at all; the ordinary Courts *ex hypothesi* are not functioning except under military protection, and the effect of martial law . . . is to substitute for the ordinary law of the land the will of the military commander. The liberty, property, and even the lives, of the persons in the affected area are placed at the mercy of the military. But . . . the Crown can only declare martial law in cases of absolute necessity, and when the necessity ends normal legal conditions are automatically restored. Where martial law has been declared it is competent for the Courts—and is indeed the duty of the Courts if called upon—after the restoration of normal conditions to decide whether and to what extent martial law was justified."¹⁸

As to the handing over charge by civil authorities to the military authorities the following points are established:—"Firstly, a state of war and armed rebellion or insurrection must exist and not merely a state of riot which could be put down with the aid of the military and other citizens. Secondly, neither the military nor citizens can refuse or impose conditions on such aid. Thirdly, the necessity must be proved, not merely of recourse to the military but also of the impossibility of functioning of the ordinary civil laws and the necessity of their abolition for the time being, and the Courts have power to go into the question whether such necessity existed. Fourthly, it is only when the existence of war, whether against foreigners or rebels, and necessity are established, that the jurisdiction of the Courts ceases. Fifthly, the powers exercised by the military commonly but incorrectly known as 'martial law' in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal, and therefore need Acts of Indemnity, if they are not to be questioned..."

"It is only when practically the entire population of a certain area is so widely and so deeply disaffected and so armed that it is able to enforce its own law and the King's law and writ do not run that an armed rebellion or insurrection as distinguished from riot can be said to exist and necessity to arise..."

"The justification for the acts of the military lies not merely in their bona fides but in the existence of necessity, i.e., in the proof of such a state of war, insurrection or armed resistance as to justify the cessation of the ordinary law and its replacement by military force pure and simple. The question of necessity or whether the proved facts amount to necessity is a question of fact for the Courts. If necessity is proved, . . . then the acts of the military are not justiciable by the ordinary Courts. Unless it is proved, they are so justiciable."¹⁹

"The civil authorities are not entitled to abrogate their duties and to hand over control to the military except in cases of necessity...inasmuch as martial law is no law at all. The existence of martial law...places all citizens in the area to which it extends under the unfettered control of the military authorities, whose acts are not justiciable by the civil Courts...It is...plainly the duty of the civil authorities, assisted by all loyal subjects, whether civil or military, to carry on the civil administration, and not to hand over control to the military, unless the necessity of the case demands it...It is undoubtedly the duty of the Courts, if the necessity is challenged, to enquire into the matter, and if the necessity is not established, then any persons who have committed acts not sanction-

¹⁴ Finlayson's Review of the authorities as to the Repression of Riot or Rebellion, p. 96.

¹⁵ *Allen*, [1921] 2 I. R. 241.

¹⁶ *Strickland*, [1921] 2 I. R. 317.

¹⁷ (1930) 32 Bom. L. R. 1613, 55 Bom. 263.

¹⁸ Per Beaumont, C. J., in *Chanappa Shantirappa*, (1930) 32 Bom. L. R. 1613, 1626, 55 Bom. 263, 280.

¹⁹ Per Madgavkar, J., in *ibid.*, pp. 1636, 1638, 1639, 55 Bom. 263, 293, 296, 297.

ed by the ordinary law are liable to be attacked in the Courts at the instance of those who have suffered from their lawless acts."²⁰

Liability of private persons.—Private persons acting under ss. 43, 59, 77 and 78 of the Code of Criminal Procedure²¹ will be protected under this section.

If an offender resists arrest and attempts to escape, a person who is bound by law to assist in arresting the offender and in preventing his escape is entitled to use all means necessary to effect the arrest short of causing death.²²

PRACTICE.

Procedure.—Jurisdiction.—Act of State.—It is within the province of municipal Courts to determine the true character of the acts done by a public functionary, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it.²³

Punishment.—Ignorance of law is no defence, but it is a matter to be taken into consideration in mitigation of punishment.²⁴

80. Nothing is an offence which is done by accident¹ or misfortune, and without any criminal intention² or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

ILLUSTRATION.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

COMMENT.

This section exempts the doer of an innocent or lawful act in an innocent or lawful manner from any unforeseen evil result that may ensue from accident or misfortune. If either of these two elements is wanting the act will not be excused on the ground of accident.

1. 'Accident.'—An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things.²⁵ An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.¹ The idea of something fortuitous and unexpected is involved in the word 'accident'.² An injury is said to be accidentally caused whensoever it is neither wilfully nor negligently caused.³ Accused was beating a person with his fists when the latter's wife with a baby on her shoulder interfered. Accused hit at the woman but the blow accidentally struck the baby and two days later it died from the effects of the blow. It was held that although the child was hit by accident the accused's act was not covered by this section inasmuch as he was not at the time doing a lawful act.⁴

The following illustrations given in Stephen's Digest of Criminal Law⁵ further elucidate the nature of acts that may be regarded as accidental:—

(1) A, a schoolmaster, corrects a scholar in a manner not intended or likely to injure him, using due care. The scholar dies. Such a death is accidental.

²⁰ Per Blackwell, J., in *Channappa Shantirappa*, (1930) 32 Bom. L. R. 1613, 1643, 55 Bom. 263, 302.

²¹ Act V of 1898.

²² *Mani Karki*, (1926) 28 Cr. L. J. 445, 5 B. L. J. 223, [1927] AIR (R) 121.

²³ *Musgrave v. Pulido*, (1879) 5 App. Cas. 102, 111.

²⁴ *Esop*, (1836) 7 C. & P. 456; *Sitaram Kunbi*, (1928) 24 N. L. R. 110, 29 Cr. L. J. 506, [1928] AIR (N) 188.

²⁵ Per Willes, J., in *Fenwick v. Schmalz*, (1868)

L. R. 3 C. P. 313, 316.

¹ Stephen's Digest of Crim. L., Art. 281.

² Per Lord Halsbury, L. C., in *Hamilton, Frazer & Co. v. Pendorf & Co.*, (1887) 12 App. Cas. 518, 524.

³ 10th Par. Rep., 16.

⁴ *Jageshar*, (1923) 24 Cr. L. J. 789. See *Chatur Natha*, (1919) 21 Bom. L. R. 1101, 21 Cr. L. J. 85, [1920] AIR (B) 224.

⁵ Article 281, p. 168.

(2) A turns B, a trespasser, out of his house, using no more force than is necessary for that purpose. B resists, but without striking A. They fall in the struggle and B is killed. Such a death is accidental.

(3) A, a workman, throws snow from a roof, giving proper warning. A passenger is nevertheless killed. Such a death is accidental.

(4) A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger. B is shot dead. Such a death is not accidental. If A had reason to believe that the gun was not loaded, the death would have been accidental, although he had not used every possible precaution to ascertain whether the gun was loaded or not.

2. 'Criminal intention.'—See Comment under s. 81, *infra*.

CASES.

Shooting accident.—Two men, accused and deceased, went into a jungle, shikaring porcupines. They agreed to take up certain positions in the jungle and lie in wait for game. This was done. After a while, the accused heard a rustle, and believing it was a porcupine fired in that direction. The shot, however, reached his companion and caused his death. It was held that the accused was protected by this section, the affair being a pure accident.⁶ The accused, a young man, with several companions, went to shoot a pig. He took up his position and waited in the jungle while his companions proceeded to beat the pig towards him. A boar was driven in his direction and the accused fired. The ball, however, missed the boar and hit one of the beaters causing his immediate death. It was held that the death was the result of an accident and was not due to any such negligence on the part of the accused as would bring his act within the purview of s. 304A of the Penal Code and the accused was not guilty of any offence.⁷

English cases.—A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with a rammer; he carried it home and showed it to his wife; and she standing before him he pulled up the cock, and touched the trigger. The pistol went off and killed the woman. The rammer, perhaps, was too short and deceived him. It was held that the man was guilty of manslaughter. Foster thinks that this is an extremely hard case "because accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall amongst the nearest friends and relations."⁸ A man and his wife went to take dinner at the house of a friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. He went to church after dinner and in the evening returned home bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He taking it up touched the trigger, and the gun went off and killed the wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family had privately taken the gun out to shoot and had returned it loaded to the place where it was put in the friend's house. The accused was acquitted on the ground that he had reasonable grounds to believe that the gun was not loaded.⁹ A person was charged with having fired a fowling-piece loaded with small shot, in a field within an easy shot of a high road, where persons frequently passed, and in the direction of the road, and killed a girl passing at the time. It appeared that the shot was really a long one, being above fifty yards, and that it proved fatal only by one of the leads having unfortunately penetrated the child's eye, while the other shot hardly penetrated the skin. It was held that the death was accidental.¹⁰

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention¹ to cause harm, and in good faith² for the purpose of preventing or avoiding other harm to person or property³.

⁶ *Timmappa*, (1901) 3 Bom. L. R. 678.

⁷ *Basant Singh*, (1927) 29 Cr. L. J. 487, 29 P. L. R. 45, [1927] AIR (L) 880; *Shakir Khan*, (1980) 31 P. L. R. 955, 82 Cr. L. J. 587, [1981]

AIR (L) 54.

⁸ (1664) *Rampton's case*, Foster 263 Kel. 41.

⁹ Foster, 265.

¹⁰ *Alison*, 144.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

ILLUSTRATIONS.

(a) A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down C.

(b) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

COMMENT.

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.¹¹

Wherever necessity forces a man to do an illegal act, *forces* him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. It must be voluntary. A man who is absolutely by natural necessity forced, his will does not go along with the act.¹²

1. 'Without any criminal intention.'—Under no circumstances can a person be justified in intentionally causing harm; if he causes the harm without any criminal intention, and merely with the knowledge that it is likely to ensue, he will not be held responsible for the result of his act, provided it be done in good faith to avoid or prevent other harm to person or property.

'Criminal intention' simply means the purpose or design of doing an act forbidden by the criminal law without just cause or excuse. An act is intentional if it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied. The word 'intent' does not mean ultimate aim and object. Nor is it used as a synonym for motive.¹³ Motive is not to be confused with intention. If a man knows that a certain consequence will follow from his act it must be presumed in law that he intended that consequence to take place although he may have had some quite different ulterior motive for performing the act.¹⁴ The motive for an act is not a sufficient test to determine its criminal character. By a motive is meant anything that can contribute to give birth to, or even to prevent, any kind of action. Motive may serve as a clue to the intention; but although the motive be pure, the act done under it may be criminal. Purity of motive will not purge an act of its criminal character.

Motive though not a *sine qua non* for bringing the offence home to the accused is relevant and important on the question of intention.¹⁵ Though the prosecution is not bound to prove motive for the crime, absence of any motive is a factor which may be

¹¹ Stephen's Dig. of Crim. Law, Art. 33.

¹² Lord Mansfield in *George Stratton*, (1779) 21 St. Tr. 1046, 1228.

¹³ *Ram Sukh*, (1933) 34 Cr. L. J. 1055, 10 O. W. N. 1075, [1933] AIR (O) 436.

¹⁴ *Mir Chhittan*, (1936) 38 Cr. L. J. 202,

[1936] A. L. J. 1197, [1937] AIR (A) A13.

¹⁵ *Hazrat Gul Khan*, (1927) 47 C. L. J. 240, 32 C. W. N. 345, 29 Cr. L. J. 546, [1928] AIR (C) 430; *Chandu*, (1928) 29 Cr. L. J. 378, [1928] AIR (L) 657.

considered in determining the guilt of the accused.¹⁶ But if the actual evidence as to the commission of the crime is believed, then no question of motive remains to be established.¹⁷ It is not the bounden duty of the prosecution to prove the motive with which a certain offence has been committed. It is sufficient if the prosecution prove by clear and reliable evidence that certain persons committed the offence, whatever the motives may be which induced them to commit that offence.¹⁸

Where the legislature makes an offence dependent on proof of intention, the Court must have proof of facts sufficient to justify it in coming to the conclusion that the intention existed. No doubt one has usually to infer intention from conduct, and one matter that has to be taken into account is the probable effect of the conduct. But that is never conclusive. The accused, a money lender, kept an account-book called *vyaj-vahi*, in which he made entries as to loans advanced by him, which entries were signed by the borrowers. None of these entries was stamped. The accused was prosecuted under s. 68(c) of the Indian Stamp Act, 1899. It was held that the accused was not guilty of the offence charged, because the Government had failed to prove any intent to defraud the Government of duty and that the Court would not infer a fraudulent intention merely because the result of the action of the parties would be to deprive the Government of duty.¹⁹ Intention is not capable of positive proof: it can only be implied from overt acts. As a general rule, every sane man is presumed to intend the necessary or the natural and probable consequences of his acts and this presumption of law will prevail unless from a consideration of all the evidence the Court entertains a reasonable doubt whether such intention existed. This presumption, however, is not conclusive nor alone sufficient to justify a conviction and should be supplemented by other testimony.²⁰ An accused must be judged to have the intention that is indicated by his proved acts.²¹

Under the Penal Code no man can be tried for any delusion or misconception of mind, however culpable and criminal such delusion or misconception may appear to be.²²

Mens rea.—It is one of the principles of the English criminal law that a crime is not committed if the mind of the person doing the act in question be innocent. It is said that *actus non facit reum, nisi mens sit rea* (the intent and act must both concur to constitute the crime). This principle has been discussed elaborately by Wills, J., in *Tolson's case*²³ in which the accused was convicted of bigamy, having gone through the ceremony of marriage within seven years, after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead. It was held by the majority of the Court that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong. Wills, J., observed: "The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction, for instance—which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice and, indeed, the foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen."

¹⁶ *Hans Raj*, (1928) 30 Cr. L. J. 478, 30 P. L. R. 424.

¹⁷ *Kazi Bazar*, (1928) 33 C. W. N. 136, 48 C. L. J. 307, 30 Cr. L. J. 494, [1929] AIR (C) 1; *Tilak Ram*, (1928) 5 O. W. N. 596, 29 Cr. L. J. 768; *Bhuvwar*, (1932) 9 O. W. N. 1191.

¹⁸ *Ratan Lal*, (1933) 8 Luck. 57

¹⁹ *Ramchandra Gujar*, (1937) 39 Bom. L. R. 1184, [1938] Bom. 114.

²⁰ *Ismail*, (1946) 48 P. L. R. 410.

²¹ *Parbhu Dusaad*, (1926) 28 Cr. L. J. 868, [1928] AIR (P) 46.

²² *Abdul Kadir*, (1880) 3 All. 279, 280, F.B. (1889) 23 Q. B. D. 168, 172, 173.

"Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

"Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." But in the same case²⁴ Stephen, J., remarks that the phrase *non est reus, nisi mens sit rea* "Naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a '*mens rea*', or 'guilty mind', which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. '*Mens rea*' means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a '*mens rea*', or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime..."

"The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

It, therefore, appears that the above maxim has not so wide an application as it is sometimes considered to have. It has undergone a modification owing to the greater precision of modern statutes. It is impossible to apply it generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created. Crimes are at the present day much more accurately defined by statutes or otherwise than they formerly were.

But *Sherras v. De Rutzen*²⁵ seems very like an emphatic re-assertion of the doctrine that *mens rea* is an essential ingredient in every offence except in three cases:¹ (1) cases not criminal in any real sense but which in the public interest are prohibited under a penalty, e.g., Revenue Acts; (2) public nuisances; and (3) cases criminal in form but which are really only a summary mode of enforcing a civil right.

An intention to offend against the penal provisions of an Act constitutes *mens rea*. Sir Richard Couch, in delivering judgment of the Judicial Committee of the Privy Council,² observed: "It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea*

²⁴ *Tolson*, (1889) 23 Q. B. D. 168, 185, 186, 187.

²⁵ [1895] 1 Q. B. 918, 922.

¹ *Vide* the judgment of Wright, J., in

Sherras v. De Rutzen, *ibid.*

² *Bank of New South Wales v. Piper*, [1897] A. C. 383, 389.

on the part of the accused, and that he may avoid conviction by shewing that such mens did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." The words "a particular intent" meant all those states of mind, which a statute which creates an offence regards as necessary that an accused person should have, before he could be said to be guilty of the offence.³

The maxim *actus non facit reum, nisi mens sit rea* has, however, no application to the offences under the Code; because the definitions of various offences contain expressly a proposition as to the state of mind of the accused. The definitions state whether the act must have been done 'voluntarily', 'knowingly', 'dishonestly', or 'fraudulently' or the like. Every ingredient of the offence is stated in the definitions. So mens rea will mean one thing or another according to the particular offence. The guilty mind may thus be a fraudulent mind, or a dishonest mind, or a negligent or rash mind. Every offence under the Code virtually imports the idea of criminal intent or mens rea.⁴

In a criminal Court one often wants to test the alleged guilty mind by seeing what was the motive of the alleged criminal in doing the particular act. It is not essential, under the Code, for the prosecution to establish a motive. But as a matter of common sense, this is usually of importance, because an average man does not commit a criminal offence unless he has a strong motive for doing it.⁵

When guilty intent is the gist of an offence, evidence of similar acts to those charged at or about the same time as the latter is admissible to prove the intent.⁶

2. 'Good faith'.—See s. 52, *supra*.

3. 'Preventing harm to person or property'.—This is the case in which evil is done to prevent a greater evil. It is to this ground of justification that we must refer the extreme measures which may become necessary on occasions of contagious diseases, sieges, famines, tempests, shipwrecks. But the more serious a remedy of this nature is, the more evident ought its necessity to be. The welfare of the State has served as a pretext for all crimes. To give validity to this means of justification three essential points must be established: the certainty of the evil to be avoided, the absolute inapplicability of any means less costly, the certain efficacy of the means employed.⁷

Where a chief constable, not in his uniform, came to a fire and wished to force his way past the military sentries placed round it, was kicked by a sentry, it was held that, as the sentry did not know who he was, the kick was justifiable for the purpose of preventing much greater harm under this section and as a means of acting up to the military order. "The kick would be justified under s. 81... as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused by that section who in a great fire pulls down other peoples' houses to prevent the conflagration from spreading."⁸ Where a Magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, it was held that the Magistrate was protected under this section or ss. 96 to 105.⁹ A person placed poison in his toddy pots, knowing that, if taken by a human being, it would cause injury but with the intention of thereby detecting an unknown thief who was in the habit of stealing the toddy from his pots. The toddy was drunk by, and caused injury to, some soldiers who purchased it from an unknown vendor. It was held that the person was rightly convicted of causing hurt by poison under s. 323, and that this section did not apply.¹⁰

³ *Bank of New South Wales v. Piper*, [1897] A. C. 383. Followed in *Samansab Sultansab Hukari*, (1946) 48 Bom. L. R. 784.

⁴ *Sundar Lal Gupta*, [1937] O. W. N. 30, (1936) 33 Cr. L. J. 188, [1937] AIR (O) 273.

⁵ Per Marten, C. J., in *Shamdasani*, (1929) 31 Bom. L. R. 1144, 1147, 31 Cr. L. J. 383, 385, [1929] AIR (B) 443; *Dhanraj Mills Ltd.*, (1943) 45 Bom. L. R. 300, 44 Cr. L. J. 574,

[1943] AIR (B) 182.

⁶ *Dudley Fredrick West*, (1916) 12 Cr. App. R. 145.

⁷ Bentham.

⁸ Per Jardine, J., in *Bostan valad Futtekhani*, (1892) 17 Bom. 626, 628.

⁹ *Gopal Naidu*, (1922) 46 Mad. 605, F.R.

¹⁰ *Dhania Daji*, (1868) 5 B. H. C. (Cr. C.) 59

Killing human being owing to starvation.—A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. The accused D and S, sea-men, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat. The boat was drifting on the ocean, and was probably more than 1,000 miles from land. On the eighteenth day, when they had been seven days without food and five without water D proposed to S that lots should be cast who should be put to death to save the rest and that they afterwards thought it would be better to kill the boy that their lives should be saved. On the twentieth day D, with the assent of S, killed the boy, and both D and S fed on his flesh for four days. At the time of the act there was no sail in sight nor any reasonable prospect of relief. Under those circumstances there appeared to the accused every probability that unless they then or very soon fed upon the boy or one of themselves they would die of starvation. It was held upon those facts, that there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder.¹¹ Lord Coleridge, C. J., said: "The temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. 'Necessessest ut eam, non ut vivam', is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made...it is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No'—

'So spake the Fiend, and with necessity,

The tyrant's plea, excused his devilish deeds.'

It is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime...It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime."

A and B, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both; A pushes off B, who is drowned. This, in the opinion of Sir James Stephen, is not a crime, as A thereby does B no direct bodily harm, but leaves him to his chance of another plank.

Doctrine of self-preservation.—The authors of the Code remark:—"We long considered whether it would be advisable to except from the operation of the penal

¹¹ *Dudley and Stephens*, (1884) 14 Q. B. D. 273, 287, 288. The gravity of a cruel and deliberate murder is in no way lessened because the

accused committing it was starving: *Nga Ywa*, (1934) 12 Ran. 616.

clauses of the Code acts committed in good faith from the desire of self-preservation; and we have determined not to except them.

"We admit, indeed, that many acts falling under the definition of offences ought not to be punished when committed from the desire of self-preservation; and for this reason, that, as the Penal Code itself appeals solely to the fears of men, it never can furnish them with motives for braving dangers greater than the dangers with which it threatens them. Its utmost severity will be inefficacious for the purpose of preventing the mass of mankind from yielding to a certain amount of temptation. It can, indeed, make those who have yielded to the temptation miserable afterwards. But misery which has no tendency to prevent crime is so much clear evil. It is vain to rely on the dread of a remote and contingent evil as sufficient to overcome the dread of instant death, or the sense of actual torture. An eminently virtuous man indeed will prefer death to crime; but it is not to our virtue that the penal law addresses itself; nor would the world stand in need of penal laws if men were virtuous. A man who refuses to commit a bad action, when he sees preparations made for killing or torturing him unless he complies, is a man who does not require the fear of punishment to restrain him. A man, on the other hand, who is withheld from committing crimes solely or chiefly by the fear of punishment, will never be withheld by that fear when a pistol is held to his forehead or a lighted torch applied to his fingers for the purpose of forcing him to commit a crime.

"It would, we think, be mere useless cruelty to hang a man for voluntarily causing the death of others by jumping from a sinking ship into an overloaded boat. The suffering caused by the punishment is, considered by itself, an evil, and ought to be inflicted only for the sake of some preponderating good. But no preponderating good, indeed no good whatever, would be obtained by hanging a man for such an act. We cannot expect that the next man who feels the ship in which he is left descending into the waves, and sees a crowded boat putting off from it, will submit to instant and certain death from fear of a remote and contingent death. There are men, indeed, who in such circumstances would sacrifice their own lives rather than risk the lives of others. But such men act from the influence of principles and feelings which no penal laws can produce, and which if they were general, would render penal law unnecessary. Again, a gang of dacoits, finding a house strongly secured, seize a smith, and by torture and threats of death induce him to take his tools and to force the door for them; here, it appears to us, that to punish the smith as a house-breaker would be to inflict gratuitous pain; we cannot trust to the deterring effect of such punishment. The next smith who may find himself in the same situation will rather take his chance of being, at a distant time, arrested, convicted and sentenced to imprisonment, than incur certain and immediate death.

"In the cases which we have put, some persons may perhaps doubt whether there ought to be impunity; but those very persons would generally admit that the extreme danger was a mitigating circumstance to be considered in apportioning the punishment. It might, however, with no small plausibility be contended that if any punishment at all is inflicted in such cases, that punishment ought to be not merely death, but death with torture; for the dread of being put to death by torture might possibly be sufficient to prevent a man from saving his own life by a crime; but it is quite certain, as we have said, that the mere fear of capital punishment which is remote, and which may never be inflicted at all, will never prevent him from saving his life. And *a fortiori*, the dread of a milder punishment will not prevent him from saving his life. Laws directed against offences to which men are prompted by cupidity, ought always to take from offenders more than those offenders expect to gain by crime. It would obviously be absurd to provide that a thief or a swindler should be punished with a fine not exceeding half the sum which he had acquired by theft or swindling; in the same manner, laws directed against offences to which men are prompted by fear ought always to be framed in such a way as to be more terrible than the dangers which they require men to brave. It is on this ground, we apprehend, that a soldier who runs away in action is punished with a rigour altogether unproportioned to the moral depravity which his offence indicates. Such a soldier may be an honest and benevolent man, and irreproachable in all the relations of civil life; yet he is punished as severely as a deliberate assassin, and more severely than a robber or a kidnapper. Why is this? Evidently because, as his offence arises

from fear, it must be punished in such a manner that timid men may dread the punishment more than they dread the fire of the enemy.

"If all cases in which acts falling under the definition of offences are done from the desire of self-preservation were as clear as the cases which we have put of the man who jumps from a sinking ship into a boat, and of the smith who is compelled by dacoits to force a door for them, we should, without hesitation, propose to exempt this class of acts from punishment. But it is to be observed, that in both these cases the person in danger is supposed to have been brought into danger, without the smallest fault on his own part, by mere accident, or by the depravity of others. If a captain of a merchantman were to run his ship on shore in order to cheat the insurers, and then to sacrifice the lives of others in order to save himself from a danger created by his own villainy; if a person who had joined himself to a gang of dacoits with no other intention than that of robbing were at the command of his leader, accompanied with threats of instant death in case of disobedience, to commit murder, though unwillingly, the case would be widely different, and our former reasoning would cease to apply; for it is evident that punishment which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear which a man may entertain of being brought to the gallows at some distant time as sufficient to overcome the fear of instant death; but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed crimes which every one among them was unwilling to commit, under the influence of mutual fear; but we think it clear that this circumstance ought not to exempt them from the full severity of the law.

"Again, nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that, when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft; yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft; but it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which would provide that as soon as a man who has neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbours.

"We should, therefore, think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would *a fortiori* be absurd to enact that no act under the fear of any other evil should be an offence.

"There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death. But it appears to us impossible precisely to define these cases. We have, therefore, left them to the Government, which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Courts."¹²

But in their first Report the Commissioners say: "We think that a distinction may be drawn between cases in which a man does a thing which is an offence by law, spontaneously, to save his own life, and cases in which he does such a thing, from what is called duress, that is from the compulsion of others to save his life threatened by them.

"With respect to the former, we agree with the authors of the Code that it is

¹² Note B, pp. 111, 112, 113.

impossible to define precisely those cases in which it may be proper to excuse the parties, and that it is expedient to leave them to the discretion of the Government."¹³

They then proposed s. 54 to meet the latter kind of cases.

As to the doctrine of compulsion and necessity, see Comment under s. 94, *infra*.

Act of a child
under seven years
of age.

82. Nothing is an offence which is done by a child under seven years of age.

COMMENT.

Under the age of seven years no infant can be guilty of a crime; for, under that age an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion.¹⁴ He cannot distinguish right from wrong. If the accused were a child under seven years of age, the proof of that fact would be *ipso facto* an answer to the prosecution.¹⁵ See *ante*, s. 6, ill. (a) Accused purchased for one-anna, from a child aged six years, two pieces of cloth valued at fifteen annas, which the child had taken from the house of a third person. It was held that, assuming that a charge of an offence under s. 411 could not be sustained, the accused was clearly guilty of criminal misappropriation, if he knew that the property belonged to the child's guardian and dishonestly appropriated it to his own use.¹⁶ The defendant caught a child in the act of stealing a piece of wood from his premises, and gave it into custody. The child was discharged by the Magistrate on the ground that it was under the age of responsibility. Erle, C. J., said that an infant under seven years of age could not incur the guilt of felony.¹⁷

The immunity of children under seven years of age from criminal liability is not confined to offences under the Code only, but extends to offences under any special or local law in virtue of s. 40. A child under seven years of age, who was the registered owner of a hired motor-vehicle—there being no law in Burma against children, however, young, being registered owners of motor-vehicles—was held not liable for the offence of plying a bus for hire without a licence.¹⁸ But if a particular Act has special provisions to the contrary a child will be liable. See, for instance, the Indian Railways Act¹⁹ as to offences committed by children against certain provisions of that Act.

Where an Ordinance makes members of a partnership or co-parceners of a joint family firm liable for the criminal act of their servant in contravention of the Ordinance, the case of minor co-parceners will be governed by ss. 82 and 83 of the Code.²⁰

83. Nothing is an offence which is done by a child above seven years of age and under twelve,¹ who has not attained sufficient maturity of understanding² to judge of the nature and consequences of his conduct³ on that occasion.

Act of a child
above seven and
under twelve of
immature under-
standing.

COMMENT.

In construing this section the capacity of doing that which is wrong is not so much to be measured by years, as by the strength of the offender's understanding and judgment. The circumstances of a case may disclose such a degree of malice as to justify the maxim *malitia supplet aetatem*.²¹

1. 'Under twelve'.—With reference to the precocity of children in the East, the rule of the Indian Code which fixes the age of twelve as the period after which the plea of immaturity of understanding shall not be allowed, appears to be proper.²²

2. 'Sufficient maturity of understanding'.—"Where the accused is above seven years of age and under twelve, the incapacity to commit an offence only arises

¹³ Sections 167, 168, p. 232.

¹⁴ 1 Hale P. C. 27, 28; *Marsh v. Loader*, (1863) 14 C. B. N. S. 535.

¹⁵ *Lukhmi Agradani*, (1874) 22 W. R. (Cr.)

¹⁶ *Mahulshah*, (1886) 1 Weir 470.

¹⁷ *Marsh v. Loader*, (1863) 14 C. B. N. S.

535.

¹⁸ *Ba Ba Sein*, [1938] Ran. 227.

¹⁹ Act IX of 1890, s. 130.

²⁰ *Utiam Chand*, [1946] Lah. 239.

²¹ *Mussamut Amona*, (1864) 1 W. R. (Cr.)

43.

²² 1st Rep., s. 117, p. 220.

where the child has not attained sufficient maturity, etc., and such non-attainment would have apparently to be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, was alleged to have been of unsound mind. The Legislature is manifestly referring in section 83. to an exceptional immaturity of intellect."²³ Maturity of understanding is to be presumed in the case of such a child unless the negative be proved on the defence.²⁴

3. 'Consequences of his conduct.'—"It is not apparently the *penal* consequences to the offender that are referred to, but the natural consequences which flow from a voluntary act, such for instance as that, when fire is applied to an inflammable substance, it will burn, or that a heavy blow with an axe or a sword will cause death or grievous hurt."²⁵

Theft by child.—Where, a child of nine years of age stole a necklace, worth Rs. 2-8, and immediately afterwards sold it to the accused for five annas, the child was discharged under this section, but the accused was convicted because the act of the child, though under twelve years of age, showed that he had attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, and that the act of the child was therefore theft, and that the accused was rightly convicted of receiving stolen property.¹

Bigamy by child of ten years.—Where a child of ten years married again during the life-time of her husband, the marriage being negotiated and caused to be performed by her mother, the child was held not to have attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage.²

Murder of girl of ten years.—The accused who was about ten years of age slept with her mother-in-law the night before the murder. Her husband aged about nineteen slept with his brother in another hut in the same homestead. In the early morning the mother-in-law woke up the accused, and told her to go about her household duties. Shortly after this the accused was seen running out of the house and her husband was found mortally wounded on the neck. She hid herself in a field and was not found until the afternoon. It was held that she was *doli capax* and that the Court could infer from the circumstances of the case such a degree of malice as to justify the application of the maxim *malitia supplet cetatum*.³

English law.—According to English law an infant between the age of seven and fourteen years is presumed to be *doli incapax*. If a child more than seven and under fourteen years of age is indicated for felony, it will be left to the jury to say whether the offence was committed by the accused, and, if so, whether at the time of the offence, the accused had a guilty knowledge that he was doing wrong.⁴ In cases of murder if it appear to the Court and jury that the infant was *doli capax*, and could discern between good and evil when the offence was committed, he may be convicted of the capital offence and executed.⁵ But an infant under fourteen, if indicted for murder, must be proved conscious of the nature of the act.⁶

Infants above fourteen and under twenty-one are subject to all kinds of punishments; for it is *presumptio juris* that after fourteen years they are *doli capaces*, and can discern between good and evil.⁷

English cases.—A boy of eight was hanged in 1629 for burning two barns as it appeared that he had malice, revenge, craft, and cunning.⁸ Where a boy of ten killed his play-fellow, the fact that he hid the body away was held sufficient to rebut the presumption of *doli incapax* and he was hanged. So a girl of thirteen was burnt for killing her mistress.⁹ Where an infant of nine years of age killed an infant of the like age and hid both the blood and the body, and afterwards confessed the crime, it was held that he might lawfully be hanged but pardon was asked for.¹⁰ Similarly,

²³ Per Jackson, J., in *Lukhimi Agradanini*, (1874) 22 W. R. (Cr.) 27, 28.

²⁴ 1st Rep., s. 117, p. 220.

²⁵ Per Jackson, J., in *Lukhimi Agradanini*, (1874) 22 W. R. (Cr.) 27, 28.

¹ *Krishna*, (1883) 6 Mad. 373.

² *Godi*, (1896) Cr. R. No. 55 of 1896, Unrep. Cr. C. 876.

³ *Mussamut Amona*, (1864) 1 W. R.

(Cr.) 43.

⁴ *Owen*, (1830) 4 C. & P. 236; *Sidney Smith*, (1845) 1 Cox 260.

⁵ 1 Hale P. C. 26.

⁶ *Vamplew*, (1862) 3 F. & F. 520.

⁷ 1 Hale P. C. 26.

⁸ *Ibid.*, p. 25.

⁹ *Ibid.*, p. 26.

¹⁰ *Ibid.*, p. 27.

where a boy of ten years of age murdered a girl of about five years of age, under circumstances of "mischievous discretion", he was sentenced to death, though he was afterwards pardoned by the King upon condition of his entering immediately into the sea-service. The Judges unanimously laid down: "There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away of life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences; and as the sparing this boy, *merely on account of his age*, will probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remaineth any doubt touching his guilt."¹¹ A confession made by a boy under fourteen years of age, who had committed murder, was held to be admissible against him.¹²

Rape.—The rule at common law is that in regard to the offence of rape *malitia non supplet cetatum*: a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure*, and Judges have time after time refused to receive evidence to show that a particular accused was in fact capable of committing the offence. The Criminal Law Amendment Act¹³ has not altered the common law principle.¹⁴ Nor can a boy under fourteen be convicted of an assault with intent to commit a rape,¹⁵ or of feloniously carnally knowing and abusing a girl under ten years of age.¹⁶ But he can be guilty as a principal in the second degree¹⁷ or may be convicted of an indecent assault.¹⁸ This presumption of English law has no application to India.¹⁹ A boy of twelve can be convicted of attempt to commit rape.²⁰

PRACTICE.

Evidence.—It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point, and especially when it is necessary to determine the period of detention. Where the age of the accused is under twelve years, the Magistrate should, considering the provisions of this section, find that he has attained sufficient maturity of understanding to judge of the nature and consequences of his act.²¹

An objection that the accused is of such an age as not to have attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, is not one of a preliminary character, but rather a matter of defence to be considered with the other issues arising in the case.²²

Where a child under twelve years of age commits an offence when he is unable to understand the nature of the offence, he cannot be debarred under s. 105 of the Indian Evidence Act from the defence allowed him by this section because of his ignorance of Court procedure.²³

Punishment.—Sentences of death, transportation, or imprisonment cannot be passed on a child or young person.²⁴ The parent may be ordered to pay fine instead of the child or young person.²⁵

84. Nothing is an offence which is done by a person who, at the time of doing it,¹ by reason of unsoundness of mind,² is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.³

Act of a person
of unsound mind.

¹¹ *William York*, (1748) Foster 70, 72.

¹² *Wild's Case*, (1835) 1 Moody 452.

¹³ 48 & 49 Vic., c. 69.

¹⁴ *Waite*, [1892] 2 Q. B. 600.

¹⁵ *Eldershaw*, (1828) 3 C. & P. 396; *Henry Philips*, (1839) 8 C. & P. 736.

¹⁶ *Jordan*, (1839) 9 C. & P. 118.

¹⁷ *Eldershaw*, (1828) 3 C. & P. 396.

¹⁸ *Williams*, [1893] 1 Q. B. 320.

¹⁹ *Paras Ram Dube*, (1915) 37 All. 187.

²⁰ *Nga Tun Kaing*, (1917) 18 Cr. L. J. 943, [1918] AIR (LB) 96 (1).

²¹ *Makinuddin* (1899) 27 Cal. 133; *Mari-muthu*, (1909) 9 Cr. L. J. 392.

²² *Lukhini Agradani*, (1874) 22 W. R. (Cr.) 27.

²³ *Ali Raza*, (1924) 28 O. C. 69, 26 Cr. L. J. 310, [1925] AIR (O) 811.

²⁴ Bom. Act. XIII of 1924, s. 22; Bengal Act II of 1922, s. 21; Madras Act IV of 1920, s. 22; C. P. Act X of 1928, s. 26.

²⁵ Bom. Act XIII of 1924, s. 25; Bengal Act II of 1922, s. 25; Madras Act IV of 1920, s. 26; C. P. Act X of 1928, s. 29.

COMMENT.

The policy of the law is to control not only the sane, but so far as is possible, also the insane. It is not, therefore, every person mentally diseased who, *ipso facto*, is exempted from criminal responsibility. Such exemption is allowed only where the insane person "is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." This section lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from the medical test, that the criminality of an act is to be determined.¹ This provision of our law is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in *M'Naghton's case*.²

This section provides that a man who is, by reason of unsoundness of mind, prevented from controlling his own conduct and deprived of the power of passing a rational judgment on the moral character of the act he meant to do cannot be legally responsible for the act. If a man suffers under a partial delusion only and is sane in other respects he must be dealt with as if the facts with respect to which the delusion existed were real.³

A man who by reason of mental disease is prevented from controlling his own conduct, and a man who is deprived, by disease affecting the mind, of the power of passing a rational judgment on the moral character of the act he meant to do, is entitled to the benefit of this section.⁴ A human creature deprived of reason, and disordered in his senses, is still an animal, or instrument possessing strength and ability to commit violence; but he is no more so than a mere mechanical machine which, when put in motion, performs its powerful operations on all that comes in its way, without consciousness of its own effect, or responsibility for them. In like manner, the man under the influence of real madness has properly no will, but does what he is not conscious or sensible of doing and therefore cannot be made answerable for any consequences.⁵

Under this section an accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong.⁶

There are four kinds of persons who may be said to be *non compos mentes* (not of sound mind): (1) an idiot; (2) one made *non compos* by illness; (3) a lunatic or madman; and (4) one who is drunk.

(1) An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals... and those are said to be idiots who cannot count twenty, or tell the days of the week, who do not know their fathers or mothers, or the like... A person deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is an idiot; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, convicted, and punished, although great caution should be observed in such proceedings.⁷

The word 'idiot' has not been defined in any Indian Act, but undoubtedly idiocy is a form of congenital insanity, due to the absence of development of the mental faculties and intelligence from very childhood. The only standard and test of insanity laid down by the law is, according to this section, whether the person was by reason of unsoundness of mind incapable of knowing the nature and quality of the act, or that the act was wrong or contrary to law. In England the Mental Deficiency Act, 1913, defines idiots as being persons so deeply defective in mind from birth, or from an early age, as to be unable to guard themselves against common physical dangers, and it distinguishes idiots as being a more aggravated type of defectives than imbeciles or

¹ *Lakshman Dagdu*, (1886) 10 Bom. 512; *Nga Kan Hla*, (1914) 2 U. B. R. 28, 16 Cr. L. J. 95, [1914] AIR (UB) 81.

² (1943) 4 St. Tr. (N.S.) 847, 10 C. & F. 200.

³ *Mohammad Husain*, (1912) 15 O. C. 321, 14 Cr. L. J. 81.

⁴ *Hakik Shah*, (1887) P. R. No. 42 of 1887.

⁵ *A. Gordon Kintoch's case*, (1795) 25 How. St. Tr. 891, 1000.

⁶ *Geron Ali*, [1940] 2 Cal. 329.

⁷ Archbold, 30th Edn., p. 13, Russell, 9th Ed., Vol. I., p. 16, 1 Hale P. C. 84.

feeble-minded persons. This definition and distinction, although not absolutely binding in India, furnish a good guide to the Courts in India. Further, although there has always been a difference between the points of view of a medical man and a lawyer on the question of insanity, the former tending to include any form of abnormality in the term insanity, the classification and distinction contained in the English Act regarding idiots, imbeciles and merely feeble-minded persons is in perfect accord with medical books of high authority, which define idiocy as *dementia naturalis* or complete *amentia*, and imbecility as partial *amentia*. It is, therefore, clear that in order to find that a person is an idiot it is not sufficient to find that he is a mere imbecile; one cannot be an idiot unless his faculties have not all been developed and he has not acquired any appreciable intelligence.⁸

(2) A person made *non compos mentis* by illness is excused in criminal cases from such acts as are committed while under the influence of his disorder.⁹ Several causes have been assigned for this disorder; sometimes from the distemper of the humours of the body; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain; and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia* in respect of some particular matters, to a total alienation of the mind, or complete madness.¹⁰

(3) A lunatic is one who is "afflicted by mental disorder only at certain periods and vicissitudes; having intervals of reason. Such persons during their frenzy are criminally as irresponsible as those whose disorder is fixed and permanent".¹¹

That in the species of madness called lunacy, where persons are subject to temporary paroxysms in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be to all intents and purposes amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement.¹²

Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

(4) As to persons who are drunk, see s. 85, *infra*.

1. 'At the time of doing it'.—To establish a defence on the ground of insanity it must clearly be proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the *nature and quality* of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.¹³ If he did know it, he was responsible.¹⁴ The mere fact that on former occasions the accused had been occasionally subject to insane delusions or had suffered from derangement of the mind, or that subsequently he had at times behaved like a mentally deficient person is *per se* insufficient to bring his case within the exemption.¹⁵ The antecedent and subsequent conduct of the man are relevant only to show what the state of his mind at the time the act was committed. The Court is only concerned with the state of mind of the accused at the time of the act.¹⁶ A plea of insanity at the time of trial will not avail the accused.¹⁷ In such a case he will be tried in accordance with the special procedure laid down in the Code of Criminal Procedure.

⁸ *Titli alias Tereza v. Alfred Robert Jones*, (1933) 56 All. 423; *Sonabati Debi v. Narayan Chandra Upadhyay*, (1935) 16 P. L. T. 874.

⁹ 1 Hale P. C. 30.

¹⁰ *Ibid.*

¹¹ Russell, 9th Ed., Vol. I, p. 17, 1 Hale P. C. 31.

¹² *Bellingham's case*, Collinson on Lunacy, p. 636; *Oxford*, (1840) 9 C. & P. 525, 533; *Offord*, (1831) 5 C. & P. 168; *Hadfield's case*, Collinson on Lunacy, p. 439.

¹³ Third question and answer in *M'Naghton's Case*, (1843) 4 St. Tr. (N.S.) 847, 10 C. & F. 200, 204; *Oxford*, (1840) 9 C. & P. 525; *Pursoram Doss*, (1867) 7 W. R. (Cr.) 42; *Jugo Mohun Malo*, (1875) 24 W. R. (Cr.) 5; *Kazi Bazlur*, (1928) 33

C. W. N. 136, 48 C. L. J. 307, 30 Cr. L. J. 494, [1929] AIR (C) 1; *Pancha*, (1931) 33 Cr. L. J. 714, [1932] AIR (A) 238; *Hazara Singh*, (1945) 47 P. L. R. 158.

¹⁴ *Harka*, (1906) 26 A. W. N. 193, 4 Cr. L. J. 88.

¹⁵ *Tola Ram*, (1932) 8 Lah. 684, 690; *Chandgi*, (1932) 33 P. L. R. 211, 33 Cr. L. J. 634, [1932] AIR (L) 260; *Sankappa Shetty*, [1940] M. W. N. 963, (1940) 52 L. W. 689, 42 Cr. L. J. 558, [1941] AIR (M) 326; *Mohammad Islam*, (1930) 7 O. W. N. 1100, 32 Cr. L. J. 327, [1931] AIR (O) 77.

¹⁶ *John Dowlat Moon*, (1927) 29 Cr. L. J. 393, [1928] AIR (P) 363.

¹⁷ *Nota Ram*, (1866) P. R. No. 56 of 1866.

The fact that the accused has had an attack of insanity before the occurrence of the criminal act and another one in jail during the period between the enquiry in the committing Magistrate's Court, and the opening of the trial in the Sessions Court, does not mean that the accused committed the act in a fit of insanity and the accused cannot be entitled to the benefit of this section merely on that ground.¹⁸

2. 'Unsoundness of mind'.—Whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease, or exists from the time of birth, it is included in this expression. Thus an idiot who is a person without understanding from his birth, a lunatic who has intervals of reasons, and a person who is mad or delirious, are all persons of "unsound mind". There are numerous degrees of insanity. It has been said that not every little cloud floating over an otherwise enlightened understanding will exempt from criminal responsibility; nor on the other hand, will every glimmering of reason over the darkness of a troubled mind subject the unfortunate being to the heavy pains provided for wilful wrong-doing. According to the Code, unsoundness of mind, to make a man irresponsible, must reach that degree which is described in the latter part of this exception. It is not every person suffering from mental disease that can avoid responsibility for a crime by invoking the plea of insanity. There is a distinction between a "medical insanity" and "legal insanity" and the Courts are only concerned with the legal and not with the medical view of the question.¹⁹

If a person is found unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor.²⁰

An idiot or lunatic, even if he is conscious of his act, has no capacity to know its nature and quality, and is therefore not responsible. Mad men, especially those under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing "what is either wrong or contrary to law", they are not responsible. A common instance is, where a man fully believes that the act he is doing, e.g., killing another man, is done by the immediate command of God.²¹

"It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law... A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man, that was going to take his life; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land".²² A person whose cognitive faculties are not so impaired as to make it impossible for him to know the nature of his act or that he was doing what was wrong or contrary to law is not exempted from criminal responsibility.²³ Mere subjection to insane impulses is not sufficient.²⁴ There are some forms of unsoundness of mind which seem to affect only particular acts. The unsoundness of mind may be such that in respect of certain acts the person committing them is incapable of knowing the nature of what he is doing, while in the case of other acts he might have knowledge of their character.²⁵

¹⁸ *Nabi Ahmad Khan*, (1932) 9 O. W. N. 355, 33 Cr. L. J. 542, [1932] AIR (O) 190.

¹⁹ *Bagga*, (1931) 32 P. L. R. 331, 32 Cr. L. J. 1230, [1931] AIR (L) 276; *Sajjan Singh*, (1931) 32 Cr. L. J. 816; *Ram Adhin*, (1931) 7 Luck. 341.

²⁰ *Harka*, (1906) 26 A. W. N. 193, 4 Cr. L. J. 88; *Vithoo*, (1911) 7 N. L. R. 185, 13 Cr. L. J. 164.

²¹ *M. & M.* 61.

²² *Per O'Kinealy and Banerjee, JJ.*, in *Kader Nasyer Shah*, (1896) 23 Cal. 604, 607;

Chajju Mal, (1909) 10 P. L. R. 346, 11 Cr. L. J. 105; *Dhani Bux*, (1915) 9 S. L. R. 171, 17 Cr. L. J. 79, [1916] AIR (S) 1; *Ramzan*, (1918) P. R. No. 30 of 1918, 20 Cr. L. J. 1, [1919] AIR (L) 470; *Vodde Subbigadu* (1925) 27 Cr. L. J. 46, [1925] AIR (M) 1238.

²³ *Ram Sundar Das*, (1919) 23 C. W. N. 621, 29 C. L. J. 209, 20 Cr. L. J. 383, [1919] AIR (C) 248.

²⁴ *Gedka Goala*, (1937) 16 Pat. 333.

²⁵ *G. J. Joseph*, (1939) Mad. 353, 357.

It is not every kind of frantic humour of something unaccountable in a man's actions that points him out to be such a mad man as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast such as one is never the object of punishment.¹ A person cannot be said to be insane where all that is established is that he was moody, irritable and conceited and may be said to have been peculiar but at no time did he suffer from insanity of such nature or degree as to preclude him from knowing the nature of his acts or to obscure the distinction between right and wrong.² Want of any motive for the doing of an act cannot be taken as evidence of maniacal tendency.³

Partial delusion.—Whether a person who, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is to be therefore excused depends upon the nature of the delusion. If he labours under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. For example, if under the influence of his delusion, a person supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and killed him in revenge for such supposed injury, he would be liable to punishment.⁴ If a person afflicted with an insane delusion, in respect of one or more particular subjects or persons, commits a crime, knowing that he was acting contrary to law, but did the act complained of with a view, under the influence of an insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed.⁵

Moral insanity.—This is a form of insanity when a man's intellectual faculties are sound, but his moral sense is affected or diseased. The functions of the mind are of a twofold nature—those of the intellect, or faculty of thought, such as perception or judgment; and, those of the moral sentiments and affections, the propensities and the passion; and the latter may be diseased while the intellectual faculties are sound.⁶ "We learn, however, . . . that insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses . . . we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired".⁷

The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions, or impressions, of a moral nature; and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a deceased or depraved state of mind, or an aberration of the

¹ *Edward Arnold*, (1724) 16 St. Tr. 695, 704. Followed in *Tola Ram*, (1927) 8 Lah. 684; *Sardara*, (1928) 29 Cr. L. J. 827. See *Kazi Bazlur*, (1928) 33 C. W. N. 136, 48 C. L. J. 307, 30 Cr. L. J. 494, [1920] AIR (C) 1; *Pancha*, (1931) 33 Cr. L. J. 714, [1932] AIR (A) 233.

² *Umar Khan*, (1931) 32 P. L. R. 804, 33 Cr. L. J. 186, [1932] AIR (L) 11.

³ *Haynes*, (1859) 1 F. & F. 666; *Pancha*, (1931) 33 Cr. L. J. 714, [1932] AIR (A) 233.

⁴ Fourth question and answer in *M'Naghton's*

Case, (1803) 4 St. Tr. (N.S.) 847, 10 C. & F. 200; *Ghata Pramanik*, (1901) 28 Cal. 613; *Sajjan Singh* (1931) 32 Cr. L. J. 816; *Pancha*, (1931) 33 Cr. L. J. 714, [1932] AIR (A) 233.

⁵ First question and answer in *M'Naghton's Case*, (1803) 4 St. Tr. (N.S.) 847, 10 C. & F. 200; *Townely*, (1863) 3 F. & F. 839.

⁶ From the speech of Sir Alexander Cockburn in defence of *M'Naghton*.

⁷ Per O'Kinealy and Banerjee, J., in *Kader Nayer Shah*, (1896) 23 Cal. 604, 608. See *Tola Ram*, (1927) 8 Lah. 684.

moral feelings; the sense of right and wrong being still, although it may be perverted, yet not destroyed. And the theory of a moral insanity, or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject.⁸ The circumstance of the accused having acted under an irresistible influence to the commission of an offence is no defence if at the time he committed the act he knew he was doing what was wrong. If "an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime punishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration".⁹

The circumstance of an act being apparently motiveless is not a ground from which the existence of an irresistible influence can be inferred. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief.¹⁰ It is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act.¹¹ Where it was proved that the accused had committed multiple murders while suffering from mental derangement of some sort and it was found that there was (i) absence of any motive, (ii) absence of secrecy, (iii) want of pre-arrangement, and (iv) want of accomplices, it was held that the circumstances were sufficient to support the inference that the accused suffered from unsoundness of mind.¹²

Insanity brought on by drunkenness.—The House of Lords have laid down after a review of English cases bearing on the subject that insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged only under certain circumstances. Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent. In this case the accused ravished a girl of thirteen years of age and in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence was a plea of drunkenness. It was held that drunkenness was no defence unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it (which was not alleged), inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other; and that the accused was guilty of murder.¹³ Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by the drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.¹⁴

Drunkenness is no excuse, but *delirium tremens* caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility.¹⁵ If voluntary drunkenness has caused a disease which has produced such incapacity as is mentioned in this section then the act will be excused, though the disease may be of a temporary nature.¹⁶ The accused while proceeding towards this field met a boy who was returning home, and without speaking a word he killed the boy with a single stroke of a club as he passed and then made off across a field. The blow dealt was unpremeditated, there being no quarrel or dispute of any kind. The evidence showed that the accused was addicted to intemperate habits by excessive use of opium, and that for some days before and after killing the boy the accused was irresponsible for his actions. It was held that the accused was incapable of knowing the

⁸ *Burton*, (1863) 3 F. & F. 772.

⁹ *Per Bramwell, B.*, in *Haynes*, (1859) 1 F. & F. 666, 667; *Barton*, (1848) 3 Cox 275.

¹⁰ *Haynes*, (1859) 1 F. & F. 666, 667; *Sobha*, (1905) P. R. No. 40 of 1905, 2 Cr. L. J. 714.

¹¹ *Stokes*, (1848) 3 C. & K. 185, 188.

¹² *Gedka Goala*, (1937) 16 Pat. 333.

¹³ *Director of Public Prosecutions v. Beard*, [1920] A. C. 479; *Stone*, (1937) 53 T. L. R. 1046.

¹⁴ *Ramsingh*, (1938) Nag. 305.

¹⁵ *Davis*, (1881) 14 Cox 563.

¹⁶ *Bheleka Aham*, (1902) 29 Cal. 493.

nature of his act or that he was doing what was either wrong or contrary to law.¹⁷ The accused after partaking of intoxicating liquor walked two miles in the sun to a village where he was hit on the head by another person. He pursued that person to a certain house, but not finding him there he attacked and wounded with a club five women who were in the house. The Civil Surgeon thought that the accused was not fully responsible for his actions owing to the mental state caused by the wound on his head, the alcohol he had taken, and the walk in the sun. It was held that the facts were not sufficient to bring the case within the provisions of this section. The term 'unsoundness of mind' cannot be construed so widely as to cover the loss of self-control following a hostile blow on the head. The assault on the women was the outcome of disappointed rage.¹⁸

Homicidal mania.—Homicidal maniacs need have no motive to perpetrate crime.¹⁹ But because a murder is committed without a motive, irresistible influence of homicidal tendency cannot be inferred.²⁰ Where a husband who has never been known to have ill-treated his wife assaults his wife which results in her death, it cannot be said, from the mere fact that there was an absence of a deep-seated motive, that the husband must have been insane.²¹

As to the mental disease known as hebephrenia which leads one to commit murderous assaults without motive see *Onkar Datt Nigam's case*.²²

Impulsive insanity.—It is said that on particular occasions men are seized with irrational and irresistible impulses to kill, to steal, or to burn, and that under the influence of such impulses they sometimes commit acts which would otherwise be most atrocious crimes...It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse...was (really) irresistible as well as unresisted. If it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder. It would not be less murder if the same irritation and the corresponding desire were produced by some internal disease. The great object of the criminal law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones. The proof that an impulse was irresistible depends principally on the circumstances of the particular case. The commonest, and probably the strongest cases, are those of women, who without motive or concealment, kill their children after recovery from childbed.²³

Where an act of murder is committed without motive and apparently on some kind of sudden impulse, it cannot fall within this section by reason of the accused not having known the nature of the act or that it is wrong or contrary to law. The mere fact that an act of this character is committed on a sudden impulse with no discoverable motive will not, in general, afford sufficient basis for accepting a plea of insanity.²⁴

3. 'Nature of the act or...what is either wrong or contrary to law.'

The question in each case must be, whether the accused person was in a state to know the nature of the act and its criminal character as against the law of the land. That is, it must be ascertained whether he was conscious of doing what he ought not to do. If the accused were conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable. His liability will not be diminished if he did the act complained of with a view, *under the influence of insane delusion*, of redressing or revenging some supposed grievance or

¹⁷ *Bheleka Aham*, (1902) 29 Cal. 493.

¹⁸ *Maung Gyi*, (1912) 7 L. B. R. 13, 14 Cr. L. J. 427.

¹⁹ *Vaithinatha Pillai*, (1913) 40 I. A. 193, 36 Mad. 501, 15 Bom. L. R. 91; *Dewa Ram*, (1936) 38 Cr. L. J. 893, [1937] AIR (L) 486.

²⁰ *Inayat*, (1928) 29 Cr. L. J. 1006.

²¹ *Sankappa Shetty*, (1940) M. W. N. 963,

(1940) 52 L. W. 689, 42 Cr. L. J. 553, [1941] AIR (M) 326.

²² [1935] O. W. N. 53, 55, 36 Cr. L. J. 392, (1935) AIR (O) 143.

²³ Stephen's General View of Criminal Law of England, pp. 94, 95.

²⁴ *Murugesu Tevan*, (1935) M. W. N. 534.

injury, or of producing some public benefit, if he knew that he was acting contrary to law.²⁵ A person may be both insane and responsible for his actions.¹ Where a man deliberately murdered his wife under the belief that she was haunted by evil spirits, and that if he killed her evil spirits would leave her, he was held guilty of murder.² Where the accused alleged that she had committed murder by reason of being possessed by evil spirit and in pursuance of its bidding, on pain of herself being killed by that spirit, it was held that she was guilty of murder.³ The accused was anxious to get the deceased in his service as a cow-herd but the deceased's father refused to let him undertake the duty. Thereupon the accused one day caught hold of the deceased, fell him to the ground and beat him on the head with stones till he died. The accused then ran away and was seen cleaning his blood-stained hands with sand in the river. He subsequently hid himself in his cottage and attempted to prevent people coming in by placing stones against the door. After his arrest he was certified insane and committed to a Mental Hospital. After he was discharged as cured he stood his trial. It was held that the accused was not insane within the meaning of this section as in killing the deceased he knew that he was doing something wrong and that it did not matter how insane he might be from the medical point of view.⁴

A man may be suffering from some form of insanity in the sense in which the words would be used by an alienist but may not be suffering from unsoundness of mind as defined in this section. The law recognizes nothing but incapacity to realize the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently clear to apprehend what he is doing, he must always be presumed to intend the consequences of the action he takes. Where, therefore, the accused, after killing four persons in rapid succession with a *gandasa*, dropped it and began to run away, and subsequently volunteered information concerning the death of one of the deceased and there were no accomplices nor any evidence of motive, secrecy or pre-arrangement on the part of the accused, it was held that he was rightly convicted of murder.⁵

The inquiry must be directed to the particular thing done and not to any other, because a man may be responsible for some things, and not for others. Thus everything depends on the attitude of the prisoner's mind with regard to the particular act charged against him. If it was a guilty mind with regard to that act, its general derangement will not be an excuse. Thus, in the case of Lord Ferrers, who was tried before the House of Lords for the murder of his steward, it was shown that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions, but as it appeared that the murder was deliberate and the Earl knew what he was doing, he was executed.⁶

Any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong.⁷

Where a person, otherwise sane but labouring under the influence of an insane delusion, commits an act of revenge for some supposed grievance or injury, he is nevertheless punishable according to the nature of the crime committed if at the time he understood that he was committing a wrong and unlawful act. In other words, he must be considered in the same situation as to responsibility as a sane person would be if the facts with regard to which the delusion exists were true.⁸ A person who is in a highly excited and unbalanced condition, but is nevertheless conscious that what he is doing is wrong and a crime, cannot be said to be of unsound mind within the meaning

²⁵ *M'Naghton's Case*, (1843) 10 C. & F. 200; *Southey*, (1865) 4 F. & F. 864; *Leighk* (1866) 4 F. & F. 915; *Razai Mia*, (1895) 22 Cal. 817; *Muthusami Asari*, (1919) M. W. N. 796, 10 L. W. 377, 20 Cr. L. J. 828, (1919) AIR (M) 128. See *Musst. Poochiee*, (1865) 3 W. R. (Cr.) 9, where the evidence of a Civil Surgeon is criticised. See *Muhammad Husani*, (1912) 15 O. C. 321, 14 Cr. L. J. 81.

¹ *Davis*, (1881) 14 Cox 563, 564; *Lachhman*, (1923) 46 All. 243.

² *Seat Ali*, (1917) 3 P. L. W. 356, 18 Cr. L.

J. 766, [1917] AIR (P) 503.

³ *Sukni Chamain*, [1936] P. W. N. 189, 37 Cr. L. J. 543, [1936] AIR (P) 245.

⁴ *Ghungar Mal*, [1939] Lah. 128.

⁵ *Mani Ram*, (1926) 8 Lah. 114; *Jalal*, (1929) 30 Cr. L. J. 1024.

⁶ *Earl Ferrers*, (1760) 19 St. Tr. 885, 947.

⁷ Per Stephen, J., in *Davis*, (1881) 14 Cox 563, 564; *Hay*, (1911) 22 Cox 268.

⁸ *Ghinua Oraon*, (1917) 3 P. L. J. 291, 296, 19 Cr. L. J. 135, [1918] AIR (P) 179, F.B.

of this section.⁹ Where all that is proved is that a person who has committed a murder is conceited, odd, irascible and that his brain is not quite all right, it is insufficient to establish that the accused was incapable of knowing that what he was doing was wrong, and the provisions of this section are not applicable to his case.¹⁰

There is a clear difference between medical insanity and legal insanity. It is only legal insanity which furnishes a ground for exemption from criminal responsibility. There can be no legal insanity unless the cognitive faculties of the accused are, as a result of unsoundness of mind, completely impaired. In order to constitute legal insanity the unsoundness of mind must be such as should make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law.¹¹

Unsoundness of mind need not necessarily make a person incapable of understanding the nature of all his acts. There are some forms of unsoundness of mind which seem to affect only particular acts. In other words, unsoundness of mind may be such that in respect of certain acts the person committing them is incapable of knowing the nature of what he is doing while in the case of other acts he might have knowledge of their character.¹²

Homicide by person suffering from fever.—Where an accused, who was suffering from fever which caused him while suffering from its paroxysms to be bewildered and unconscious, killed his children at being annoyed at their crying, but he was not delirious then, and there was no evidence to show that he was not conscious of the nature of his act, it was held that he could not be entitled to protection under this section.¹³ The accused stabbed a child (his brother's wife) with a sword and killed her. No motive could be assigned for his attack on the child, and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was held that he was guilty of murder.¹⁴ Where it appeared that the accused was, at the time of the commission of the offence, suffering from fever, his temperature was about 100 degrees, and he was not delirious, it was held that he could not be considered as temporarily insane.¹⁵

Homicide by ganja-smoker.—The accused, a habitual *ganja*-smoker, killed his wife and children, because she quarrelled with him and objected to go to a village where he proposed to go. It was held that until the accused's habit of smoking *ganja* had induced in him such a diseased state of mind as to make him incapable of knowing the nature of his act or criminality, this section did not apply in his favour.¹⁶

Homicide under influence of religious enthusiasm.—Where a father sacrificed his son because wealth had not accompanied the son's birth and afterwards cut his own throat as a protest against his deity's injustice, he was held guilty of murder. The Court said: "Although there may have been some degree of religious enthusiasm or even hallucination, there is nothing to show that Bishen [the father] killed his child whilst in a state of mind that incapacitated him from knowing right from wrong. It seems to us rather that he did expect to receive some worldly benefit from the sacrifice of his son, and that wealth would come to him, and his dead child be restored to life again together."¹⁷ Where the accused, the priest of a temple, killed a five months' old female child in the belief that the goddess wanted sacrifice and his defence was that he was not in his senses but inspired, and it was not proved that he was incapable of knowing the nature of the act he did or what he was doing was either wrong or contrary to law and it was also not proved that before or after the occurrence he was anything but a sane person, it was held that it was not a case in which the accused had in a state of paroxysm, religious or otherwise, on the spot and instantaneously committed murder to establish a defence of insanity within the meaning of this section.¹⁸

⁹ *Sher Singh*, (1923) 25 Cr. L. J. 395, [1926] AIR (L) 508; *Umar Khan*, (1931) 32 P. L. R. 804, 33 Cr. L. J. 186, [1932] AIR (L) 11.

¹⁰ *Abdul Rashid*, [1927] 28 Cr. L. J. 635, [1927] AIR (L) 567.

¹¹ *Kalicharan*, [1947] Nag. 226.

¹² *Joseph*, [1939] Mad. 353, 356.

¹³ *Lakshman Dagdu*, (1886) 10 Bom. 512.

¹⁴ *Venkatasami*, (1889) 12 Mad. 459.

¹⁵ *Sengodai Vannan*, (1927) 53 M. L. J. 151, [1927] M. W. N. 270, 28 Cr. L. J. 543, [1927]

AIR (M) 688.

¹⁶ *Sakharam valad Ramji*, (1890) 14 Bom. 564; *Tincouri Dhopi*, (1922) 27 C. W. N. 290, 39 C. L. J. 34, [1923] AIR (C) 460; *Devasikanani*, (1927) 55 M. L. J. 228, 27 L. W. 77, 29 Cr. L. J. 63 [1928] AIR (M) 196.

¹⁷ *Bishendharee Kahar*, (1867) 7 W. R. (Cr.) 64, 66.

¹⁸ *Narayanawamy Goundan*, [1931] M. W. N. 719.

Melancholic homicidal mania.—The accused who was charged with committing murder was a young man of weak intellect, and the motive actuating the offence was trivial and inadequate. As soon as he had killed his uncle by hacking him on the head and neck with a sword, the accused rushed about, brandishing his weapon and shouting "Victory to Kali". He attempted to strike other persons, including his own father. When the paroxysm had passed off, during the police enquiry, the accused appeared to be rational, but immediately afterwards, he developed aphasia, attempted to commit suicide and was undoubtedly insane from that time for a period of five years. It was held that the above were the signs and indicia of insanity as expressed in works on the subject of medical jurisprudence, and that the accused was suffering from a fit of melancholic homicidal mania at the time he hacked the deceased with the sword and was, by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to law, and therefore he was not guilty of murder.¹⁹

Homicide under influence of morbid feeling.—The accused was seen near a boy who was playing in a public place. Some hours afterwards the child's dead body was found there; the throat was cut and there were marks of a violent struggle. The accused gave himself up and admitted the act, recounting all the circumstances with perfect intelligence. He said that he had done the act from a morbid feeling; that he was tired of life and wished to be rid of it. It was held that he was guilty of murder.²⁰

The accused killed his wife and child. There was no apparent motive to explain the double murder and the accused admitted without reservation what he had done and made no attempt at concealment or escape. According to the accused his mind was a blank at the time of the occurrence and he was not conscious of what he did. There was some evidence that the accused had not been quiet himself, that he had been disturbed and distressed by the shortage of cloth, rice and fodder. There was no reliable evidence that his intellect was deranged. It was held that he was guilty of murder.²¹

Where the accused being driven to desperation on account of starvation and being unable to get any food to nourish her infant daughter, killed her daughter, it was held that the mere fact that the accused was in a state of desperation did not entitle her to claim exemption under this section, but the case was not a fit one for the infliction of capital sentence.²²

Homicide without motive.—The accused, a soldier, shot his officer through the head; the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression. It was held that that was not enough to raise the defence of insanity, that the sole question was whether the accused fired the gun intending to kill, and that his expressions soon after the act were evidence of that, and that the alleged inadequacy of motive was immaterial, the question being not of motive but intent.²³

Mere absence of motive for a crime howsoever atrocious it may be, cannot, in the absence of plea and proof of legal insanity, bring the case within the exemption under this section, because a crime is not excused by its own atrocity and one must look outside the act itself for the evidence as to how much the accused knew about it.²⁴

Homicide under influence of insane delusions caused by loss of blood.—A married woman killed her husband immediately after an apparent recovery from a disease which had caused a great loss of blood and brought on insane delusions of the senses, and which had been renewed at the time of murder. It was held that she had not been in such a state of mind at the time of the act as to know its nature or be accountable for it.²⁵

Homicide by person in paroxysm of insanity.—Where a married woman, fondly attached to her children, and apparently most happy in her family, poisoned two of them, but it appeared that there was insanity in her family, it was held that she was not guilty as she had been in a paroxysm of insanity at the time of the act.¹

¹⁹ *Shibo Koeri*, (1905) 10 C. W. N. 725, 3 Cr. L. J. 469; *Karma Urang*, (1927) 32 C. W. N. 342, 30 Cr. L. J. 247, [1928] AIR (C) 238.

²⁰ *Burton*, (1868) 3 F. & F. 772.

²¹ *Ram Sundar Das*, (1919) 29 C. L. J. 209, 23 C. W. N. 621, 20 Cr. L. J. 383, (1919) AIR (C) 248; *Rafiuddin*, [1944] O. W. N. 292.

²² *Mabajan Bibi*, (1932) 33 Cr. L. J. 476, [1932] AIR (C) 658.

²³ *Dixon*, (1869) 11 Cox 341; *Nga San Pe*, (1936) 33 Cr. L. J. 397, [1937] AIR (R) 33.

²⁴ *Kalicharan*, (1947) Nag. 226.

²⁵ *Law*, (1862) 2 F. & F. 336.

¹ *Vyse*, (1862) 3 F. & F. 247.

Homicide by monomaniac.—Where the accused labouring under a notion that the inhabitants of Hadleigh and particularly one C were continually issuing warrants against him with intent to deprive him of his liberty and life, shot C, it was held that the accused laboured under that species of insanity which was called monomania and was therefore not liable for his act.²

Homicide by person suffering from failure of reasoning powers.—Where the accused cut his wife's throat without any rational motive, and was captured at once without any attempt on his part to escape or offer resistance, and the evidence showed that before the commission of the offence he suffered from a failure of reasoning powers, and also that he entertained delusions as to dangers which threatened his wife, it was held that the facts proved unsoundness of mind which prevented the accused from knowing the nature of his act.³

Homicide during epileptic fit.—The accused murdered his mother and wounded his step-father in a fit of epilepsy without any apparent cause. After the murder the accused hid in a ravine. The medical evidence showed that the accused was subject to epileptic fits and he used to be completely unconscious during such time. It was held that the accused was guilty of the acts charged but not so as to be responsible in law for his action.⁴

Attempt to commit homicide.—The accused was convicted of attempt to commit murder (s. 307). It was found from the evidence of the prosecution witnesses that he was known as "Mad Nga Pyan"; that immediately before his attack he was noticed by persons to be in one of his mad fits, that he was suffering under a delusion that one whom he attacked was keeping his sisters and daughters in the monastery, that he confessed to the investigating officer and the headman, that he stopped going on with the attack when he was asked to do so, that the act was utterly unprovoked and motiveless. It was held under those circumstances that the accused at the time of committing the offence was incapable by reason of unsoundness of mind of knowing the nature of the act or that it was wrong or contrary to law.⁵

PRACTICE.

Evidence.—Where a plea of insanity is raised, the Court has to consider two issues. Firstly, whether the accused has established that at the time of committing the act he was of unsound mind. If he does not succeed in this preliminary issue, the plea fails. Secondly, if he was of unsound mind, whether he has established that the unsoundness of mind was of a degree and nature to satisfy one of the tests laid down by the section.⁶ In all cases where legal insanity is set up as a defence it is very material to consider the circumstances which have preceded, attended and followed the crime, viz., (1) whether there were deliberation and preparation for the act, (2) whether it was done in a manner which showed a desire for concealment, (3) whether, after the crime, the offender showed consciousness of guilt and made efforts to avoid detection, and (4) whether after his arrest, he offered false excuses and made false statements.⁷ The facts that the conduct of the accused at the time of the trial was unusual and that his father was insane were held not to justify the conclusion that the accused at the time of committing the offence was of unsound mind.⁸ But to prove a plea of insanity, evidence that the grandfather of the person had been insane may be adduced, after it has been proved by medical testimony that such a disease is often hereditary in a family.⁹ Evidence as to the accused's conduct before and after up to the time of trial is admissible as presumptive evidence of his mental condition when the act was committed. The absence of all motive for a crime, when corroborated by independent evidence of the accused's previous insanity, is not without weight.¹⁰

Evidence of experts is relevant in matters of insanity.¹¹ A deposition of a Civil Surgeon directed by s. 464 of the Criminal Procedure Code should be taken. He should

² *Offord*, (1831) 5 C. & P. 168.

³ *Dil Gazi*, (1907) 34 Cal. 686; *Musammatt Anandi*, (1923) 45 All. 329.

⁴ *Nga Ant Bwe*, (1936) 38 Cr. L. J. 667, [1937] AIR (R) 99.

⁵ *Nga Pyan*, (1911) 4 B. L. T. 267, 13 Cr. L. J. 49.

⁶ *Narain*, (1945) 25 Pat. 368.

⁷ *Deorao*, [1946] Nag. 946.

⁸ *Jeeva Amtha*, (1868) Unrep. Cr. C. 10.

⁹ *Tuckey*, (1844) 1 Cox 103.

¹⁰ *Sheikh Mustaffa*, (1864) 1 W. R. (Cr.) 19.

¹¹ Indian Evidence Act (I of 1872), s. 45.

be questioned as to the number of times he had himself seen the accused, the nature of his conversation with him, and all the circumstances from which he is led to regard him of sound or unsound mind.¹²

A medical man, conversant with the disease of insanity, who never saw the accused previously to the trial, but who was present during the whole trial and the examination of all the witnesses, cannot be asked his opinion as to the state of the accused's mind at the time of the commission of the alleged crime, or his opinion whether the accused was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time. Because each of these questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put, though the same cannot be insisted on as a matter of right.¹³ In a subsequent case, however, it was decided that, notwithstanding the opinion of the Judges in *M'Naghton's* case, a physician who had been in Court during the whole trial could not be asked whether, having heard the whole evidence, he was of opinion that the accused at the time he committed the alleged act was of unsound mind. The proper mode of examination was to take particular facts, and assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the accused at the time the alleged act was committed.¹⁴ A medical man may be asked whether such and such appearances proved by other witnesses are, in his judgment, symptoms of insanity. But he cannot be asked whether, from the other testimony given, the act with which the accused is charged is, in his opinion, an act of insanity, as this is the very point to be decided by the jury.¹⁵ He may give his opinion as to the state of mind, not as to the responsibility of the accused. The latter is for the jury, under the direction of the Judge.¹⁶ Where, for instance, a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was during such a fit though there is nothing before or after the act to indicate it.¹⁷ The subtle essence which we call 'mind' defies, of course, ocular inspection and can only be known by its outward manifestations. By the language and conduct of the man, his thoughts and emotions are read. According as they conform to, or contrast with, the practice of people of sound mind, the large majority of mankind, we form our judgment as to his mental soundness. For this reason evidence is admissible to show that his conduct and language at different times and on different occasions indicated some morbid condition of his intellectual powers; and the more extended the view of his life, the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant. Evidence as to insanity in his parents and immediate relatives may also be pertinent. It is never allowable to infer insanity in an accused person from the mere fact of its existence in his ancestors. But when testimony directly tending to prove insane conduct on the part of the accused himself has been given, evidence of his family antecedents is admissible as corroborative of that testimony.¹⁸ Where a plea of insanity is set up, the accused's counsel has no right, in his address to the jury, to quote the opinions of medical men as given in their works.¹⁹ Because a case from a work on medical jurisprudence is no evidence in a Court of Justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present.²⁰

The fact of unsoundness of mind is one which must be clearly proved before any jury is justified in returning a verdict.²¹

Presumption.—The law presumes every person at the age of discretion to be sane unless the contrary is proved; and even if a lunatic has lucid intervals the law presumes the offence of such person to have been committed in a lucid interval unless it appears to have been committed during derangement.²²

¹² *Gonoo v. Deenbundhoo*, (1851) N. A. R. 24.

¹³ 6th question and answer in *M'Naghton's* case, (1843) 10 Cl. & F. 200

¹⁴ *Frances*, (1849) 4 Cox 57.

¹⁵ *Wright's case*, (1821) Russ. & Ry. 456; *Searle*, (1831) 1 M. & R. 75.

¹⁶ *Richards*, (1858) 1 F. & F. 87.

¹⁷ *Ibid.*; *Wazir*, [1947] O. W. N. 555.

¹⁸ *Per Cox, J.*, in *United States v. Guiteau*, 10

Fed. Rep. 161; *Tucket*, (1844) 1 Cox 193.

¹⁹ *Crouch*, (1844) 1 Cox 94.

²⁰ *Taylor*, (1874) 13 Cox 77.

²¹ *Nobin Chunder Banerjee*, (1878) 20 W. R. (Cr.) 70, 13 Beng. L. R. Appx. 20.

²² *Balu*, (1881) Unrep. Cr. C. 172; *Sheo-din*, (1901) 21 A. W. N. 132; *Nobin Chunder Banerjee*, (1878) 20 W. R. (Cr.) 70, 13 Beng. L. R. Appx. 20.

This point has been elaborately discussed in a case in which it is said : "There is some difference of opinion between medical and legal jurists, namely how far insanity may be inferred solely from the nature of the act complained of and the conduct of the accused in respect of it. I am concerned only with the legal and not with the medical view of the question, and there is ample judicial authority for the view that it is utterly unsafe to admit a defence of insanity upon arguments merely derived from the character of the crime.

"In *Regina v. Stokes*²³ Rolfe, B., said :—'It would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, or the certainty of future punishment before him, he was therefore insane—as if the perpetration of crimes was to be excused by their very atrocity.'

"In *Regina v. Haynes*²⁴ Bramwell, B., said to the jury :—'It has been urged... that you should acquit him [the prisoner] on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But... the circumstance of an act being *apparently* motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispensable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration.'

"These remarks are very pertinent in a country where we have constantly to deal with criminals upon whose savage instincts neither religion nor conscience can be seriously regarded as restraints, and who can only be kept from the most atrocious crimes against the persons of others by their fear of the law. Human nature is manifold. Man, *at his best*, is only a very highly developed animal, with all the instincts and passions of the inferior animals. In him they are softened, modified and controlled by generations of civilization and education, and restrained by example, social opinion, and the fear of punishment in this world or the next. Man, *at his worst*, is very little above the lower animals, and is only made more dangerous by that reason which distinguishes him from them. With him, criminal longings are natural and familiar, and he is only kept from yielding to them by a dread of punishment. Cruelty—that is, a desire to inflict suffering for the pleasure of witnessing it—is a natural instinct. We find it in the highly civilized and educated despot who is freed from all restraint by the possession of absolute power : we find it in all classes of reasoning mankind : we find it in children who are left to follow the promptings of their own natures and we find it in nearly all the lower animals. It is this natural instinct which lends to a real battle far more interest than is conveyed by the most scientific of sham fights, not only to those fighting, but to those looking on, whatever may be the excuses and justifications used to cover the bloodshed. It is because of this natural instinct that the most humane, educated, highly civilized, and sometimes most religious, sportsmen are conscious—very clearly conscious—of a greater pleasure in shooting at living game than at inanimate targets of any kind, however carefully devised to satisfy the mere desire for skill in the use of weapons. Many other instances of the kind might be put forward. Education, religion, civilization, all strive to cover up or find excuses for this blood-thirstiness, but it is there as part of our animal nature; it may be controlled into absolute impotence, but it can never be eradicated.

"The crime called 'running amok' is common enough in India. In some few cases it may be due to real insanity, or to a temporary mental disorder caused by drugs or other intoxicants. But I believe that in the majority of cases it is nothing but the reckless indulgence of a natural desire to kill. The records of criminal justice in India teem with cases where the injury inflicted by the criminal on his victim is out of all proportion to the motive or provocation which gave rise to the crime, and this, where

²³ (1848) 3 C. & K. 185, 189.

²⁴ (1859) 1 F. & F. 666, 667.

there has not been the least reason for suspecting any degree of insanity. I have, in my own limited experience, had cases where a young boy, some 15 years of age, killed his sleeping father for the sake of getting hold of five rupees in the pocket of the latter; where a young man killed his sleeping mother after deliberate premeditation, because of a petty dispute as to his share in the family rice crop; and where a perfectly sane and affectionate father dashed out the brains of his favourite child—a boy 2 or 3 years of age—in order to point a curse at a creditor who was pressing him for a petty debt. Each of these cases simply shewed the breaking out of a naturally savage nature, through the feeble, artificially created, restraint which usually kept it down.

"In the cases of a large majority of Indian rustics of the class of the accused, the lack of education and the narrow vista of a village life, result in their having only a vague idea of the power of the law, and their want of knowledge and imagination prevents them from realizing anything even approximate to the more serious of the consequences that may ensue from disobedience to it. It is not therefore surprising that in moments of mental excitement this restraining phantom easily fades from view, and acts are done that shock and surprise educated and law-abiding men, and give them an impression that mental derangement alone can account for such criminality. It is such an impression, no doubt, that led the District Magistrate in the present case to his finding of what has been called 'inferential insanity.' But it was an erroneous inference. It probably arose from an unconscious but natural tendency which we all have of judging others by ourselves. The Magistrate having concluded with ease and certainty that he would never have committed such motiveless acts of violence except in a state of insanity, proceeded to infer that nobody else, including the criminal before him, would likewise do them except under a like disability. We often hear the expression 'No one but a mad-man would do such a thing': but a closer examination will always convince the speaker that he is measuring others by the standard of his own mind, and running all the risks of inaccuracy which attend upon the custom of drawing general conclusions from particular cases. When dissected in this way, the fallacy of the argument that because no sane District Magistrate would run *amok*, wounding people with an axe, therefore no illiterate rustic would do so, unless insane, will be evident to everybody. Circumstantial evidence, to justify a judicial finding solely based on it, must be of a kind which excludes all other reasonable and probable hypotheses except the one set up. The accused in this case suddenly wounded two men, apparently without motive, and laughed when questioned about his conduct shortly after. Such conduct is of course consistent with his being insane: but it is at least equally consistent with the mere indulgence of a savage but reasoning instinct—with a brutal but perfectly sane desire to cause blood-shed—with a foolish and reckless but still not insane craving for notoriety—and with possibly one or more or several other rational and culpable states of minds. Therefore accused's conduct alone cannot furnish a safe, or even a legal, basis to support the theory of insanity of any kind—let alone legal insanity—to the exclusion of all these other hypotheses with equal claims to a *locus standi*. The finding of the Magistrate is unsupported by any evidence of hereditary tendency towards mental disorder, or of any other cause for impairment of the intellect, or of a single display of previous or subsequent eccentricity on the part of the accused; and it is therefore impossible to sustain the inference upon which accused has been discharged. On the contrary, his conduct in running away and concealing himself in the house of a friend in another village, immediately after he had wounded the two men, seems to me a strong indication of the existence of a consciousness in his mind that he had done what was wrong. So that, even if we could infer the presence of a certain amount of mental derangement, it did not amount to legal insanity, since the cognitive faculty had apparently not been destroyed by it."²⁵

Onus.—The burden of proving the defence afforded by this section rests on the accused.¹ That onus may be discharged by producing evidence as to the conduct

²⁵ *Katay Kisan*, (1904) 17 C. P. L. R. 113, 120, 1 Cr. L. J. 854, 859; *Mahommad Sarwar*, (1929) 81 Cr. L. J. 164, [1930] AIR [N] 63.

¹ *Irappa*, (1895) Unrep. Cr. C. 818; *Niaz Ali*, (1904) 25 A. W. N. 2, 2 Cr. L. J. 91; *Katay Kisan*, (1904) 17 C. P. L. R. 113, 120, 1 Cr. L. J. 854, 859; *Chandu Lal*, (1928) 21 A. L. J. R.

776, 25 Cr. L. J. 348, [1924] AIR (A) 186; *Deva-sikamani*, (1927) 55 M. L. J. 228, 27 L. W. 771, 29 Cr. L. J. 63, [1928] AIR (M) 196; *Sardar Bakhsh*, (1934) 35 P. L. R. 708; *Onkar Datt Nigam*, [1935] O. W. N. 53, 36 Cr. L. J. 392, [1935] AIR (O) 143; *Nga San Pe*, (1936) 38 Cr. L. J. 397, [1937] AIR (R) 33; *Sodeman*, [1936] 2

of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition, his family history and so forth. Mere absence of motive is not a sufficient ground upon which mania may be inferred.² But if it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then it is open to the Court to consider whether the evidence proves to its satisfaction that the accused comes within the exception.³ Mental derangement a year previous to the act being committed, combined with peculiar circumstances, has been held sufficient to shift the burden of proof.⁴ The evidence must prove an alienation of reason preventing the moral sense.⁵

Procedure.—The procedure for the trial of insane persons is laid down in Chapter XXXIV of the Code of Criminal Procedure.

Where the defence of insanity is set up, in order to warrant the jury in acquitting the accused, it must be proved affirmatively that he is insane, if the fact be left in doubt, and if the crime charged in the indictment be proved, it is their duty to convict.⁶ The plea of insanity can be raised even in appeal.⁷

Punishment.—Partial delusion, or the mere existence of mental disease, does not exempt a person from criminal responsibility, though mental weakness, caused by disease, is an extenuating circumstance affecting the sentence.⁸ The accused had intentionally killed another man, and it was found on the evidence that he was at the time insane, but not to such a degree that he did not know the nature of his act or that what he was doing was wrong and contrary to law. It was held that although the accused was not entitled to the benefit of this section, it was not proper that he should be hanged, but rather he should be sentenced to transportation for life, so that the Government might be in a position to make such modification (if any) of the sentence as might be indicated by further observation of the accused.⁹

Acquittal.—The following is suggested as a suitable form of finding of acquittal on the ground of insanity :—

“The Court, concurring with the Assessors, finds that—did kill—by striking him on the head with a club, but that, by reason of unsoundness of mind, he was incapable of knowing that he was doing an act which was wrong or contrary to law, and that he is not therefore guilty of the offence specified in the charge, viz.,—and the Court directs that the said—be acquitted, and that, under the provisions of s. 471, Criminal Procedure Code, the said—be kept in safe custody in the—pending the orders of the Local Government.”¹⁰

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law : provided that the thing which intoxicated him was administered to him without his knowledge¹ or against his will.

Act of a person incapable of judgment by reason of intoxication caused against his will.

COMMENT.

Voluntary drunkenness is no excuse for the commission of a crime.¹¹ At the same time drunkenness does not, in the eye of the law, make an offence the more hein-

A. E. R. 1138; *Sankappa Shetty*, [1946] M. W. N. 963, (1940) 52 L. W. 689, 42 Cr. L. J. 558, [1941] AIR (M.) 326; *Deorao*, [1946] Nag. 946.

² *Bahadur*, (1927) 9 Lah. 371; *Narain*, (1946) 25 Pat. 368; *Deorao*, [1946] Nag. 946.

³ *Musammal Anandi*, (1923) 45 All. 329.

⁴ *Arzoo Bebee*, (1865), 2 W. R. (Cr.) 33.

⁵ *Nobin Chunder Banerjee*, (1873) 20 W. R. (Cr.) 70, 13 Beng. L. R. Appx. 20.

⁶ *Michael Stokes*, (1848) 3 C. & K. 185.

⁷ *Arthur Robert Canham*, (1925) 18 Cr. App. R. 163.

⁸ *Nepal*, (1886) Unrep. Cr. C. 229; *Nga Po Tha*, (1896) P. J. L. B. 249; *Nga Kan Tha*, (1933) 34 Cr. L. J. 791, [1933] AIR (R) 144; *Nga Sein Gale*, (1934) 12 Ran. 445.

⁹ *Lachman*, (1923) 46 All. 243; *Mitha*, (1932) 34 P. L. R. 1044, 34 Cr. L. J. 909, [1933] AIR (L) 123.

¹⁰ C. H. R. and O., Vol. I, Ch. I, s. 149, p. 54. See *Somya Hirya*, (1918) 20 Bom. L. R. 629, 43 Bom. 134.

¹¹ *Bodhee Khan*, (1866) 5 W. R. (Cr.) 79; *Boodh Dass*, (1886) P. R. No. 41 of 1866.

ous.¹² It is a species of madness for which the mad man is to blame. The law pronounces that the obscurity and divestment of that judgment and human feeling which in a sober state would have prevented the accused from offending, shall not, when produced by his voluntary act, screen him from punishment, although he be no longer capable of self-restraint.¹³ *Qui peccat ebrius, luat sobrius*: let him who sins when drunk be punished when sober.¹⁴

Drunkenness makes no difference to the knowledge with which a man is credited and if a man knew what the natural consequences of his acts were he must be presumed to have intended to cause them.¹⁵ This section deals with the question of the knowledge possessed by an accused person at the time he commits the offence and leaves quite open the question of intention. On the question how far drunkenness is an excuse for a crime the proper test is that laid down in the case of *Director of Public Prosecutions v. Beard*.¹⁶ The test to apply is not the test applied in cases of insanity, viz., whether the accused person knew what he was doing was wrong or was able to appreciate the nature and quality of his act. The correct test is whether by reason of drunkenness the accused person was incapable of forming an intention of committing the offence.¹⁷

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration with the other facts proved in order to determine whether he had that intent, but evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. The accused became very drunk, but knew what he was doing. He went to his house, took hold of a *dah* and going along the road shouted his intention to kill a person with whom he had had a dispute. A person on the road gently tried to pacify him and thereupon the accused not only threatened to cut him, but followed him and inflicted such wounds on him that the person died. It was held that the accused should be imputed with the same knowledge as he would have had he been sober, and his act amounted to murder for which there were no extenuating circumstances.¹⁸

"If a man chooses to get drunk, it is his own voluntary act: it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party."¹⁹

Although simple frenzy occasioned immediately by drunkenness is no excuse yet if by one or more such practices, an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed frenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.²⁰

1. 'Without his knowledge.'—If a man is made drunk through stratagem or the fraud of others, or through ignorance, or through any other means causing intoxication without the man's knowledge or against his will, he is excused. If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes such a temporary or permanent frenzy, this puts him into the same condition as any other frenzy, and equally excuses him.²¹

¹² *Zoolfkar Khan*, (1871) 16 W. R. (Cr.) 36, 8 Beng. L. R. Appx. 21.

¹³ 7th Parl. Rep., s. 19.

¹⁴ *Kendrick v. Hopkins*, (1580) Cary's Rep. 133.

¹⁵ *Judagi Mullah*, (1929) 8 Pat. 911.

¹⁶ [1920] A. C. 479.

¹⁷ *Muthu Goundan*, [1931] M. W. N. 113; *Samman Singh*, [1943] Lah. 89.

¹⁸ *Nga Sein Gale*, (1934) 12 Ran. 445.

¹⁹ Per Alderson, B., in *Meakin*, (1836) 7 C. & P. 297; *Patrick Carroll*, (1835) 7 C. & P. 145. Contra, *John Thomas*, (1837) 7 C. & P. 817; *Pearson's Case*, (1885) 2 Lewin, 144; *Bishna*, (1932) 33 P. L. R. 130, 33 Cr. L. J. 378, [1932] AIR (L) 244.

²⁰ 1 Hale P. C. 32. See Comment on s. 84. See also *John Burrow's Case*, (1823) 1 Lewin 75; *William Rennie's Case*, (1825) 1 Lewin 76.

²¹ 1 Hale P. C. 32.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

COMMENT.

As certain guilty knowledge or intention forms part of the definitions of many offences, this section is provided to meet those cases. It says that a person voluntarily drunk will be deemed to have the same knowledge as he would have had if he had not been intoxicated.

The Madras High Court has held that the second part of the section speaks of knowledge only and omits any reference to intent. Whether this omission is intentional or not, it may be due to the fact that in the majority of cases the question of intention is merely the question of knowledge. If the accused knew what the natural consequences of his acts were, ordinarily he must be deemed to have intended to cause them. Though ordinarily intention is to be inferred from knowledge there must be cases where intent must be found as a fact and cannot be assumed, in which cases voluntary drunkenness may be relied on to show that the required 'intent' is absent. Where the evidence shows that the accused knew that the act he was doing was a wrongful act, the Court can presume from such knowledge that he must have had the criminal intent requisite for the offence.²²

The Patna High Court has held that there may be cases in which a particular knowledge is an ingredient, and there may be other cases in which a particular intent is an ingredient, the two are not necessarily always identical. This section does not say that he shall be liable to be dealt with as if he had the same intention as might have been presumed if he had not been intoxicated.²³

The Calcutta High Court has in an early case observed: "Voluntary drunkenness does not, of course, palliate any offence, but it is generally taken into account as throwing light on the question of intention."²⁴ The Legislature appears to have intended to make a distinction between the presumption as to knowledge and the presumption as to intention, and though ordinarily intention is to be inferred from knowledge, it is not to be inferred when the knowledge is merely a legal fiction.²⁵ Although there is a presumption so far as knowledge is concerned, there is no such presumption with regard to intention.

A full bench of the former Chief Court of Lower Burma laid down that the omission of any express provision in this section regarding the intention which is to be attributed to a drunken man doing an act which is an offence when done with a particular knowledge or intent leaves it open to the Courts to deal with the question of intention on the general principles of law. The drunkenness of an accused person at the time he committed the act, charged as an offence, may be and should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged, and that the intention which would be ascribed to a sober man in connection with an act must not necessarily be ascribed to a drunken man who does the same act. The question of intention must be determined in each individual case according to the actual facts proved according to accepted principles.¹ Intoxication should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged and the intention which would be ascribed

²² *Decasikamani*, (1927) 55 M. L. J. 228, 27 L. W. 77, 29 Cr. L. J. 63, [1928] AIR (M) 196. In *Mandhu Gadaba*, (1914) 38 Mad. 479, the Court discussed the question as to knowledge and intention which should be attributed to a drunken person without coming to unanimous conclusion.

²³ *Dil Mohammad*, (1942) 21 Pat. 250; *Jhiktu Bhogta*, (1941) 23 P. L. T. 763, 43 Cr. L. J. 544, [1942] AIR (P) 427.

²⁴ Per Glover, J., in *Ram Sahoy Bhur*, (1864) W. R. (Gap No.) (Cr.) 24, 25. See *J. M.*, (1910) 1 U. B. R. (1910-13) 17, 11 Cr. L. J. 659.

²⁵ *Abdul Karim*, (1892) S. J. L. B. 650; *Nga Ba Gyaw*, (1911) 1 U. B. R. (1910-13) 105, 13 Cr. L. J. 471.

¹ *Tun. Baw*, (1912) 6 L. B. R. 100, F. B; *Manindra Lal*, (1937) 41 C. W. N. 1187, 38 Cr. L. J. 863, [1937] AIR (C) 432.

to a sober man in connection with that act must not necessarily be ascribed to an intoxicated man who does the same act. If the accused was so drunk as to be unable to form the intent to kill the offence would be one of manslaughter, i.e., culpable homicide.²

The former Chief Court of the Punjab had held that although this section attributed to a drunken man the knowledge of a sober man when judging of his action, it did not give him the same intention, and, therefore, drunkenness or a state of intoxication afforded a sufficient excuse for not exacting the extreme penalty of the law.³ *Pal Singh's* case was distinguished in a subsequent case in which it was said that in that case the accused had no motive to cause the death of his victim and that the attack was a sudden one. Where, however, the accused primed themselves with drink in order to wreak vengeance upon their enemy and beat him mercilessly, the penalty of death was inflicted.⁴ Though voluntary drunkenness cannot excuse the commission of an offence, yet where, as upon a charge of murder, the question is whether an act was premeditated or done only from sudden heat and impulse, the fact of the party being intoxicated is held to be a circumstance proper to be taken into consideration. The sentence of death was accordingly commuted to transportation for life.⁵ Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation.⁶ The Rangoon High Court has held to the contrary.⁷

In England it has been held that where the intention of a person committing a crime is an element of the crime itself, the fact that he was intoxicated at the time he committed the act may be taken into consideration in considering whether he formed the intention necessary to constitute the crime.⁸ The House of Lords after referring to various cases have laid down that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether or not he had this intent. Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.⁹ The Court of Criminal Appeal has held that intoxication may reduce homicide to manslaughter.¹⁰ It has also held that drunkenness is not a good defence unless it can be positively proved that it was of such a nature that the accused did not know the difference between right and wrong.¹¹

CASE.

The accused became very drunk, but knew what he was doing. He went to his house, took hold of a *dah* and going along the road shouted his intention to kill a person with whom he had had a dispute. A person on the road gently tried to pacify him and thereupon the accused not only threatened to cut him, but followed him and inflicted such wounds on him that the person died. It was held that the accused must be imputed with the same knowledge as he would have had had he been sober, and his act amounted to murder for which there were no extenuating circumstances.¹²

PRACTICE.

Procedure.—Punishment.—Insobriety is no excuse for the commission of a

² *Nga Hpeik*, (1937) 39 Cr. L. J. 689, [1938] AIR (R) 219.

³ *Pal Singh*, (1917) P. R. No. 28 of 1917, 18 Cr. L. J. 868, [1917] AIR (L) 226; *Tincouri Dhopi*, (1922) 27 C. W. N. 290, 39 C. L. J. 34, [1923] AIR (C) 460; *Nga Sein Gale*, (1934) 12 Ran. 445.

⁴ *Sheru*, (1923) 7 Lah. 50.

⁵ *Booth Dass*, (1866) P. R. No. 41 of 1866.

⁶ *Waryam Singh*, (1926) 7 Lah. 141.

⁷ *Nga Sein Gale*, (1934) 12 Ran. 445.

⁸ *Doherty*, (1887) 16 Cox 306. See also *Cruse*, (1838) 8 C. & P. 541, 556; *Monkhouse*, (1849)

4 Cox 55; *Moore*, (1852) 3 C. & K. 319; *Gamlan*, (1858) 1 F. & F. 90.

⁹ *Director of Public Prosecutions v. Beard*, [1920] A. C. 479, followed in *Sheru*, (1923) 7 Lah. 50; *Bishan Singh*, (1929) 30 P. L. R. 357, 30 Cr. L. J. 662, [1929] AIR (L) 637; *Nga Sein Gale*, (1934) 12 Ran. 445.

¹⁰ *Thomas Meade*, (1909) 2 Cr. App. R. 54.

¹¹ *William Wallace Galbraith*, (1912) 8 Cr. App. R. 101.

¹² *Nga Sein Gale*, (1934) 12 Ran. 445; *Subbai Goundan*, [1937] M. W. N. 1329.

crime, but may, in some cases, be taken into consideration when awarding punishment for a crime committed in a state of drunkenness.¹³

87. Nothing which is not intended to cause death, or grievous hurt,¹ and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent,² whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Act not intended and not known to be likely to cause death or grievous hurt, done by consent.

ILLUSTRATION.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

COMMENT.

This section appears to proceed upon the maxim *volenti non fit injuria* : he who consents suffers no injury. This rule is founded upon two very simple propositions : (1) that every person is the best judge of his own interest; (2) that no man will consent to what he thinks hurtful to himself.

Every man is free to inflict any suffering or damage he chooses on his own person and property; and if instead of doing this himself, he consents to its being done by another, the doer commits no offence. A man may give away his property; and so another who takes it by his permission does not commit theft. He may inflict self-torture or he may consent to suffer torture at the hands of another.¹⁴ The authors of the Code say : "We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. Both the general rule and the restrictions may, we think, be easily vindicated. If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his pictures shall be cut to rags, that his fine house shall be pulled down, that the best horses in his stables shall be shot, that his plate shall be thrown into the sea, those who obey his orders, however capricious those orders may be, however deeply Z may afterwards regret that he gave them, ought not, as it seems to us, to be punished for injuring his property. Again, if Z chooses to sell his teeth to a dentist, and permits the dentist to pull them out, the dentist ought not to be punished for injuring Z's person. So if Z embraces the Mahomedan religion, and consents to undergo the painful rite which is the initiation into that religion, those who perform the rite ought not to be punished for injuring Z's person.

"The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true that, in the vast majority of cases, they judge better of their own interest than any lawgiver, or any tribunal, which must necessarily proceed on general principles, and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals, can judge for them. It is difficult to conceive any law which should be effectual to prevent men from wasting their substance on the most chimerical speculation, and yet which should not prevent the construction of such works as the Duke

¹³ *Jaimal Singh*, [1923] AIR (L) 294.

¹⁴ M. & M. 64.

of Bridgewater's canals. It is difficult to conceive any law which should prevent a man from capriciously destroying his property, and yet which should not prevent a philosopher, in a course of chemical experiments, from dissolving a diamond, or an artist from taking ancient pictures to pieces, as Sir Joshua Reynolds did, in order to learn the secret of the colouring. It is difficult to conceive any law which should prevent a man from capriciously injuring his own health, and yet which should not prevent an artisan from employing himself in callings which are useful and indeed necessary to society, but which tend to impair the constitutions of those who follow them, or a public-spirited physician from inoculating himself with the virus of a dangerous disease. It is chiefly, we conceive, for this reason, that almost all Governments have thought it sufficient to restrain men from harming others, and have left them at liberty to harm themselves.

"But though in general we would not punish an act on account of any harm which it might cause to a person who had consented to suffer that harm, we think that there are exceptions to this rule, and that the case in which death is intentionally inflicted is an exception.

"It appears to us that the reasons which render it highly expedient to inflict punishment in ordinary cases of harm done by consent of the person harmed do not exist here. The thing prohibited is not, like the destruction of property, or like the mutilation of the person, a thing which is sometimes pernicious, sometimes innocent, sometimes highly useful. It is always, and under all circumstances, a thing which a wise law-giver would desire to prevent, if it were only for the purpose of making human life more sacred to the multitude. We cannot prohibit men from destroying the most valuable effects, or from disfiguring the person of one who has given his unextorted and intelligent consent to such destruction or such disfiguration, without prohibiting at the same time gainful speculations, innocent luxuries, manly exercises, healing operations. But by prohibiting a man from intentionally causing the death of another, we prohibit nothing which we think it desirable to tolerate.

"It seems to us clear, therefore, that no consent ought to be a justification of the intentional causing of death."¹⁵

Scope.—The section does not permit a man to give his consent to anything intended or known to be likely to cause his own death or grievous hurt. It only justifies any harm short of grievous hurt. The question of benefit to the person harmed is immaterial under this section, though material under the preceding one. See also s. 91, *infra*.

1. 'Grievous hurt.'—See s. 320, *infra*.

2. 'Consent.'—See s. 90, *infra*, which gives a negative explanation of this word. 'Consent' is defined in the Indian Contract Act, s. 13, as follows:—"Two or more persons are said to consent when they agree upon the same thing in the same sense." Sir James Stephen says that in criminal law, 'consent' means "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents." Where an act is in itself unlawful, consent can never be an available defence. There are well-established exceptions to the rule, e.g., in the case of friendly sporting contests or rough but innocent horseplay.¹⁶

A claimed to be proof against edged instruments and invited B to put his claim to test. B thereupon cut A on the arm inflicting a wound as a result of which A bled to death. It was held that A's consent was given under a misconception of fact but that in the circumstances B could not be supposed to be aware of his mistake. B had no intention of causing death or grievous hurt and was therefore entitled to the benefit of this section.¹⁷

Manly sports and exercises.—Ordinary games such as fencing, single sticks, boxing, football, and the like are protected by this section. A prize-fight is illegal, and all persons aiding and abetting therein are guilty of assault, and the consent of the person actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault; but mere presence at the prize-fight does not as a matter of law necessarily render persons so present guilty of an assault as

¹⁵ Note B, pp. 106-108.

¹⁶ *Donovan*, (1934) 30 Cox 187.

¹⁷ *Shwe Kin*, (1915) 8 L. B. R. 166, 16 Cr. L. J. 581, [1915] AIR (LB) 101.

aiding and abetting in such fight.¹⁸ All persons who by their presence encourage a fight from which death ensues to one of the combatants are guilty of manslaughter, although they neither say nor do anything.¹⁹ No persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done and thus shelter themselves from the consequences of their acts.²⁰ All struggles in anger, whether by fighting or wrestling, or any other mode—all kinds of contests in anger are unlawful.²¹ There is nothing unlawful in sparring unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match, does not amount to manslaughter.²²

If death ensue in consequence of such games as are entered into to give strength, skill, or activity in the use of arms, or for sport or recreation, as wrestling by consent, playing at cudgels, fencing, archery, etc., it is held in England to be misadventure. The true principle which distinguishes such cases from those where death ensues in consequence of an intent to do a slight injury is, that here bodily harm is not the motive on either side. Proper caution and perfect fair play should be used on both sides: for, if any improper advantage be taken, it will amount to manslaughter.²³ If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter. In such a case it is immaterial to consider whether the act which caused death was in accordance with the rules and practice of the game. The act would be unlawful if the person committing it intended to produce a serious injury to another, or if, in committing an act which he knows may produce a serious injury, he is indifferent and reckless as to the consequences.²⁴

"It seems also, that in cases of friendly contests with weapons, which, though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms. For if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, from whence death ensued; the want of due and friendly caution would make such act amount to manslaughter, but not to murder, because the intent was not malicious.

"But though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended; if death casually ensue, it is but misadventure."²⁵

PRACTICE.

Evidence.—Prize-fight.—Although all persons present at and sanctioning a prize-fight, where one of the combatants is killed, are guilty of manslaughter, yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter.¹

88. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit¹ it is done in good faith, and who has given a consent,² whether express or implied, to suffer that harm, or to take the risk of that harm.

ILLUSTRATION.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

¹⁸ *Coney*, (1882) 8 Q. B. D. 534; *Perkins*, (1881) 4 C. & P. 537; *Orton*, (1878) 14 Cox 226.

¹⁹ *Murphy*, (1883) 6 C. & P. 103.

²⁰ *Bradshaw*, (1878) 14 Cox 83, 84.

²¹ *Canniff*, (1840) 9 C. & P. 359.

²² *Young*, (1866) 10 Cox 371.

²³ *Alison*, 144.

²⁴ *Bradshaw*, (1878) 14 Cox 83, 84.

²⁵ 1 East P. C. 269.

¹ *Hargrave*, (1831) 5 C. & P. 170.

COMMENT.

No consent can justify an intentional causing of death. But a person for whose benefit a thing is done, may consent that another shall do that thing, even if death may probably ensue. The last section allows any harm to be inflicted short of grievous hurt : this section sanctions the infliction of any harm as it is for the benefit of the person to whom it is caused.

The authors of the Code say : "In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labour under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigour. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death but knowing himself to be likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death. We propose, therefore, that it shall be no offence to do even what the doer knows to be likely to cause death if the sufferer being of ripe age has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but on the contrary, intended in good faith the benefit of the sufferer."² See also s. 91, *infra*.

1. 'Benefit'.—Mere pecuniary benefit is not benefit within the meaning of this section.³

2. 'Good faith, and who has given a consent.'—Nothing is said to be done in good faith which is done without due care and attention.⁴ Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A surgeon undertakes that he will perform a cure, but he does not undertake to use the highest possible degree of care and skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill. He does not undertake to use the highest possible degree of skill.⁵ Any person, whether a licensed medical practitioner or not, who deals with the life or health of any person, is bound to have competent skill; and is bound to treat his patients with care, attention, and assiduity; and if a person dies for want of either, the person is guilty of manslaughter.⁶ To render a medical man liable for negligence, or want of due care and skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care, there must have been a want of competent and ordinary care and skill; and to such a degree as to have led to a bad result.⁷ The Court (or the jury) has to consider whether in the execution of that duty which a doctor had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of.⁸ The question is whether, under all the circumstances, the accused acted with criminal inattention and carelessness.⁹

² Note B, p. 108.

³ Explanation to s. 92, *infra*.

⁴ Section 52, *supra*.

⁵ *Lanphier v. Phipps*, (1838) 8 C. & P. 475.

⁶ *Spiller*, (1832) 5 C. & P. 333.

⁷ *Rich v. Pierpont*, (1862) 3 F. & F. 35.

⁸ *Ferguson's Case*, (1830) 1 Lewin 181.

⁹ *Crook*, (1859) 1 F. & F. 521.

But if a person bona fide and honestly exercising the best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter and it makes no difference whether the party be a regular or an irregular surgeon.¹⁰

The Court of Criminal Appeal in England has laid down that an act, unlawful *per se* as being criminal, cannot be rendered lawful because the person to whose detriment it is done consents to it. The Court observed: "If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection, may, in another, be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. . . . There are . . . well established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by Sir Michael Foster in the Chapter, just cited, where he refers to the case of persons who in perfect friendship engage by mutual consent in contests, such as 'cudgels, foils, or wrestling,' which are capable of causing bodily harm. . . . Another exception to the general rule, or, rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm. An example of this kind may be found in *Reg. v. Bruce*.¹¹ In such cases the act is not in itself unlawful, and it becomes unlawful only if the person affected by it is not a consenting party. . . . other exceptions to the rule. . . . are . . . the reasonable chastisement of a child by a parent or by a person in loco parentis. . . . we think that 'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."¹²

Unqualified persons.—The Law Commissioners observe that this section will not excuse dangerous operations performed by unqualified persons: "We apprehend that 'an unqualified and ignorant quack' could hardly be excused, for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life but by misrepresentation; and such a one could hardly satisfy a Court of Justice that he had undertaken the operation in good faith under cl. 72 (this section), for good faith must surely be construed here to mean, a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant."¹³

A person not qualified, as not being a regular medical practitioner, but assuming to be, or to practise as such, and undertaking to treat another for a disease, is liable for injury caused by ignorant and improper treatment, by which the patient is rendered worse instead of better, and is injured by the use of improper medicine.¹⁴ A person who so 'takes a leap in the dark' is guilty of gross negligence.¹⁵ Death caused by administering an improper medicine is manslaughter.¹⁶ But even an unlicensed practitioner will not be criminally responsible for the death of a person, occasioned by his treatment, unless his conduct is characterised either by gross ignorance of his art, or gross inattention to his patient's safety.¹⁷ If he is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter.¹⁸

¹⁰ *Van Butchell*, (1829) 3 C. & P. 629.

¹¹ (1847) 2 Cox 262, 263.

¹² *Donovan*, [1934] 2 K. B. 498, 507, 508, 509.

¹³ 1st Rep., s. 123, p. 221.

¹⁴ *Ruddock v. Lowe*, (1865) 4 F. & F. 519.

¹⁵ *Markuss*, (1864) 4 F. & F. 356.

¹⁶ *Nanny Simpson's Case*, (1829) 1 Lewin 172; *Webb's Case*, (1834) 2 Lewin 196.

¹⁷ *Long*, (1830) 4 C. & P. 398.

¹⁸ *Long*, (1831) 4 C. & P. 423.

A person uneducated in matters of surgery operated on a man for internal piles by cutting them with an ordinary knife, and the man died from hæmorrhage. He was charged, under s. 304A, with causing death by doing a rash and negligent act. It was contended that, inasmuch as the accused had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that at all events he was entitled to the benefit of this section as he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk. It was held that having regard to the meaning of "good faith" he was not entitled to the benefit of this section; and that this section did not apply to the case, as it was not shown by the accused that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk.¹⁹

The accused operated upon a patient for cataract, with the result that the patient lost the sight of her left eye. It was found that the operation was performed with the consent of the patient, and in good faith and for her benefit, and that it was performed in accordance with the recognized Indian method of treatment for cataract. It was held that the accused had committed no offence under the Code.²⁰

English cases.—In an action against a chemist and druggist upon an alleged retainer (as a surgeon and apothecary) to treat the plaintiff for a certain disorder (for which mercurial treatment was improper), it was held that mercurial treatment, in a case for which it was wholly unfit, was such negligence or ignorance as would sustain an action.²¹ A person in the habit of acting as a man-midwife tore away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, as a result of which the patient died. It was held that he was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.²² The accused, a person not a regular practitioner, administered lobelia, a dangerous medicine, which produced death. It was held that the question for the jury was whether he had acted so rashly and carelessly as to cause death.²³ Any person who deals with the life or health of another person is bound to use competent skill and sufficient attention; if the patient dies for the want of either, the person is guilty of manslaughter.²⁴

89. Nothing which is done in good faith¹ for the benefit² of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person : Provided—

Act, done in good faith for benefit of child or insane person, by or by consent of guardian.

First.—That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Provisos.

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

¹⁹ *Sukaroo Kobiraj*, (1887) 14 Cal. 566. See *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.

²⁰ *Suraj Bati*, (1908) 28 A. W. N. 91, 5 A. L. J. R. 155, 7 Cr. L. J. 306.

²¹ *Jones v. Fay*, (1865) 4 F. & F. 525.

²² *Williamson*, (1807) 3 C. & P. 635.

²³ *Crick*, (1859) 1 F. & F. 519.

²⁴ *Burdee*, (1916) 25 Cox 598.

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

ILLUSTRATION.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

COMMENT.

To obtain the benefit of the exception embodied in this section it is necessary to show that the act done was for the benefit of the minor.²⁵ The section empowers the guardian of an infant under twelve years or an insane person to consent to inflict harm on the infant or the insane person provided it is done in good faith and is done for his benefit. Persons above twelve years are considered to be capable of giving consent under s. 88.

Object.—The authors of the Code observe : . "A lunatic may be in a state which makes it proper that he should be put into a straight waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is, by our definition, voluntarily to cause grievous hurt and, as sharp instruments are used, is a very highly penal offence. We have therefore provided, by clause 71 (this section), that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind."¹ See also s. 91, *infra*.

The following illustrations had been given by the authors of the Code² to illustrate the meaning of this section : but except illustration (d) all were omitted by the Commissioners. They, however, elucidate the purport of the section :—

(a) A, a parent, whips his child moderately, for the child's benefit. A has committed no offence.

(b) A confines his child, for the child's benefit. A has committed no offence.

(c) A, in good faith, for his daughter's benefit, intentionally kills her to prevent her from falling into the hands of Pindarries. A is not within the exception.

(d) A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A has committed no offence, inasmuch as his object was the preventing of death or grievous hurt to the child.

(e) A, in good faith, for his child's pecuniary benefit, emasculates his child. Here, inasmuch as A has caused grievous hurt to the child for a purpose other than the preventing of death or grievous hurt to the child, A is not within the exception.

(f) A, intending in good faith the pecuniary benefit of Z, his daughter, a child under twelve years of age, abets a rape committed by B on Z. Neither A nor B is within the exception.

1. 'Good faith.'—See s. 52, *supra*.

2. 'Benefit'.—Mere pecuniary benefit is not benefit within the meaning of this section.³

A school-master may for purposes of discipline inflict moderate punishment and such punishment may be inflicted for offences committed not only within the school limits but also outside the school walls except when the school is closed for any length of time for a period of regular holidays.⁴

Provisos.—The authors of the Code say : "We cannot safely confide to him the interest of his neighbours in the same unreserved manner in which we confide to him his own, even when he sincerely intends to benefit his neighbours. Even parents

²⁵ *Nanku*, [1935] A. L. J. R. 1096, 37 C. L. J. 35, [1935] AIR (A) 916.

¹ Note B, p. 109.

² Clause 71, p. 11.

³ Explanation to s. 92, *infra*.

⁴ *Maung Ba Thauung*, (1925) 3 R. an 661

have been known to deliver their children up to slavery in a foreign country, to inflict the most cruel mutilations on their male children, to sacrifice the chastity of their female children, and to do all this declaring, and perhaps with truth, that their object was something which they considered as advantageous to the children. We have therefore not thought it sufficient to require that on such occasions the guardian should act in good faith for the benefit of the ward. We have imposed several additional restrictions which, we conceive, carry their defence with them."⁵

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury,¹ or under a misconception of fact,² and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception : or

Consent known to be given under fear or misconception.

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of insane person.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Consent of child.

COMMENT.

This section does not define 'consent' but describes what is not consent.

Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.⁶ Consent means an active will in the mind of a person to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act.⁷

Under this section the consent must be free, i.e., it must not be caused by coercion, fraud, or misrepresentation. Consent under the Code is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind.⁸ Suppose an ignorant person to represent himself as having skill to perform a difficult operation, and by this pretence to obtain consent to perform it, such consent can avail him nothing.⁹ But where the facts which invalidate a consent are unknown to the person to whom it is given, as if other persons without his knowledge represent that he possesses medical skill and thus obtain consent to his administering a potent medicine, etc., this will not make the consent invalid.

Object.—The object of this section is not to lay down that a child under twelve years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge such consent must be a real consent, not vitiated by immaturity, misconception, misunderstanding, fear or fraud.¹⁰

Consent differs from submission.—"There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere *submission* involves *consent*."¹¹ "Mere submission by one who does not know the nature of the act done cannot be consent."¹²

1. 'Fear of injury.'—This is a very wide expression. 'Injury' seems to be limited to physical injury.

2. 'Misconception of fact.'—Consent given under a misconception is invalid, if the person to whom the consent is given is aware of its existence. An honest mis-

⁵ Note B, p. 109.

⁶ Story on Equity, 3rd Edn., s. 222, p. 94.

⁷ Lock, (1872) 9 L. R. 2 C. C. R. 10, 11.

⁸ Nayamuddin, (1891) 18 Cal. 484, 492, F.B.

⁹ Sukaroo Kobiraj, (1887) 14 Cal. 566.

¹⁰ Khalil-ur-rahman, (1933) 11 Ran. 213.

¹¹ Per Coleridge, J., in Day, (1841) 9 C. & P. 722, 724.

¹² Per Quain, J., in Lock, (1872) L. R. 2 C. C. R. 10, 14.

conception by both the parties, however, does not invalidate the consent. In a case the private parts of the deceased were cut off by the accused who were eunuchs. The accused pleaded that a similar operation was performed on them; that they never understood the practice of emasculation to be forbidden; and that they acted under the free consent of the deceased. It was held that where a man of full age submitted himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and died from the injury, the persons concerned in the act were guilty of culpable homicide and not murder.¹³ The accused, who professed to be snake-charmers, persuaded the deceased to allow themselves to be bitten by a poisonous snake, inducing them to believe that they had power to protect them from harm. It was held that the consent given by the deceased allowing themselves to be bitten did not protect the accused, such consent having been founded on a misconception of facts, that is, in the belief that the accused had power by charms to cure snake-bites and the accused knowing that the consent was given in consequence of such misconception.¹⁴ The accused was indicted for indecently assaulting two boys, each of whom was eight years of age. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. It was held that the accused was guilty as the boys merely submitted to his act not knowing its nature.¹⁵

Misrepresentation.—A consent given on a misrepresentation of fact is one given under a misconception of fact within the meaning of this section. The misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given.¹⁶ The accused professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done under the belief that he was merely treating her medically and performing a surgical operation. It was held that the accused was guilty of rape.¹⁷

Where a licensee removed from Government control timber of the kind which was not covered by his license by misleading the responsible officer to accept the revenue and to issue a removal pass and bill of title, then the consent of the officer for removal was no consent under this section and in the circumstances there was theft of the timber.¹⁸

Consent in cases of rape.—This section will only protect a man from the charge of rape if he has the intelligent consent of the prosecutrix. According to the English law a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape.¹⁹ See s. 376, *infra*.

Indecent assault.—In two cases it has been held that an indecent assault is within the rule that fraud vitiates consent. In the first case, the accused, knowing that he had a foul disease, induced a girl, who was ignorant of his condition, to consent to sleep with him, and infected her.²⁰ In the second case, the accused having gonorrhoea had connection with a girl without informing her of the fact and the disease was communicated to her.²¹ It was held in both these cases that the accused was guilty of an indecent assault. But both these cases were unfavourably commented upon in *The Queen v. Clarence*,²² which practically lays down that concealment of the physical condition of the accused is not such a fraud as to create criminal liability. In this case the accused had connection with his wife at a time when he was suffering from gonorrhoea, the wife not knowing about the disease. It was held that the conduct of the accused did not amount to assault occasioning actual bodily harm. In each of the two cases mentioned above the prosecutrix was a young girl and not a town woman. In the case

¹³ *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.

¹⁴ *Poonai Fattamah*, (1869) 12 W. R. (Cr.) 7, 3 Beng. L. R. (A. Cr. J.) 25. See, however, *Shwe Kin*, (1915) 8 L. B. R. 166, 16 Cr. L. J. 581, [1915] AIR (LB) 101.

¹⁵ *Lock*, (1872) L. R. 2 C. C. R. 10.

¹⁶ *Jaladu*, (1911) 86 Mad. 543; *Mussammatt Soma*, (1916) P. R. No. 17 of 1916, 18 Cr. L. J. 18, [1916] AIR (L) 414.

¹⁷ *Flattery*, (1877) 2 Q. B. D. 410.

¹⁸ *Maung Ba Chit*, (1929) 7 Ran. 821.

¹⁹ *Fletcher*, (1866) L. R. 1 C. C. R. 39; *Barratt*, (1878) L. R. 2 C. C. R. 81.

²⁰ *Bennett*, (1866) 4 F. & F. 1105.

²¹ *Sinclair*, (1867) 13 Cox 28.

²² (1888) 22 Q. B. D. 23, 16 Cox 511. See also *Hegarty v. Shine*, (1878) 14 Cox 145, where the Court expressed the opinion that the concealment of a venereal disease from a woman could not constitute an assault.

of a town woman a question may be raised as to the implied consent to take risks flowing from promiscuous embraces.

PRACTICE.

Evidence.—The onus of proving consent is on the accused. The evidence of consent which would be sufficient in a civil transaction must be equally sufficient in exculpation of an accused's guilt.²³

91. The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Exclusion of acts which are offences independently of harm caused.

ILLUSTRATION.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

COMMENT.

This section says in explicit terms that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. If the act is an offence independently of the harm which it has caused then the doer will not be protected by the consent given.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit¹ it is done in good faith³, even without that person's consent², if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit : Provided—

Act done in good faith for benefit of a person without consent.

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Provisos.

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt⁴ or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt⁵, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

ILLUSTRATIONS.

(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A not intending Z's death, but in good faith, for Z's

²³ *Anunto Rurnagat*, (1866) 6 W. R. (Cr.) 57.

benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(d) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the housetop, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here even if the child is killed by the fall. A has committed no offence.

Explanation.—Mere pecuniary benefit⁶ is not benefit within the meaning of sections 88, 89 and 92.

COMMENT.

The logical place of this section would be after s. 89.

Object.—The principal object of ss. 88, 89 and this section is protection of medical practitioners. The authors of the Code observe :—

"There yet remains a kindred class of cases which are by no means of rare occurrence. For example, a person falls down in an apoplectic fit. Bleeding alone can save him, and he is unable to signify his consent to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught in a blanket below, but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished.

"In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by clause 72 (this section) a protection very similar to that which we have given to the acts of regular guardians."²⁴

The following illustrations²⁵ further elucidate the meaning of the section :—

(1) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(3) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

1. 'Benefit'.—See Explanation. 2. 'Good faith'.—See s. 52, *supra*.

Where the accused, a man of education and wealth and living in a town where medical attendance could be procured, chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in a cruel way, it was held that he could not be said to have acted with due care and attention and was guilty of an offence under s. 344.¹

3. 'Consent'.—See s. 90, *supra*. 4. 'Grievous hurt'.—See s. 320, *infra*.

5. 'Hurt'.—See s. 319, *infra*. Section 89 provides for 'grievous hurt' in a similar case.

²⁴ Note B, p. 109.

²⁵ Stephen's Digest of Crim. Law, Art. 226.

¹ *Shinbhu Narain*, (1923) 45 All. 495.

6. 'Pecuniary benefit.'—The explanation to this section, coupled with s. 88, does not justify the performing of a dangerous surgical operation by an unskilled person, although it was not intended to cause death, for the mere pecuniary benefit of the person voluntarily submitting to it.²

93. No communication made in good faith¹ is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Communication
made in good faith.

ILLUSTRATION.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

COMMENT.

This section is introduced to protect the innocent without unduly cloaking the guilty. It requires that communication should have been made (1) in good faith, and (2) for the benefit of the person to whom it is made. The illustration speaks of a surgeon. Very often a timely warning to the patient of his approaching death is necessary in order that he may be able to arrange his affairs to his own satisfaction. In such a case the doctor will be protected under this section if the patient dies of the shock resulting from the communication.

1. 'Good faith.'—Sec s. 52, *supra*.

94. Except murder, and offences against the State² punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence³: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Act to which a
person is compelled
by threats.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

COMMENT.

The Indian law about compulsion and necessity as a justification of an act otherwise criminal is based on the law of England. By this section a person is excused from the consequences of any act, except (1) murder, and (2) offences against the State punishable with death, done under fear of instant death. Fear of hurt or even of

² *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.

grievous hurt is not a sufficient justification. In English law fear of grievous hurt is a good justification.

Object.—Stephen³ says : “Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats, of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, If you do it I will hang you. Is the law to withdraw its threat if some one else says, If you do not do it I will shoot you ?

“Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be opened to collusion, and encouragement would be given to associations of malefactors, secret or otherwise.”

1. ‘**Except murder.**’—See s. 300, *infra*, as to the definition of ‘murder.’ Murder committed under a threat of instant death is not excused under this section.⁴ But ‘murder’ does not include abetment of murder and therefore abetment of murder would be excused.⁵ If an offence is completed when all danger of instant death has been removed the person committing the offence is not protected under this section.⁶ Where a confessional statement by the wife, charged with abetment of murder, alleged that she held her husband’s legs while another struck him with an axe, but that she protested against the murder, and only assisted because such other person threatened to kill her also, it was held that the omission of the Judge to direct the jury that, if they believed the statement, she could not, having regard to this section, be convicted of abetment of murder under s. 109, was a misdirection vitiating the conviction.⁷

2. ‘**Offences against the State.**’—See s. 121, *infra*, for offences against the State punishable with death. The section provides that compulsion is not a defence to a charge under it, but it may operate in mitigation of punishment according to the circumstances of a case.⁸

3. ‘**Threats, which, . . . cause the apprehension that instant death to that person will . . . be the consequence.**’—There must be reasonable fear, at the very time, of instant death. Persons who do criminal acts from fear of anything but instant death do them at their peril.⁹ Persons who had offered or given bribes to certain officials in the Revenue Department of the Government in order to avoid pecuniary injury or personal molestation were not protected by this section.¹⁰ Mere menace of future death will not be sufficient. Where certain witnesses gave false evidence, and then pleaded that they were coerced to do so by a Police Inspector, it was held that they were guilty as there was no proof of instant death.¹¹ A policeman stood by, acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession. He was bound under the Bombay District Police Act (Bom. IV of 1890) to arrest persons committing assaults likely to cause grievous bodily injury but he did not. It was held that nothing but fear of instant death was a defence for a policeman who tortured any one by orders of his superior.¹²

Where the accused of his own accord placed himself in a situation by which he became subject to the threats of another person, whatever threats may have been used towards him, the provisions of this section avail him nothing.¹³

Doctrine of compulsion and necessity.—“No one can plead the excuse of necessity or compulsion as a defence of an act otherwise penal, except as provided in s. 94. . . Lord Hale argues that our law is better than that laid down by the Jesuitical Casuists of France, in this respect, as it prevents aggrieved persons pretending to judge their own cause, and then proceeding to illegal means of redress, as when

³ History of Crim. Law, Vol. II, p. 107.

⁴ *Killikiyalara Bomma*, [1912] M. W. N. 1108, 14 Cr. L. J. 207.

⁵ *Karu*, [1937] Nag. 524.

⁶ *Zahid Beg*, [1937] A. L. J. R. 1253, (1937) 39 Cr. L. J. 364, [1938] AIR (A) 91.

⁷ *Umadasai Dasi*, (1924) 52 Cal. 112.

⁸ *Aung Hla*, (1931) 9 Ran. 404.

⁹ *Magantal*, (1889) 14 Bom. 115, 131, 132.

¹⁰ *Idid*.

¹¹ *Sonoo*, (1868) 10 W. R. (Cr.) 48.

¹² *Lati Khan*, (1895) 20 Bom. 394.

¹³ *Sanlaydo*, (1933) 35 Cr. L. J. 262, [1933] AIR (R) 204.

servants, judging themselves in want of clothes or victuals, get them by robbing their masters.¹⁴ Mr. Branson cited *Alexander Mac Growther's case*¹⁵ as showing how any other rule would make crime triumphant. Where some prisoners pleaded that in 1746 they joined the Duke of Perth in arms against the king, because they feared that their houses would be burned and their goods spoiled, all the Judges concurred that the prisoners were rightly convicted; and Sir M. Foster points out that if threats of this kind were an excuse, it would be in the power of any leader of a rebellion to indemnify all his followers." The same consideration applies to people who bribe public officers : a crime more common here than high treason. If the law allowed the bribers to escape criminal liability...by pleading and proving that they were put in fear of some pecuniary injury or some stoppage of promotion, that would be tantamount to encouraging the corruption, as the corrupt Judge or Officer would then be able by a politic use of threats to give an indemnity to all who paid him money...in dealing with the question of guilty or not, the law does not, where there is no fear of instant death, require the Courts to discuss the philosophy of free will, or determine whether the person who bribes to secure some advantage to himself is a victim of extortion, or feels helpless or not".¹⁶ "No man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind."¹⁷

The same learned Judge in another Bombay case¹⁸ remarks : "All our training as Judges, all the great decisions make us look with dislike on any theory which makes crime easy and excuses atrocious acts...Except where unsoundness of mind is proved, or real fear of instant death is proved, the burden being on the prisoner, the pressure of temptation is not an excuse for breaking the law...Our Courts have no duty cast on them of discussing the varying motives to crime as a matter of metaphysics—of sitting as did the fallen angels reasoning high of

'Providence, foreknowledge, will and fate.

Fixed fate, free will, foreknowledge absolute,

And found no end in wandering mazes lost.'"

See also the remarks of Lord Coleridge in *The Queen v. Dudley*¹⁹ (*vide cases under s. 81, supra*).

English law.—The English law excuses a person who has been forced to commit an offence by fear of death or of grievous bodily harm, except in cases of treason or homicide. The fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels.²⁰ A person is excused, under certain conditions, if he is forced to levy war against the King or to adhere to the King's enemies provided he uses every reasonable endeavour to resist or escape.²¹ According to English law a married woman charged with the commission of any criminal act, except treason, homicide, and probably robbery, is, in case her husband shall be present at the time of the commission of such act, presumed to have acted under his coercion, and such coercion excuses the act, unless it appear that she did not so act. There is no provision in favour of the wife under such circumstances in the Penal Code.

PRACTICE.

Procedure. —Punishment.—The moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.²²

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper¹ would complain of such harm.

¹⁴ 1 Hale P. C. 54.

¹⁵ (1746) 18 St. Tr. 391, Foster 13, 217.

¹⁶ Per Jardine, J., in *Maganlal*, (1889) 14 Bom. 115, 134, 133-135.

¹⁷ *Tyler*, (1838) 8 C. & P. 616, 620.

¹⁸ *Devji Govindji*, (1895) 20 Bom. 215, 222, 223.

¹⁹ (1884) 14 Q. B. D. 273.

²⁰ *Alexander Mac Growther's case*, (1746) 18 St. Tr. 391, 393, Foster 15, 18.

²¹ 7th Parl. Rep., 73.

²² *Stephen's History of Crim. Law*, Vol. II, p. 107.

COMMENT.

The maxim *de minimis non curat lex* (the law does not take account of trifles) is the foundation of this section.

Object.—The authors of the Code observe : “Clause 73 (this section) is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man’s ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident; and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the judges to except them in practice; for if the Code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning.”²³

Scope.—This section has no application, unless the act in question amounts to an offence under the Code, but for the operation of this section. Where the accused who was ordered by his employers in Calcutta to take certain bags of papers and forms belonging to them to their yard to burn and destroy them, instead of doing that, took them to a place for sale, it was held that his act did not amount to criminal breach of trust and that this section had therefore no application.²⁴ The section has no application where the act charged against the accused person amounts to an offence irrespectively of whether he thereby caused, intended to cause, or knew himself to be likely to cause, harm. The accused was arrested under s. 131 of the Railways Act for being found in a state of intoxication on a railway station. The Magistrate discharged him on the ground that the harm done was so slight that “no notice would be taken of it under s. 95 of the Indian Penal Code beyond a mere warning.” It was held, on revision, that the accused should have been convicted because to be drunk upon any part of a railway was to commit an offence under s. 120A of the Railways Act, and the fact that he caused little or no annoyance to any one in particular could not exempt him from conviction under that section.²⁵

This section leaves unaffected the Madras Regulations (XII of 1816, s. 10 and IV of 1821, s. 6) as to trivial offences.

1. ‘Person of ordinary sense and temper.’—Such person must be taken from the class to which the complainant belongs.

CASES.

Acts causing slight harm.—Where a person took pods, almost valueless, from a tree standing on Government waste land;¹ where a person complained of the harm caused to his reputation by the imputation that he was travelling with a wrong ticket;² where a young woman, of questionable character, was going through a public thoroughfare to fetch water, and the accused caught hold of her hand, as a mere piece of foolish and vulgar chaff;³ where the accused was convicted of mischief for taking some earth of hardly any appreciable value from an open piece of ground;⁴ where a person removed a semi-decayed branch of a tamarind tree not belonging to him, and overhanging the roof of his house, because it inconvenienced him;⁵ where a barrister and a pleader were engaged in a case, and the latter made a remark conveying an imputation

²³ Note B, pp. 109, 110.

²⁴ *Preo Nath Chowdhry*, (1902) 29 Cal. 489, See *Wilkinson*, (1898) 2 C. W. N. 216.

²⁵ *John Scott*, (1905) 1 N. L. R. 139, 2 Cr. L. J. 751.

¹ *Kasya Bin Ranji*, (1868) 5 B. H. C. (Cr. C). 35. To the same effect is *Mahomed Khan*, (1894) 8 C. P. L. R. (Cr.) 15, where a few

branches of no appreciable value were cut off from a tree.

² *South Indian Railway Company v. Ramakrishna*, (1889) 13 Mad. 34.

³ *Bhairon Mistr*, (1887) 7 A. W. N. 73.

⁴ *Gulzari Lal*, (1882) 2 A. W. N. 220.

⁵ *Jiva Ram*, (1881) 1 A. W. N. 100; *Mahomed Khan*, (1894) 8 C. P. L. R. (Cr.) 15.

on the former upon which the former called the latter a "liar";⁶ where two parties collected outside their respective houses and apparently challenged each other, but nothing happened;⁷ where a pleader said to the pleader of the opposite party that the status of a witness who received Rs. 10 to Rs. 15 a month was higher than his;⁸ where a person killed a goat by *jhatka* process and exposed its flesh for sale in the presence of Mahomedans so as to insult them;⁹ where a pleader said *halakat bhanchod* to a person who insisted on sitting in the pleaders' room after he was pushed out of it;¹⁰ where a newspaper stated about another newspaper that it had borrowed a certain sum and the lender was 'leading the paper by the nose';¹¹ and where the words used were more akin to an abuse or an insult than to defamation of character,¹² this section was held applicable.

A Deputy Magistrate went to a place to inquire into a petition made by the residents for funds to enable them to dig a well and in the course of a discussion with the people assembled, he remarked that as some of the residents were well-to-do men, they must make the well themselves, whereupon the accused who were present there said to the Deputy Magistrate: "Then why do you make an inquiry, go away quietly." It was held that the accused were not guilty of any offence as their statement came within the purview of this section.¹³

Acts causing serious harm.—Where a blow was given across the chest with an umbrella by a dismissed policeman to a District Superintendent of Police because his application to reconsider his case had been rejected;¹⁴ where the accused tore up a paper which showed a money debt due from him to the prosecutor, though it was unstamped, and therefore not a legal security;¹⁵ where the accused was charged with the offence of theft in respect of three pice worth of dung-cakes and mangoes;¹⁶ where a respectable man was taken by the ear;¹⁷ where a man of a low caste instituted a prosecution for defamation on his being falsely charged with theft;¹⁸ where a person was dubbed *kulabhrashta*, i.e., prostitute's son, in a book published by the accused;¹⁹ where the accused at the time of a feast of his brotherhood declared that the complainant had been outcasted and was not fit to sit down at the feast with the other members of the brotherhood;²⁰ or where the accused used the words "go to hell" to a person after an altercation with him,²¹ this section was held to be not applicable.

PRACTICE.

The Central Provinces Circular.—Magistrates should also bear in mind the provisions of s. 95 of the Indian Penal Code and apply them reasonably to the complaints before them, with reference to the position in life of the parties concerned, and the habits of the class to which they belong.²²

Of the Right of Private Defence.

Things done in private defence.

96. Nothing is an offence which is done in the exercise of the right of private defence.

COMMENT.

Object.—The authors of the Code say: "We propose...to except from the

⁶ *Vansittart*, (1883) 3 A. W. N. 46; *Amir Hasan*, (1883) 3 A. W. N. 167.

⁷ *Parna Singh*, (1911) 12 Cr. L. J. 103.

⁸ *Sharif Umud v. Qabul Singh*, (1921) 43 All. 497, 502.

⁹ *Kirpa Singh*, (1912) P. W. R. (Cr.) No. 26 of 1912, 13 Cr. L. J. 601.

¹⁰ *Moro B. Marathe*, (1913) 15 Bom. L. R. 1039, 15 Cr. L. J. 11, [1914] AIR (B) 126.

¹¹ *Maung Sein*, (1926) 4 Ran. 462, 463.

¹² *Jas Raj Jagga*, (1928) 30 Cr. L. J. 379, [1929] AIR (I) 234; *Kundanmal*, (1943) 45 Cr. L. J. 105, [1943] AIR (S) 196; *Rangel*, (1931) 34 Bom. L. R. 282, 56 Bom. 196; *Bhagirath*, (1931) 8 W. N. 157, 32 Cr. L. J. 991, [1931] AIR (O) 392.

¹³ *Jaykrishna Samanta*, (1916) 21 C. W. N. 95, 24 C. L. J. 137, 18 Cr. L. J. 17, (1917) AIR (C) 570.

¹⁴ *Government of Bengal v. Sheo Gholam Lalla*, (1875) 24 W. R. (Cr.) 67.

¹⁵ *Ramasami*, (1888) 12 Mad. 148. See *Maula Bakhsh*, (1904) 27 All. 28; *Kashi Nath Naek*, (1897) 25 Cal. 207.

¹⁶ *Ranchore*, (1888) Cr. R. No. 61 of 1888, Unrep. Cr. C. 400.

¹⁷ *Shoshi Bhusan Mukerjee v. Walmsley*, (1897) 1 C. W. N. exxxiv.

¹⁸ *Nobin Dowe*, (1865) 2 W. R. (Cr.) 35.

¹⁹ *Ramanuja Chariar v. Prathivathi Bayan Karam*, [1911] 2 M. W. N. 8, 12 Cr. L. J. 497.

²⁰ *Mohan Lal v. Ram Charan*, (1928) 26 A. L. J. R. 361, 29 Cr. L. J. 451, [1928] AIR (A) 213.

²¹ *Bhimji Naranji Dalal*, (1927) Crim. Revn. No. 344 of 1927, decided by Fawcett and Mirza, JJ., on December 16, 1927 (Unrep. Bom.).

²² C. P. Cr. C. (1929) No. 7, s. 4, p. 21.

operation of the penal clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. In this part of the chapter we have attempted to define, with as much exactness as the subject appears to us to admit, the limits of the right of private defence. It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang-robbers, and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation in resisting a body of dacoits.²³

This right of defence is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men so effectually as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men.²⁴ The law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. The right of self-defence, as defined by law, must be fostered in the citizens of every free country. If a man is attacked he need not run away, and he would be perfectly justified in the eye of law if he holds his ground and delivers a counter-attack to his assailants provided always, that the injury which he inflicts in self-defence is not out of proportion to the injury with which he was threatened.²⁵

Scope.—There is no right of private defence under the Code against any act which is not in itself an offence under it.¹ An act done in exercise of the right of private defence is not an offence and does not, therefore, give rise to any right of private defence in return.²

The defence of possession either of goods or lands against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace.

Limitations.—The right is subject in all cases to the restriction contained in cls. 3 and 4 of s. 99.³

Aggression.—This right cannot be pleaded by persons who, believing they will be attacked, court the attack.⁴

PRACTICE.

Whether right of defence should be pleaded.—The accused must plead the right of defence. It is for those who raise this plea to prove it. If raised, a full account of the occurrence must be given in evidence.⁵ Because it is necessary that all the circumstances should be pleaded before a Court and the plea ought to be proved by satisfactory evidence.⁶ In a case the Allahabad High Court held that a Court ought not to set up such a plea when the accused himself has not done so.⁷ Subsequently it has held that even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of the fact.⁸ The Madras High Court has ruled that even if the accused does not specifically plead private defence, he may be

²³ Note B, p. 110.

²⁴ Bentham.

²⁵ *Mahandi*, (1929) 31 P. L. R. 621, 31 Cr. L. J. 654, [1930] AIR (L) 93.

¹ *Ganouri Lal Das*, (1889) 16 Cal. 206, 218.

² *Gouri Sanker v. Sheikh Sullan*, (1917) 18 Cr. L. J. 864, [1917] AIR (LB) 12.

³ *Josef Casorati*, (1879) P. R. No. 36 of 1879.

⁴ *Nowabdee*, (1864) W. R. (Gap No.) (Cr.) 11.

⁵ *Jamsheer Sirdar*, (1877) 1 C. L. R. 62; *Kali Churn Mookerjee*, (1882) 11 C. L. R. 232.

⁶ *Fateali*, (1909) Crim. Revn. Application No. 222 of 1909 (Unrep. Bom.).

⁷ *Gullu*, (1904) 24 A. W. N. 113, 1 Cr. L. J. 427.

⁸ *Kishen Lal*, (1924) 22 A. L. J. R. 501, 26 Cr. L. J. 501, [1924] AIR (A) 645; *Bahadur Khan*, (1932) 34 Cr. L. J. 373, 9 O. W. N. 1019, [1933] AIR (O) 63.

acquitted if the evidence showed that he was acting in self-defence.⁹ In a Full Bench decision the Calcutta High Court has observed that it cannot be laid down as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised. If such a case arises on the prosecution evidence, it should be put to the jury for their consideration whatever line might have been taken by the accused or his counsel.¹⁰ Similarly, the Lahore High Court has held that when there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence, the Court ought not to ignore that evidence and convict the accused merely because the latter set up a different defence and denied having committed the assault.¹¹

Where the right of private defence, or any other general exception, is pleaded by the accused and evidence is adduced to support such plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused person is entitled to be acquitted if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general exception) a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception. The presumption laid down in s. 105 of the Evidence act might come into play, but it does not follow therefrom that the accused must be convicted even when the reasonable doubt under the plea of right of private defence or any other general or special exception pervades the whole case. The Court, at the end of the trial, has still to see whether having regard to the entire evidence and the circumstances of the case the charge is proved beyond reasonable doubt.¹²

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law. An accused person can set up an alternative inconsistent defence.¹³

An accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on his behalf.¹⁴

The mere failure of the prosecution to account for the injuries sustained by the accused's party does not raise a presumption that the accused acted in the right of private defence.¹⁵

A plea of self-defence can be raised for the first time in appeal if facts on the record justify such a plea.¹⁶

Right of private
defence of the body
and of property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body, and the body of any other person¹, against any offence affecting the human body;

Secondly.—The property, whether movable or immovable, of himself or of any other person², against any act which is an offence falling under the definition of theft³, robbery⁴, mischief⁵ or criminal trespass⁶, or which is an attempt⁷ to commit theft, robbery, mischief or criminal trespass.

⁹ *Veerana Nadan*, [1912] M. W. N. 404, 13 Cr. L. J. 470; *Pachai Gounden*, (1914) 15 Cr. L. J. 710, [1915] AIR (M) 532; *Jogali Bhaigo Naiks*, (1926) 27 Cr. L. J. 1198, [1927] AIR (M) 97.

¹⁰ *Uppendra Nath Das*, (1914) 19 C. W. N. 653, 668, 21 C. L. J. 377, 16 Cr. L. J. 561, [1915] AIR (C) 773, F.B.; *Afiruddi*, (1919) 29 C. L. J. 571, 23 C. W. N. 833, 20 Cr. L. J. 661, [1919] AIR (C) 430.

¹¹ *Ghulam Rasul*, (1921) 23 P. L. R. 7, 22 Cr. L. J. 507, [1922] AIR (L) 314; *Ghulam Rasul*, (1937) 40 P. L. R. 17, 39 Cr. L. J. 7.

¹² *Parbhoo*, [1941] All. 843.

¹³ *Yusuf Hussain*, (1918) 40 All. 284; *Faudi, Koet*, (1919) 1 P. L. T. 79, 21 Cr. L. J. 799, [1920] AIR (P) 843; *Janki Mahto*, (1933) 35 Cr. L. J. 92, [1933] AIR (P) 568.

¹⁴ *Timmal*, (1898) 21 All. 122.

¹⁵ *Khuda Dad*, (1931) 34 P. L. R. 699, 34 Cr. L. J. 724, [1933] AIR (L) 313; *Ganpala Subbigadu*, [1940] 2 M. L. J. 1018, (1940) 52 L. W. 884, [1940] M. W. N. 1236, (1940) 42 Cr. L. J. 305, [1941] AIR (M) 286.

¹⁶ *Nur Dad*, (1932) 38 P. L. R. 718, 34 Cr. L. J. 462, [1932] AIR (L) 606.

COMMENT.

This section says what the extent of the right of defence is. Section 99 speaks of the limitations on the exercise of this right.

Scope.—This section is much wider than the English law. Under it even a stranger may defend the person or property of another person; whereas under the English law there must be some kind of relationship existing, such as that of master and servant or husband and wife or guardian and ward, before this right could be exercised on behalf of another. Under the English law a person has no right to commit an assault merely in defence of other persons.

As to the defence of property the section speaks of “theft and robbery” but not offences like “house-breaking” and “dacoity”. It, therefore, seems that the mention of “theft” must be taken to include all offences *ejusdem generis*. The same consideration applies to the mention of “mischief” and “criminal trespass.”

Where both sides take up arms and go into the open to indulge in a fight no question of the exercise of the right of self-defence arises and it is immaterial whether the fight is begun by one side or the other.¹⁷

1. ‘Any other person.’—“It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is a noble movement which makes us forget our own danger at the first cry of distress. It concerns the public safety that every honest man should consider himself as the natural protector of every other.”¹⁸ The section embodies this principle and it provides that every person has a right to defend his body or the body of any other person.

A Full Bench of the Madras High Court has ruled that the right of private defence as laid down in ss. 96 to 105 enables the arrest of any person when he has not been guilty of an offence for which arrest without warrant is permitted (e.g., drunkenness), when the person arresting or confining has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. Where, therefore, a village Magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, it was held that he was not guilty of any offence.¹⁹

Cases.—Defence of person.—Where a person assisted by a friend retaliated severely on another, who trespassed into his house with the object of having intercourse with his wife, both were held to have committed no offence.²⁰ Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle; and a fight between the parties took place, in which several men on each side were killed and injured, it was held that the person who had seized the cattle and his party were protected by this section.²¹ On being falsely informed that certain stolen property was in the possession of one P, a Sub-Inspector proceeded with a constable to P’s house with the object of making a search. On his arrival, he demanded the said property from P’s wife. She repudiated all knowledge of it and told him that her husband would be back shortly. He, however, declined to wait for P’s return, but began to threaten the woman with a cane and laid hands on her. On her cries, accused (P’s cousin) ran to her help. An altercation ensued and, ultimately, the accused, on being assaulted by the Sub-Inspector and the constable, snatched a heavy stick from the latter and struck two blows on the forehead of the Sub-Inspector which proved fatal. It was held that the accused had a right of self-defence against the dual assault on his person.²² Where the accused was attacked by a number of men armed with various weapons, snatched away a weapon from one of them and struck him with the weapon causing his death, it was held that the accused had a right of private defence of body although at the time the deceased man was unarmed.²³ Where *lathi* (club) blows were showered upon a person, it was held that he was justified in striking

¹⁷ *Abdul Latif*, (1946) 48 Cr. L. J. 367.

¹⁸ Bentham.

¹⁹ *Gopal Naidu*, (1922) 46 Mad. 605, F.B.;
Mani Karkii, (1926) 5 B. L. J. 223, 28 Cr. L.
J. 445, [1927] AIR (R) 121.

²⁰ *Dharmun Teli*, (1873) 20 W. R. (Cr.) 36.

²¹ *Nareshi Singh*, (1923) 2 Pat. 595.

²² *Param Singh*, (1925) 23 A. L. J. R. 1037,
27 Cr. L. J. 11, [1926] AIR (A) 147.

²³ *Nur Mia*, (1945) 50 C. W. N. 169.

his adversaries with a spear.²⁴ Where a boy raised a cloud of dust causing injury to passers-by and the accused who was one of them chastised the boy, it was held that the accused had acted in the exercise of the right of private defence.²⁵

English case.—Under circumstances which might have induced the belief that a man was cutting the throat of his wife, their son shot and killed his father. It was held that if the son had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable.¹

2. 'Movable or immovable property, of himself or of any other person.'—

The right of private defence of property only comes into operation when certain specified offences against property are committed or attempted to be committed. It extends not only to one's own property but also to the property of any other person. It is not necessary that one of the offences enumerated in the section should have been actually committed, it is enough if there is an attempt to commit any of those offences.² A party in possession of land is legally entitled to defend his possession against another party seeking to eject him by force;³ or to steal from it,⁴ or to do an act which will have the effect of causing injury to it, e.g., by cutting a bund.⁵ It is immaterial whether the person in possession of the property had or had not the right of possession. If a zamindar's people enter upon crops with the intention of distraining without notice, the ryot-owners are justified in considering such action as trespass.⁶ But mere persistence in demanding rent will not amount to trespass so as to justify an assault on the person making the demand.⁷ A landlord who had not tendered to his tenant such a lease as the latter was bound to accept under the Madras Rent Recovery Act (Mad. Act VIII of 1865), distrained his cattle for arrears of rent, the assistance of the police having been procured for the purpose. The tenant, with the assistance of eleven other persons, forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards. It was held that the tenants were not entitled to the right of defence and were guilty of rioting.⁸ Although an attachment of property made by an amin and his party under a time-expired warrant of attachment is illegal, such attachment does not amount to an offence of theft or robbery, there being no dishonest intention of causing wrongful gain or wrongful loss to any person; and no question of mischief or criminal trespass arises in such a case. Therefore, upon such attachment there is no right of private defence of property.⁹

In order to establish the right of private defence of property, it is not necessary for the accused to prove his possession affirmatively; he can rely on the presumption of continuance of possession arising in his favour from the circumstances of the case.¹⁰ When a person takes or attempts to take any property belonging to him out of the possession of another who has no right to it, he has no dishonest intention and neither commits nor attempts to commit an offence, and persons assaulting him are not entitled to plead that they acted in the exercise of the right of private defence of property.¹¹

When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right. Persons exercising their lawful rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence. In such a case each is liable only for his individual acts

²⁴ *Surain Singh*, (1928) 29 Cr. L. J. 755, [1928] AIR (L) 900.

²⁵ *Kamposare v. Pullappa*, [1943] 2 M. L. J. 644, [1943] M. W. N. 801, [1943] 45 Cr. L. J. 524, [1941] AIR (M) 168.

¹ *Rose*, (1884) 15 Cox 540.

² *Dalgunjan*, (1923) 25 Cr. L. J. 481, 22 A. L. J. R. 81, [1924] AIR (A) 696.

³ *Sachee alias Sachee Boler*, (1867) 7 W. R. (Cr.) 76 [112]; *Toolsee Singh*, (1868) 10 W. R. (Cr.) 64, 2 Beng. L. R. 16; *Gooroo Churn Chung*, (1870) 14 W. R. (Cr.) 69, 6 Beng. L. R. (Appx.) 9; *Tulsie*, (1925) 26 P. L. R. 487, 27 Cr. L. J. 231, [1925] AIR (L) 599.

⁴ *Mokee*, (1869) 12 W. R. (Cr.) 15.

⁵ *Birjoo Singh v. Khub Lall*, (1873) 19 W.

R. (Cr.) 66; *Shunker Singh v. Burnah Mahto*, (1875) 23 W. R. (Cr.) 25; *Ganouri Lal Das*, (1889) 16 Cal. 206.

⁶ *Kandhai Shahu*, (1875) 23 W. R. (Cr.) 40.

⁷ *Mahomed Jan v. Khadi Sheikh*, (1871) 16 W. R. (Cr.) 65 [75].

⁸ *Ramayya*, (1889) 13 Mad. 148.

⁹ *Shib Lal*, (1933) 55 All. 617.

¹⁰ *Jainath*, (1926) 28 Cr. L. J. 303, [1927] AIR (P) 181; *Qamrul Hasan*, [1941] O. W. N. 1166, (1941) 43 Cr. L. J. 115, [1942] AIR (O) 60.

¹¹ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhagirath Mahato*, (1934) 61 Cal. 991.

done in excess of such right.¹² The right of private defence is not limited to persons who are entitled to possession, but extends to such other persons as they may have gathered there to help them to protect their rights.¹³

3. 'Theft'.—See s. 378, *infra*. An illegal seizure of cattle with a view to impound them is theft and persons attempting to resist the seizure by force act in the exercise of the right of private defence of property and are as such entitled to the protection afforded by this section.¹⁴ Where a number of persons were justified in resisting the theft of their crops they could not all be considered as members of an unlawful assembly with the common object of asserting a right to the land on which the crops stood, because some of their number exceeded the right of private defence. But, if after some of them had exceeded the right of private defence, others continued in the assembly aiding and abetting them, they could all be considered members of an unlawful assembly.¹⁵ An illegal seizure of cattle with a view to impound them is theft and persons attempting to resist the seizure by force act in the exercise of the right of private defence of property and are as such entitled to the protection afforded by this section.¹⁶

4. 'Robbery'.—See s. 390, *infra*.

5. 'Mischief'.—See s. 425, *infra*.

6. 'Criminal trespass'.—See s. 441, *infra*. A rightful owner is entitled to physically turn out a trespasser or one trying to infringe upon his rights. A person exercising this right should, however, not use more force than is reasonable to defend his possession from a trespasser.¹⁷ A person in possession of lands is, however, not justified in confining persons who commit trespass.¹⁸

"A *civil trespass* will not excuse the firing a pistol at a trespasser in sudden resentment or anger. If a person takes *forcible possession* of another man's close, so as to be guilty of a *breach of the peace*, it is more than a trespass. So, if a man with force invades and enters into the *dwelling* of another. But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity. But, the making an attack upon a dwelling, and especially *at night*, the law regards as equivalent to an *assault* on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault; but no *words or singing* are equivalent to an assault, nor will they authorize an assault in return."¹⁹

The auction purchaser does not commit any criminal act in going to assert his title and to take possession of the property purchased by him by ousting the judgment debtor, who became a trespasser after the date of delivery of possession.²⁰

Where the common intention of an assembly of more than five persons was to resist by force an unlawful trespass on land it was held that they were not guilty of rioting.²¹

7. 'Attempt'.—See s. 511, *infra*.

Cases.—Defence of property.—Plea allowed.—The villagers belonging to C walked in a religious procession, through a part of the village of K, carrying with them a vessel containing water which purported to be consecrated. The villagers of K, objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructers and hurt to two others of them. It was held that they were justified in exercising their right of private defence of body and property and the harm inflicted was not more than necessary for the purpose of self defence.²² Where persons, who actually grew the disputed crop and who were no parties either to the civil suit for possession which was decreed against

¹² *Kunja Bhuiya*, (1912) 39 Cal. 896; *Am-bika Singh*, (1921) Pat. 212.

¹³ *Bangarurajee*, [1942] M. W. N. 42.

¹⁴ *Madra*, [1946] Nag. 326.

¹⁵ *Bajinath Dhanuk*, (1908) 36 Cal. 296.

¹⁶ *Madra*, [1946] Nag. 326.

¹⁷ *Ram Krishna Singh*, (1922) 3 P. L. T. 335, 23 Cr. L. J. 321; *Janki Pasban*, (1942) 23 P. L. T. 577, 44 Cr. L. J. 172, [1943] AIR (P) 6.

¹⁸ *Shurufoddin v. Kasinath*, (1870) 13 W. R. (Cr.) 64.

¹⁹ *Meade's Case*, (1823) 1 Lewin 184, 185.

²⁰ *Ram Krishna Singh*, (1922) 3 P. L. T. 335, 23 Cr. L. J. 321, [1922] AIR (P) 197.

²¹ *Kalee Mundle*, (1882) 10 C. L. R. 278; *Gooroo Churn Chung*, (1870) 14 W. R. (Cr.) 69, 6 Ben. L. R. Appx. 9; *Tootsee Singh*, (1868) 10 W. R. (Cr.) 64, 2 Beng. L. R. 16.

²² *Regula Bhemappa*, (1902) 26 Mad. 240.

their landlord, or to the delivery of possession of the land, resisted the action of the complainant who went to take possession under the decree of the civil Court, it was held that they were justified in claiming what they had grown and in resisting the complainant.²³ Where cattle belonging to the complainant trespassed on to the land of the accused, who seized the cattle and were driving them to the pound when the complainant's party arrived and attempted to rescue the cattle from the accused and in doing so the complainant's party used violence and succeeded in rescuing some of the cattle, and thereupon the accused resisted the action of the complainant's party and in attempting to defend themselves against the violence used by the complainant's party, caused injuries to several members of that party, some of which amounted to grievous hurt, it was held that the accused were legally entitled to take the cattle to the pound and that the action of the complainant's party in attempting to rescue cattle was unlawful and that the accused had, therefore, the right of private defence against the acts of the complainant's party and where it could not be said under the circumstances that the accused had exceeded that right they were not guilty of any offence.²⁴ The owner of cattle was held to have a right to protect his cattle which were being wrongfully taken away, and is not guilty of any offence, if he uses force in the exercise of the right of private defence in getting the cattle released.²⁵ Where a tree was blown down by wind and the owner of it entered into his tenant's land to remove it, it was held that he had a right of private defence of property in the fallen tree and had therefore a right of ingress over the tenant's land.¹

Criminal trespass.—A police-officer attempted to carry on a general search for stolen property (not authorized by law). One of the accused in resisting such a search pushed the Sub-Inspector and the latter ordered two constables to climb on his roof and break into the house, whereupon the villagers assumed a threatening attitude and threatened to cut them to pieces if they entered the house and this empty threat was sufficient to prevent the police from committing the trespass. It was held that the accused were justified in resisting the search, and they had not exceeded the right of private defence.²

Plea disallowed.—The accused was out in the jungle with his gun; an altercation took place between him and the deceased, the former interfering to prevent the latter from committing real or supposed cattle trespass; the deceased thereupon with a large club attacked the accused, who fired without any particular aim, but lowering the muzzle of the gun so as not to hit a vital part, and death ultimately resulted from the wound thus inflicted. It was held that the accused's act was not a legal exercise of the right of private defence, as he had only to stand back and he was safe.³ Where an amin with a party of constables, mukhia and patwari went to a village to make an attachment, but the warrant had become invalid by lapse of the time limited thereby, and the owner of the property resisted and caused grievous hurt to one of the party, it was held that he could not plead any right of private defence of property and was rightly convicted under s. 326.⁴ Where there is a spontaneous fight between two parties each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party, his own blows were given in self-defence.⁵ The complainant, having purchased land from a vendor, went to plough the field, which was unoccupied. The accused opposed the complainant's party, one of the accused claiming the land. On objection by the complainant the accused's party made a violent attack with deadly weapons resulting in the death of three persons of the complainant's party. It was held that the accused had no right of private defence as the object with which the accused persons took the law into their own hands was not to prevent either theft or mischief but to enforce their own right or supposed right to the land.⁶

²³ *Gajendra Ghorai*, (1911) 15 C. L. J. 80, 18 Cr. L. J. 188.

²⁴ *Udit Singh*, (1925) 6 P. L. T. 838, 26 Cr. L. J. 924, [1925] AIR (P) 762.

²⁵ *Dayal*, [1943] O. W. N. 20, (1943) 44 Cr. L. J. 640, [1943] AIR (O) 280.

¹ *Pusu*, (1913) 10 N. L. R. 38, 15 Cr. L. J. 352.

² *Prankhang*, (1912) 16 C. W. N. 1078, 13 Cr. L. J. 764.

³ *Kureem Bukhsh*, (1867) P. R. No. 13 of 1868, See, to the same effect, *Grudat Singh*, (1872) P. R. No. 12 of 1872.

⁴ *Shib Lal*, (1933) 55 All. 617.

⁵ *Subba Reddi*, [1943] 1 M. L. J. 388, [1943] M. W. N. 273, (1942) 56 L. W. 351, 44 Cr. L. J. 665, [1943] AIR (M) 492.

⁶ *Hariram Mahata*, (1941) 23 P. L. T. 488, 43 Cr. L. J. 41, [1942] AIR (P) 96.

Altercation between two parties.—Where the primary object of both parties is to fight and the vindication of their right to property is merely a pretext, no question of self-defence can arise.⁷ Party A sowed a crop in a field to which apparently they were entitled. Party B, claiming the field and the crop as theirs, entered upon the land and began to cut the crop. Party A, having watched party B enter upon the land, took counsel together and then proceeded to attack party B, and a fight ensued, in which grievous hurt was caused. It was held that it was not open to party A to plead that they were acting in the exercise of their right of private defence of property.⁸ This case does not lay down sound law. The finding of possession and sowing of the crops on the part of A brings the case under this section subject to s. 99. The taking of counsel before action will not by itself deprive the accused of his right of private defence. It is not found that there was time to have recourse to the authorities. This case is not supported by *Q. E. v. Prag Dat*⁹ though it professes to follow that case; and is directly in conflict with *Q. E. v. Narsang Pathabhai*,¹⁰ *Pachkauri v. Q. E.*¹¹ and *K. E. v. Ayya Annasamy Aiyar*¹² and has not been referred to in *Emp. v. Hira*.¹³ In the last case certain persons who were lawfully in possession, as tenants of agricultural land, having reason to suppose that it was possible that they might be attacked and ejected from the land by force, made a practice of keeping their clubs in readiness, and also persuaded the tenants of some adjacent fields to do likewise. The expected attack came, and there was a somewhat severe fight, in the course of which both parties were injured. It was held that the defenders were within their rights in holding themselves in readiness to repel an attack if and when it should come.

The accused went with three ploughs on the land to which the complainant had the right of possession, and of which he was in possession till such entry, and began to plough up the land, to uproot some castor plants and throw them away. While they were thus in actual but temporary occupation, the complainant and his party went on the land and tried to yoke the cattle, whereupon a riot took place. It was held that the accused were not justified in entering on the land, in ploughing it, uprooting the plants and throwing them away, that they were members of an unlawful assembly, the common object of which was to enforce a right or supposed right for the exercise of which they were prepared to use force, and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation.¹⁴

PRACTICE.

Evidence.—Burden of proof.—The burden of proof is upon the accused to justify his plea of right of private defence, and in the case of right of private defence of property, he must prove that it was his property.¹⁵

A mere statement by the accused that the other party wounded them is not the same as to say that they struck the opposite party in the exercise of the right of private defence. In order to establish the exercise of the right of private defence it is absolutely necessary to detail the exact circumstances which led them to strike the blow in question.¹⁶

When an accused person commits an act of violence upon another person in circumstances which prove that he is apprehending further violence from that person, nothing further need be proved to establish that the accused is acting in the exercise of his right of private defence. Accordingly where the deceased struck the accused with a stick and was prepared to strike him a second time and the accused took out his knife and stabbed the deceased, it is wrong to throw upon the accused the burden of proving that he had in fact consciously exercised his right of self-defence when he used his knife.¹⁷

⁷ *Bhairo Singh*, (1935) 31 N. L. R. 380, 36 Cr. L. J. 861, [1935] AIR (N) 141; *Muhammad Ibrahim*, [1929] AIR (N) 43.

⁸ *Kaliji*, (1901) 24 All. 143. *Kadhu Singh*, (1902) 24 All. 298, lays down the same principle on similar facts, followed in *Jaipal*, (1915) 17 Cr. L. J. 180, 19 O. C. 18, [1916] AIR (O) 345.

⁹ (1898) 20 All. 459.

¹⁰ (1890) 14 Bom. 441.

¹¹ (1897) 24 Cal. 686.

¹² (1901) 25 Mad. 624.

¹³ (1922) 45 All. 250.

¹⁴ *Jairam Mahton*, (1907) 35 Cal. 103.

¹⁵ *Farman Khan*, (1926) 5 Pat. 520; *Gayan Singh*, (1922) 26 Cr. L. J. 29, [1923] AIR (A) 277.

¹⁶ *Ajgar Shaikh*, (1928) 32 C. W. N. 839, 48 C. L. J. 138, 30 Cr. L. J. 799, [1928] AIR (C) 700; *Hazura Singh*, (1927) 28 Cr. L. J. 838, [1927] AIR (L) 786.

¹⁷ *Ammu Pujary*, [1942] 1 M. L. J. 200, (1941) 55 L. W. 125, [1942] M. W. N. 172, (1941) 43 Cr. L. J. 753, [1942] AIR (M) 295.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth,¹ the want of maturity of understanding,² the unsoundness of mind,³ or the intoxication⁴ of the person doing that act, or by reason of any misconception⁵ on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Right of private defence against the act of a person of unsound mind, etc.

ILLUSTRATIONS.

(a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

COMMENT.

This section lays down that for the purpose of exercising the right of private defence physical or mental incapacity of the person against whom the right is exercised is no bar.

1. 'Youth'.—See ss. 82-83, *supra*.
2. 'Want of maturity of understanding.'—See s. 83, *supra*.
3. 'Unsoundness of mind.'—See s. 84, *supra*.
4. 'Intoxication.'—See s. 85, *supra*.
5. 'Misconception.'—See ss. 76-79, *supra*.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.¹

Acts against which there is no right of private defence.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law.²

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.³

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.⁴

Extent to which the right may be exercised.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction

of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

COMMENT.

This section enumerates the limitations put on the exercise of the right of defence.

1. First clause.—This clause applies to those cases in which the public servant is acting (1) in good faith, and (2) under colour of his office, though the particular act being done by him may not be strictly justifiable by law.

This clause protects a public servant against the right of private defence even if the authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular, and it merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him. Even in such cases, where the right of private defence is open, it is not lawful for any person to offer to the public servant more violence than is strictly necessary to resist the unlawful act and that if the authority has no defect, the section has no operation.¹⁸

This clause was enacted to meet cases which would not fall within s. 332 by reason of the public servant not being at the time when the assault was committed on him in discharge of a duty imposed on him by law. It applies to those cases in which the public servant is acting in good faith under colour of his office, though the particular act being done by him may not be justifiable by law.¹⁹ Where a police-officer acting bona fide under colour of his office arrests a person but without authority, the person so arrested has no right of self-defence against the officer.²⁰

'An act which does not reasonably cause the apprehension of death or of grievous hurt.'—The right of private defence against an injury apprehended to be done by public servant extends only to those cases in which there is a reasonable cause of apprehension of death or of grievous hurt being caused by the act of such public servant.²¹ An Excise Inspector pursued an armed smuggler, and on coming up with him ordered him to stop and fired his revolver twice to frighten him, whereupon the smuggler drew a sword and cut the Inspector on the thigh. It was held that the smuggler had reasonable ground for believing that the Inspector intended to cause death or grievous hurt and did not exceed the right of private defence.²²

'Grievous hurt.'—See s. 320, *infra*. **'Public servant.'**—See s. 21, *supra*.

'Good faith.'—See s. 52, *supra*.²³ An officer of the Court who acts under a time-expired warrant and attaches property cannot be deemed to have acted in good faith;²⁴ nor can he be deemed to have so acted, where he arrests a woman without informing her that the warrant was a bailable one and deliberately refuses to give her an opportunity of giving bail;²⁵ or where he orders a person other than the one named in the warrant to execute it.¹ Where a senior police-officer effects a search without compliance with the safe-guards incorporated in s. 165, Criminal Procedure Code, he cannot be said to be acting in good faith within the meaning of this section.²

'Under colour of his office.'—The protection is intended to be given only to a public servant acting honestly in the legitimate discharge of powers conferred or of duties imposed upon him. Certain customs officials on search found that goods

¹⁸ *Puna Mahton*, (1932) 11 Pat. 743.

¹⁹ *Dalip*, (1896) 18 All. 246, 252. See *Ramji Ahir*, (1930) 11 P. L. T. 878, 31 Cr. L. J. 937, [1930] AIR (P) 387.

²⁰ *Mohamed Ismail*, (1935) 13 Ran. 754; *Public Prosecutor v. Amirtham Servai*, (1938) 50 L. W. 763, [1939] 2 M. L. J. 776, [1939] M. W. N. 1004.

²¹ *Ranjha Mal*, (1927) 28 Cr. L. J. 993, 29 P. L. R. 284, [1927] AIR (L) 706.

²² *Nga Nan Da*, (1919) 3 U. B. R. 176, 21

Cr. L. J. 97, [1920] AIR (UB) 35; *Pachai Gounden*, (1914) 15 Cr. L. J. 710, [1915] AIR (M) 532.

²³ *Bhawoo Jivaji v. Mulji Dayal*, (1888) 12 Bom. 377; *Pulkit Kotu*, (1896) 19 Mad. 349.

²⁴ *Shib Lal*, (1933) 55 All. 617; *Raghubir*, (1941) 17 Luck. 311.

²⁵ *Ramji Lal*, [1935] A. L. J. 950, 36 Cr. L. J. 1501, [1935] AIR (A) 913.

¹ *Prag*, (1942) 17 Luck. 591.

² *Mohammad Shah*, (1945) 48 P. L. R. 53,

were smuggled from Yanam into British territory. The smugglers in the course of the search attacked the officials and caused injuries. They contended that the customs officials had not the power to stop or search because there was no notification declaring Yanam to be foreign territory under s. 5 of the Indian Tariff Act. It was held that the customs officers were entitled to stop, search and seize goods which were brought in British India without payment of duty, and that, even if there was no notification, the customs officers must be deemed to have acted in good faith under colour of their office and that no right of private defence arose.³

'Not strictly justifiable by law.'—This section has no application to a case where the initial proceeding, and the power under which any public servant purports to act are altogether without jurisdiction,⁴ and entirely *ultra vires*.⁵ The word 'strictly' has been deliberately inserted by the Legislature to show that the section was not intended to apply to cases where the act was wholly unjustified. It does not extend to cases where there is a complete want of jurisdiction.⁶ The protection afforded under it to public servants is not lost to them by reason of any mistake on their part in the exercise of their proper functions.⁷ The section thus applies to cases where there is an excess of jurisdiction as distinct from a complete absence of jurisdiction, to cases where the official has done wrongly what he might have done rightly, but not to cases where the act would not possibly have been done rightly.⁸ An act which is the very contrary of the duties of a public servant cannot be said to be done by a public servant while acting or purporting to act in the discharge of his official duties.⁹ Thus resistance to the execution of an illegal warrant is justifiable in exercise of the right of private defence.¹⁰ Resistance to a general search for stolen property is justifiable as the law requires the mention of specific things.¹¹

Cases.—Resistance to officer acting without warrant.—A police-officer attempted without a search-warrant to enter into a house in search of property alleged to have been stolen, and was obstructed and resisted. It was held that, even though the officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that the officer was acting otherwise than in good faith and without malice.¹² The Patna High Court has held that a police-officer holding search without written authority is not acting either in good faith or under colour of his office. Resistance to such officer is not illegal as such a search is without jurisdiction.¹³

Resistance to illegal search.—A riot took place while a police-officer was searching the house of one of the accused outside the police-officer's limits. In the course of the riot the police-officer and his party were beaten, the property already attached by him was lost, and a person arrested by him disappeared. The object of the riot was to prevent the search, and not the taking of the property or the release of the prisoner. It was held that the police-officer having made the search in good faith and under colour of his office, the accused could not plead a right of private defence and that, if they had any such right, they had exceeded it and were guilty of offences

³ *Public Prosecutor v. Suryanarayana Reddi*, [1937] M. W. N. 741.

⁴ *Jogendra Nath Mukerjee*, (1897) 24 Cal. 320; *Haq Dad*, (1925) 6 Lah. 302.

⁵ *Tulsiram*, (1888) 13 Bom. 168; *Lekhraj*, (1891) 11 A. W. N. 195; *Asa*, (1913) 14 P. L. R. 1088, 14 Cr. L. J. 512; *Gopi Mahto*, (1931) 10 Pat. 821.

⁶ *Jograj Mahto*, (1940) 22 P. L. T. 80, 42 Cr. L. J. 199, [1940] AIR (P) 696.

⁷ *Tiruchittambala Pathan*, (1896) 21 Mad. 78, See *Bhola Mahto*, (1904) 9 C. W. N. 125, 2 Cr. L. J. 13; *Kishen Lal*, (1924) 22 A. L. J. R. 501, 26 Cr. L. J. 501, [1924] AIR (A) 645.

⁸ *Bisu Haldar*, (1907) 11 C. W. N. 836, 6 C. L. J. 127, 6 Cr. L. J. 38; *Shaikh Moinuddin*, (1921) 2 P. L. T. 455, 22 Cr. L. J. 442, [1921] AIR (P) 415; *Ghulam*, (1936) 38 P. L. R. 298, 38 Cr. L. J. 186, [1936] AIR (L) 851; *Sukar Sao*, (1941) 23 P. L. T. 232, [1941] P. W. N.

620, (1941) 42 Cr. L. J. 753, [1941] AIR (P) 560; *Bhairo*, [1941] Kar. 324.

⁹ *Afzalur Rahman*, (1942) 22 Pat. 76, 90.

¹⁰ *Musammnat Hafizan Bibi v. Musammnat Suba Bibi*, (1922) 27 C. W. N. 854, 37 C. L. J. 461, 18 L. W. 670, 44 M. L. J. 714, P.C.; *Allah Dad*, (1923) 25 Cr. L. J. 43, [1924] AIR (L) 687; *Suryanarayana v. Simhadri*, (1934) 40 L. W. 594, 67 M. L. J. 510, [1934] M. W. N. 1230, 36 Cr. L. J. 111, [1934] AIR (M) 664. But see, *Thaba Singh*, (1925) 26 P. L. R. 290, 28 Cr. L. J. 972, [1927] AIR (L) 851.

¹¹ *Prankhang*, (1912) 16 C. W. N. 1078, 13 Cr. L. J. 764; *Government of Assam v. Sahebulla*, (1928) 51 Cal. 1, F.B.

¹² *Vyankatrav Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Pukot Kotu*, (1896) 19 Mad. 349; *Attar Singh*, (1917) P. R. No. 9 of 1918, 19 Cr. L. J. 390, [1918] AIR (L) 332.

¹³ *Ram Parves*, [1944] P. W. N. 292;

of riot and hurt.¹⁴ Where the search proposed to be made by a Sub-Inspector of Police was not strictly in accordance with s. 165 of the Criminal Procedure Code, he could not be said to have acted in good faith and the accused who pushed him in order to prevent the search was held to have committed no offence.¹⁵

Resistance to acting on illegal warrant or order or acting illegally.—A warrant was issued by a Magistrate for the arrest of one D under s. 114 of the Code of Criminal Procedure. The warrant was sent to a certain *thana* to be executed. It was there, after being copied into a book kept for that purpose at the *thana*, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the *thana*, it was discovered that D was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the *thana* made a copy from the book at the *thana*, endorsed on the back the names of one N and some other constables, and, having signed the endorsement, sent N and the others out with this paper to arrest D. N and his companions arrested D; but, as they were returning with him in custody, some of D's friends, aided by D himself, attacked them, rescued D and caused hurt to the police. It was held that the police-officer concerned in arresting D under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of s. 332 of the Penal Code, so as to render the accused liable to conviction under that section; but, inasmuch as they were acting in good faith under colour of their office, this section applied, and D and his associates might be properly convicted under ss. 147 and 323 of the Code.¹⁶ Where, on the complaint of one G that his wife was wrongfully confined by his father-in-law, a warrant was issued under s. 96, Criminal Procedure Code, and the police, attempting to execute this warrant at the house of the father-in-law, was obstructed by him and seven others who used also criminal force, it was held that as the warrant issued was wholly illegal, the accused were not deprived of the right of private defence.¹⁷ Where the accused was convicted of having assaulted a peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in the tank and catch fish for the decree-holder as provided in the writ, it was held that whatever mistake there might be in the procedure of the Munsif in giving the direction in the writ, the accused had no right of private defence against the peon who was a public servant acting under colour of his office in good faith.¹⁸ Where an income-tax officer having entered the accused's factory for examination of their accounts refused to leave it and sent for a police-officer on their refusal to show him their accounts and was therefore forcibly ejected by them, it was held that this section did not deprive the accused of their right of private defence as the proceedings of the officer were wholly illegal and he was not acting in good faith under colour of his office.¹⁹ A police-officer, finding one of the accused at night time carrying a long-handled hatchet, and suspecting him to be on his way to kill a certain person with whom he had enmity, demanded the hatchet and on refusal attempted to snatch it from the accused. The latter called two others and the police-officer was assaulted by three men, grievous hurt being inflicted upon him. It was held that a hatchet, not being a weapon the possession of which without a license is forbidden by law, the action of the police-officer was wholly without jurisdiction and therefore this section was not applicable.²⁰ Where certain peons forcibly seized for military purposes a bullock cart not let on hire, and a scuffle ensued and one of the peons was hurt by the cartman, it was held that the latter acted in the exercise of his right of private defence, because the peons had no legal authority to take the cart in their charge by criminal force and without his consent, and thus their act being one not done under colour of their office, this section did not apply.²¹ Where an order of the Superintendent of Police for the arrest of the accused was illegal and the constables who sought to arrest them were armed with *lathis*, it was held that the accused were justified in resisting their arrest

¹⁴ *Mir Shah Nawaz Khan*, (1913) 8 S. L. R. 1, 16 Cr. L. J. 15, [1914] AIR (S) 160; *Ram Harakh*, (1907) 15 Cr. L. J. 436.

¹⁵ *Gopi Mahto*, (1931) 10 Pat. 821.

¹⁶ *Dahip*, (1896) 18 All 246.

¹⁷ *Bisu Haldar*, (1907) 11 C. W. N. 836, 6 C. L. J. 127, 6 Cr. L. J. 38.

¹⁸ *Preo Lal Mukerjee*, (1913) 18 C. W. N. 548, 15 Cr. L. J. 427, [1914] AIR (C) 908.

¹⁹ *Achhru Ram*, (1925) 7 Lah. 104.

²⁰ *Haq Dad*, (1925) 6 Lah. 392.

²¹ *Parshadi Pasi v. Baljit Singh*, (1913) 14 Cr. L. J. 409. Resistance to illegal impressment is justifiable - *Pancham*, (1919) 20 Cr. L. J. 727, [1919] AIR (O) 360; *Jograj Mahto*, (1940) 22 P. L. T. 80, 42 Cr. L. J. 199, [1940] AIR (P) 696.

and in causing hurt to the constables in the exercise of their right of private defence against unlawful arrest.²²

Illegal attachment.—Where articles protected from attachment were attached, it was held that this act did not justify resistance.²³ Where the property of a person was wrongfully attached as the property of certain absconders, it was held that the rightful owner had no right of private defence of his property, as the police-officer was acting in good faith under colour of his office, and that even supposing the order of attachment might not have been properly made, that would in itself be no sufficient ground for such a defence.²⁴ This decision seems questionable. There is no right of private defence if the proceedings of a public officer are not "strictly justifiable by law." But in this case the action of the police-officer was entirely *ultra vires* as the property in question did not belong to the absconders, and there is no room left for the operation of the first two clauses of this section. See *Q. E. v. Tulsiram*,²⁵ *Jagarnath Mandhata v. Q. E.*,¹ *Q. E. v. Jogendra Nath Mukerjee*.²

Illegal arrest.—Where a constable effected an arrest under colour of his office, it was held that there was no right of private defence against him even though the arrest was not strictly justifiable by law.³

Act done without jurisdiction.—A Magistrate has no jurisdiction to issue an order under s. 144, Criminal Procedure Code, in favour of any person and ask the police to allow him to cut the crops, without making any inquiry as to who was in possession of the lands, and the third party, whose possession is found, has a right of private defence of property and that party is not deprived of that right simply because the police were there armed with an illegal and unjustifiable order of the Magistrate.⁴ Where movable property was attached in execution of a civil Court decree and removed by a peon of the Court from the house of the accused contrary to certain High Court Circulars, and subsequently it was taken away by the accused, it was held that this section was not a bar to the exercise of the right of private defence of property as the removal was illegal.⁵

2. Second clause.—The first clause speaks of acts done by a public servant, this clause, of acts done under the direction of a public servant. Under this clause it is not necessary that the doer should be a public servant. He must only act under the directions of a public servant. Explanation 2 must be read conjointly with this clause. Notwithstanding this clause, a person can resist a public servant if the latter's conduct is altogether illegal. Thus, where a licensed vaccinator unlawfully attempted to take lymph from the arm of a person who objected to it, it was held that the resistance was justifiable.⁶

Cases.—Resistance to execution of warrant.—Where a police-officer attempted to execute a warrant, the issue of which was illegal, it was held that the accused were justified in their resistance.⁷ It was held similarly where a constable conducted a search without any authority.⁸ Where the warrant issued for the arrest of a debtor was initialled though not fully signed, it was held that he had no right of private defence.⁹

Resistance to execution of not strictly legal order.—An order to the police purporting to be made under s. 145, Criminal Procedure Code, directing them to take charge of some crops in dispute, was not strictly legal, and in execution of such order the police went to the spot where the crop was stored and after announcing the order proposed to guard it. It was held that the accused in seizing several men of the police party and carrying them off into confinement had exceeded their right of private defence.¹⁰ Resistance to a search conducted without any authority is justifiable.¹¹

²² *Gammun*, (1929) 31 P. L. R. 285, 31 Cr. L. J. 294, [1930] AIR (L) 348.

²³ *Poomalai Udayan*, (1898) 21 Mad. 296.

²⁴ *Bhai Lal Chowdhry*, (1902) 29 Cal. 417.

²⁵ (1888) 13 Bom. 168.

¹ (1897) 24 Cal. 324.

² (1897) 24 Cal. 320.

³ *Munshi Singh*, (1927) 29 Cr. L. J. 69; *Ranjit*, [1937] A. L. J. R. 1334, 39 Cr. L. J. 360, [1938] AIR (A) 120.

⁴ *Shaikh Moinuddin*, (1921) 2 P. L. T. 455, 22 Cr. L. J. 442; *Sukar Sao*, (1941) 28 P. L. T. 232, [1941] P. W. N. 620, (1941) 42 Cr. L. J. 753, [1941] AIR (P) 560.

⁵ *Ahammad Sheikh*, (1928) 56 Cal. 460.

⁶ *Jagarnath Mandhata*, (1897) 24 Cal. 324; *Mangobindo Muchi*, (1899) 3 C. W. N. 627; *Bahal*, (1906) 26 A. W. N. 98, 3 A. L. J. R. 327, 3 Cr. L. J. 368.

⁷ *Jogendra Nath Mukerjee*, (1897) 24 Cal. 320; *Bisu Haldar*, (1907) 11 C. W. N. 886, 6 C. L. J. 127, 6 Cr. L. J. 38.

⁸ *Idu Mandal*, (1907) 6 C. L. J. 753, 6 Cr. L. J. 439.

⁹ *Janki Prasad*, (1886) 8 All. 268.

¹⁰ *Bhola Mahto*, (1904) 9 C. W. N. 125, 2 Cr. L. J. 13.

¹¹ *Ram Parves Ahir*, (1944) 45 C. L. J. 802.

3. **Third clause.**—This clause must be read with the first clause of s. 105.¹² It places an important restriction on the exercise of the right of private defence.

'Time to have recourse to the protection of the public authorities.'—No man has the right to take the law into his own hands for the protection of his person or property, if there is reasonable opportunity of redress by recourse to the public authorities. The right of self-help, when it causes or is likely to cause damage to the person or property of another person, must be restricted and recourse to the public authorities must be insisted on. If a person prefers to use force in order to protect his property when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable.¹³ The natural tendency of the law of all civilised States is to restrict within constantly narrowing limits the right of self-help and it is certain that no other principle can be safely applied to a country like India.¹⁴

There is no right of private defence where two parties arm themselves for a fight to enforce their right or supposed right, and deliberately engage in large numbers in a fight. In such a case, if it is not shown that the accused were acting within the legal limits of the right of private defence, it does not matter which party was the first to attack.¹⁵ The right of private defence being granted for defence only, it must not and cannot legally be exercised when there is 'time to have recourse to the protection of the public authorities.' This does not mean that a person in actual possession is, when attacked, to abandon his property to the mercy of the marauders, with a view of making an application to the police for assistance.¹⁶ The law must not be invoked to oppress persons who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exercise the privilege of private defence—as provided and restricted by the law or submit to a forcible invasion of the right of person or property in cases where, under s. 97, the law does not require any such submission.¹⁷ At the same time the right of private defence does not take the place of the functions of those public servants who are especially charged with the protection of life and property and the apprehension of offenders, and where the assistance of the public authorities can be procured, the right cannot be lawfully exercised.

The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought to be based on some information of a definite kind as to the time and place of the danger actually threatened.¹⁸

Where a person is attacked while doing a lawful act, he is entitled to stand his ground and defend himself, and the law does not intend that he must run away to have recourse to the protection of the public authorities.¹⁹ There is no obligation upon a person entitled to exercise the right of private defence and to defend his person or property, to retire merely because his assailant threatens him with violence.²⁰ He

¹² *Narsang Pathabhai*, (1890) 14 Bom. 441.

¹³ *Jairam Mahton*, (1907) 35 Cal. 103, 108.

¹⁴ *Sainarain Das*, (1938) 17 Pat. 607.

¹⁵ *Kabiruddin*, (1908) 35 Cal. 368; *Maniruddin*, (1908) 35 Cal. 384; *Ambika Lal*, (1908) 35 Cal. 443; *Prag Dat*, (1898) 20 All. 459; *Bechar Anop*, (1915) 17 Bom. L. R. 888, 40 Bom. 105; *Farman Khan*, (1926) 5 Pat. 520; *Sikandar*, (1918) 20 Cr. L. J. 83, P. R. No. 36 of 1918, [1919] AIR (L) 466; *Madat Khan*, (1925) 27 P. L. R. 47, 27 Cr. L. J. 283, [1926] AIR (L) 221; *Mulla*, (1925), 26 Cr. L. J. 1294, 2 O. W. N. 332, [1925] AIR (O) 438; *Har Sarup*, (1925) 26 Cr. L. J. 1820, [1925] AIR (O) 705; *Ramphal Das*, (1929) 31 Cr. L. J. 468, [1929] AIR (P) 705; *Iqbal Husain*, (1930) 7 O. W. N. 449, 31 Cr. L. J. 835, [1930] AIR (O) 252; *Matte Mandal*, (1932) 13 P. L. T. 193, 33 Cr. L. J.

509, [1932] AIR (P) 189; *Muhammad*, (1934) 35 P. L. R. 673, 36 Cr. L. J. 411, [1934] AIR (L) 740; *Mata Din*, (1933) 10 O. W. N. 383, 34 Cr. L. J. 1916; *Sainarain Das*, (1938) 17 Pat. 607.

¹⁶ *Anumantan*, (1880) 1 Weir 44; *Shamsar Khan*, (1896) 16 A. W. N. 170; *Jageshar Rai*, (1916) 15 A. L. J. R. 47, 18 Cr. L. J. 663, [1917] AIR (A) 119 (2); *Gorie Sanker*, (1917) 18 Cr. L. J. 862, [1917] AIR (LB) 12 (1).

¹⁷ *Nga Hla Tun U*, (1896) P. J. L. B. 219; *Naresi Singh*, (1923) 2 Pat. 595.

¹⁸ *Narsang Pathabhai*, (1890) 14 Bom. 441.

¹⁹ *Hafiz Ali*, (1907) 10 O. C. 196, 6 Cr. L. J. 271; *Har Chand*, (1929) 31 Cr. L. J. 129, [1930] AIR (L) 314; *Abdul Hadi*, (1934) 35 Cr. L. J. 730, [1934] A. L. J. R. 689, [1934] AIR (A) 829.

²⁰ *Naresi Singh*, (1923) 2 Pat. 595.

has the right to defend himself.²¹ But where the accused is not doing a lawful act and is himself the aggressor and commences the beating of his assailants he is not entitled to claim the right of private defence.²²

It has been rightly said by the Madras High Court that the view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.²³ It never was intended that a man should submit to the deprivation of property in his possession without exercising any right of self-defence, and trust to recover it by the tedious operation of a case in the civil Court with all the weight of possession, onus of proof, etc., against him.²⁴ A rightful owner has a right to eject a trespasser from his land by civil process, but it is not within his right to take a mob of men and forcibly eject the person in possession of the land in respect of which he had only title without possession. The right of private defence does not cover a case of taking or retaking possession by means of criminal force or show of criminal force.²⁵ There are circumstances in which one can collect a mob expecting resistance with violence from his opponent and defend his property by violent means and can still get the benefit of the right of private defence. Those circumstances must be (1) immediate danger to the property, which if not immediately protected, would be lost by the time protection of public authorities is obtained, (2) even this justified violence by the mob for protection of property from actual invasion should be exercised within the legal limits of the right of private defence of person or property, that is to say, there must be circumstances existing leading to a reasonable apprehension of danger arising out of a committed or attempted or threatened offence affecting person or property, as the case may be, justifying the particular injury inflicted.¹

Cases.—Time to obtain protection of public authorities.—Where the servants of an indigo factory having been interfered with by the villagers to sow land, went out in force to effect their purpose and the villagers also went out armed to meet them, it was held that in the affray followed neither party could plead the right of private defence of property as there was a police-station near at hand.² The accused numbering from forty to sixty, armed with clubs, spears and heavy billets of wood, proceeded to the disputed land, attacked the complainant and his father, and destroyed the crops growing thereon. Both parties claimed the land as having fallen to their shares on partition. The Magistrate found that the complainant was in possession and had grown the crops. It was held that the right of private defence did not arise, as there was no invasion of the accused's rights on the day of occurrence, and, in any case, that they had ample time to have recourse to the authorities for the protection of their rights.³ The accused made a combined attack upon M and R as they were throwing earth upon a narrow path of the *shamilat* and in so doing threw earth upon the fences with which the accused had formed enclosures upon the *shamilat*. The injury caused to R was not serious but M died of the blow caused by one of the accused. It was held that as the matter was not urgent and no serious loss of property was threatened and there was ample time to have recourse to authorities the accused who made a combined attack were guilty under ss. 323, 325 and 149.⁴ Where the accused was being arrested even though unlawfully, for the purpose of being produced before the police authorities, he could have no reasonable apprehension that he will be unable to have recourse to the public authorities for his release, the right of private defence did not give the accused a right to use such force as might cause death.⁵

²¹ *Har Chand*, (1920) 31 Cr. L. J. 129, [1930] AIR (L) 314.

²² *Jokhu Ram*, (1934) 35 Cr. L. J. 801, 11 O. W. N. 425, [1934] AIR (O) 207.

²³ *Alingal Kunhinayan*, (1905) 28 Mad. 454; *Kuppu Naicken*, [1935] M. W. N. 952; *Kuppu-samier*, (1929) 31 Cr. L. J. 452, [1929] M. W. N. 511, [1929] AIR (M) 748.

²⁴ *Sohn*, (1865) 2 W. R. (Cr.) 59.

²⁵ *Jasuram Marwari*, (1923) 2 P. L. R. 13, 24 Cr. L. J. 745, [1924] AIR (P) 143. But, see, *Mahesh Singh*, (1924) 1 O. W. N. 549,

26 Cr. L. J. 398, [1925] AIR (O) 251.

¹ *Dorikgope*, (1945) 24 Pat. 744.

² *Jeolail*, (1867) 7 W. R. (Cr.) 34. See also *Mana Sing*, (1867) 7 W. R. (Cr.) 67 [103]; *Ram Dulal Gope*, (1899) 3 C. W. N. CCXCIX.

³ *Maniruddin*, (1908) 35 Cal. 384.

⁴ *Data Ram alias Bara*, (1925) 26 P. L. R. 267, 27 Cr. L. J. 7, [1926] AIR (L) 516; *Ujagar Singh*, (1927) 28 Cr. L. J. 593, [1927] AIR (L) 740.

⁵ *Razu*, [1945] Kar. 103.

No time to obtain protection of public authorities.—The accused received information, one evening that the complainants intended to go on his land on the following day, and uproot the *javari* seed sown in it. At about three o'clock next morning he was informed that the complainants had entered on his land, and were ploughing up the seed. Thereupon he at once proceeded to the spot, followed by the remaining accused, and remonstrated with the complainants who commenced an attack on the accused. In the fight which ensued, both sides received serious injuries, and the leader of the complainants' party was killed. It was held that the complainants being the aggressors, the accused had the right of private defence; and that they were not bound to act on the information received on the previous evening, and seek the protection of the public authorities, as they had no reason to apprehend a night attack on their property.⁶ Where the opponents of the accused erected some huts stealthily at night on a plot of land of which the accused were in peaceful possession and it was alleged that the opponents were in possession of the land for about fourteen hours, and the accused at break of day on coming to know of this took the earliest opportunity to exercise their own right of private defence and came to the spot armed to turn out the opponents who were found by them still engaged in erecting more huts and there was a free fight between the parties and the accused did not inflict more hurt than was necessary for defending themselves, it was held that the accused were not guilty of rioting as they were entitled to their right of private defence.⁷ Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle, and a fight between the parties took place, in which several men on each side were killed and injured, it was held that the person who had seized the cattle and his party had not exceeded the right of private defence.⁸ Accused received information that they were about to be attacked by a hostile section in the village. They believed that if they separated they would be pursued and attacked individually and under this belief they collected together and awaited the attack. Their enemies then appeared on the scene and one of them fired a pistol and hit one of the accused. One of the accused then fired a pistol and hit the man who had first fired, and then a fight with *lathis* commenced during the course of which one member of each party was killed. It was held that the accused were entitled to exercise the right of private defence and it could not be said that they had exceeded that right.⁹ Where in a faction fight, a large crowd, belonging to one faction, attacked the accused's house at dead of night with hired rowdies armed with sticks and knives in order to wreak vengeance on the accused, destroyed his valuable properties, and made his wife and sons fly away from the house by the back door and the accused bolted himself into the house which was attacked and having a gun and a large supply of ammunition fired at the crowd through a small window and killed three persons therein, it was held that the accused did not exceed his right of self-defence and was not guilty of any offence.¹⁰

4. **Fourth clause.**—In the case of injuring another in self-defence, there must be two things : there must be no more harm inflicted than is necessary for the purpose of defence, and there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and the right does not commence until there is the reasonable apprehension. Thus, the firing of a gun at persons at a distance of twenty-five yards, without a reasonable apprehension of danger, and without any necessity for so doing, is not justifiable by the right of private defence.¹¹ The amount of force necessary depends on the circumstances of the case, and there is no protection if the harm is caused by excessive violence quite unnecessary to the case.¹² For example, a person set by his master to watch a garden or yard, is not at all justified in shooting at or injuring, in any way, persons who may come into those premises, even in the

⁶ *Narsang Pathabhai*, (1890) 14 Bom. 441; *Pachkauri*, (1897) 24 Cal. 686; *Fouzdar Rai*, (1917) 4 P. L. W. 111, 19 Cr. L. J. 241, [1918] AIR (P) 198; *Hira*, (1922) 45 All. 250.

⁷ *Chandulla Sheikh*, (1912) 18 C. W. N. 275, 15 Cr. L. J. 209, [1914] AIR (C) 623.

⁸ *Narshi Singh*, (1923) 2 Pat. 595; *Baga*, (1916) 17 P. L. R. 272, 18 Cr. L. J. 139.

⁹ *Ajodia Prasad*, (1924) 26 Cr. L. J. 997, [1925] AIR (A) 604.

¹⁰ *Kuppusamier*, (1929) 31 Cr. L. J. 452, [1929] M. W. N. 511, [1929] AIR (M) 748.

¹¹ *Hussainuddy*, (1872) 17 W. R. (Cr.) 47; *Gobardhan Bhuyan*, (1870) 4 Beng. L. R. Appx. 101, sub-nom. *Gobalur Bhuyan*, (1870) 13 W. R. (Cr.) 55; *Josef Casorati*, (1879) P. R. No. 36 of 1879.

¹² *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33, F.B.; *Baqri*, (1916) 17 Cr. L. J. 450.

night. He ought first to see whether he could not take measures for their apprehension.¹³ A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited and gives another a kick, it is an unjustifiable act.¹⁴ At the same time when exercising the right of private defence, it is difficult to expect a person to weigh "with golden scales" what maximum amount of force is necessary to keep within the right.¹⁵ A person who is assaulted is not bound to modulate his defence step by step according to the attack. Where the attack has assumed a dangerous form every allowance should be made for the person defending himself if he, with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack.¹⁶

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right.¹⁷ In deciding whether or not an accused has exceeded his right of private defence, regard must be had to the comparative physical strength of the accused and the deceased respectively and also to the antecedents of the deceased and his conduct on the occasion.¹⁸

Cases.—Justifiable harm.—Where the accused finding a thief entering into his house at night, through an entrance made in the side-wall, seized him while intruding his body and held him with his face down to the ground to prevent his further entrance and thereby caused his death by suffocation;¹⁹ where a person attacked by another with a spear struck a blow with a club which resulted in the death of the party attacking;²⁰ where a boy whose crop was frequently stolen found a person stealing and gave him some blows with a club which resulted in his death;²¹ where a number of armed men attacked a court-house, and one of the inmates shot an assailant;²² where the accused fired his gun against persons whom he thought to be his enemies entering into the house at dead of night whereas they were policemen who had come to arrest him and a policeman was killed;²³ the right of private defence was held to be a good justification.

Where the tenants were found to have held their lands under a system, under which harvested crops were to be taken to the village *khalihan* (threshing place), but it appeared that they went in a large body armed with clubs with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindar's watchmen remonstrated and a number of their men went to the spot armed with clubs and swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindar's people had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent, it was held that inasmuch as the common object of the accused was to protect the zamindar's rights over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting.²⁴ In the course of a family quarrel between a brother and sister, as to possession of a store room, the sister was roughly handled and on hearing her cry out for help, the husband who was working close by turned up and finding the wife being assaulted by her brother and another and her hands cut and bruised, struck the brother one deadly blow with an instrument and on himself being attacked by the other man, dealt another fatal blow to him also. It

¹³ *John Scully*, (1824) 1 C. & P. 319.

¹⁴ *Wild's Case*, (1837) 2 Lwein 214.

¹⁵ *Radhey*, (1923) 24 Cr. L. J. 735, [1923] AIR (A) 357; *Abu Zar*, (1934) 35 P. L. R. 783, 36 Cr. L. J. 283, [1934] AIR (L) 748.

¹⁶ *Inzar Gul Khan*, [1936] Nag. 194.

¹⁷ *Bhajnath Dhanuk*, (1908) 36 Cal. 296; *Kunja Bhuiya*, (1912) 39 Cal. 896; *Penumelsa Thirumalraju*, (1917) 19 Cr. L. J. 248; *Ahmad*,

(1919) 23 Cr. L. J. 249.

¹⁸ *Kala Singh*, (1933) 34 P. L. R. 259, 34 Cr. L. J. 1175, [1933] AIR (L) 167.

¹⁹ *Kurrim Bux*, (1865) 3 W. R. (Cr.) 12.

²⁰ *Moizudin*, (1869) 11 W. R. (Cr.) 41.

²¹ *Mokee*, (1869) 12 W. R. (Cr.) 15.

²² *Ram Lal Singh*, (1874) 22 W. R. (Cr.) 51.

²³ *Dhara Singh*, (1946) 49 P. L. R. 88.

²⁴ *Ram Khelawan Singh*, (1909) 36 Cal. 827.

was held that the accused had reason to suppose that his wife might be severely injured and the blows struck by him on both the men were in exercise of the right of defence of his wife and himself.²⁵

More harm caused than necessary.—Where a person killed a weak old woman found stealing at night;¹ where a person caught a thief in his house at night and deliberately killed him with a pickaxe to prevent his escaping;² where the deceased attempted to take a pickaxe from the accused and the latter resisting struck him with it and killed him;³ where a number of persons apprehending a thief committing house-breaking strangled him and subjected him to gross maltreatment when he was fully in their power and helpless;⁴ where the accused fired a gun at persons at a distance of twenty-five yards without a reasonable apprehension of danger, and injured them;⁵ and where the accused armed with spears attacked and killed two persons unarmed who were ploughing a field believed by the accused to be their field;⁶ the right of private defence was negatived.⁷ Where a body of about ten men, belonging to the decrec-holder's party, went with Court officers upon a plot of land in the joint possession of the judgment-debtors to take symbolical possession thereof, and the drummer was assaulted by one of the latter, whereupon the accused and their party replied by an attack on their opponents, during the course of which one of the accused's party fractured the skull of the drummer's assailant by an isolated act, but the accused continued to beat him after he had fallen helpless on the ground, it was held that the accused had a right of private defence under the circumstances, but having exceeded such right by beating the wounded man after he had fallen, they were guilty of hurt.⁸ Where A trespassed on the lands of B, whose servants seized and confined A till the following day, when B gave information to the police, it was held that the conduct of B and his servants in confining A could not be supported on the ground that they were exercising the right of private defence of property.⁹ The accused who was watching his field (some of the grain of which had on previous occasions been stolen) saw the deceased cutting his corn. On being pursued the deceased ran his head against a tree and fell. The accused then hit him recklessly with a stick while on the ground and fractured his skull in two places, causing death. It was held that the right of private defence of property had been exceeded and the accused was guilty of culpable homicide.¹⁰ Where in a course of fight a person from one of the parties ran away but was chased by another from the opposite party and was overtaken at a considerable distance and was killed, it was held that the person chasing would be deemed to have exceeded his right of private defence and was guilty under s. 304(1).¹¹ The accused, five in number, went on a moonlight night, armed with clubs and assaulted two men who were cutting their rice crop, one of whom received six distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot. It was held that they were guilty of murder as they had inflicted more harm than was necessary for the purpose of defending their property.¹² Where the accused three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with clubs, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some lentil crops, and attacked them, fatally wounding one and severely injuring another; it was held that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former.¹³ Where the deceased assaulted the accused and was about to hit him with a clod of earth when the accused struck him two violent blows with a hatchet which he held in his hand

²⁵ *Bermu Chetty*, (1925) 27 Cr. L. J. 617, [1926] M. W. N. 212.

¹ *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33, F.B.

² *Durwan Geer*, (1866) 5 W. R. (Cr.) 73;

Fukeera Chamar, (1866) 6 W. R. (Cr.) 50.

³ *Fuzza Meeah alias Fuzza Mahomed*, (1866) 6 W. R. (Cr.) 89.

⁴ *Dhununjai Poly*, (1870) 14 W. R. (Cr.) 68.

⁵ *Hussainuddy*, (1872) 17 W. R. (Cr.) 46.

⁶ *Gour Chand Chung*, (1872) 18 W. R. (Cr.)

⁷ *Natha Singh*, (1927) 28 P. L. R. 279, 28 Cr. L. J. 487, [1927] AIR (L) 730.

⁸ See also *Abdul Hakim*, (1880) 3 All. 253;

Subba Naik, (1898) 21 Mad. 240.

⁹ *Kunja Bhuiya*, (1912) 39 Cal. 896.

¹⁰ *Shurufoddin v. Kassinath*, (1870) 13 W. R. (Cr.) 64.

¹¹ *Bag*, (1902) P. R. No. 29 of 1902; *Nga Tun Nyein*, (1917) 18 Cr. L. J. 284, [1917] AIR (LB) 28 (1).

¹² *Sadda*, (1938) 40 Cr. L. J. 904, 41 P. L. R. 360, [1939] AIR (L) 393.

¹³ *Mammun*, (1916) P. R. No. 35 of 1916, 18 Cr. L. J. 387, [1917] AIR (L) 347.

¹⁴ *Baijnath Dhanuk*, (1908) 36 Cal. 296.

and thereby caused his death, it was held that the accused had exceeded his right of private defence because the accused had reasonable apprehension of hurt but not of grievous hurt.¹⁴ Where, in a fight between the accused and the deceased, the latter attacked the former with a *kirpan* and both of them grappled and the accused succeeded in snatching the *kirpan* from the deceased, but subsequently inflicted five wounds on the deceased, with the *kirpan* which he had snatched, it was held that the accused had the right of self-defence but the only right that could be conceded to him was that he could disable K from doing him any harm. He, however, exceeded this right and was guilty under part 1 of this section.¹⁵

English case.—A parker finding a boy stealing wood in his master's ground bound him to his horse's tail and beat him. The horse took fright and ran away, and dragged the boy on the ground till his shoulder was broken, whereof he died. This was ruled to be murder.¹⁶

Arrest.—The English and Indian law differ somewhat on the point of arrest by, or by the direction of, public servants. Under the English law a person offering resistance to a public servant making an arrest is extenuated if the document of warrant or writ is defective in the frame of it, or if the manner of making the arrest is illegal, or if the name of the officer or party is entered without due authority; but the law of India allows no extenuation on any of these accounts as long as the act is bona fide.

Explanations.—Actual knowledge that a person is a public servant or acting by the direction of a public servant, or reasonable ground of knowledge as from his dress, words, weapons, etc., will deprive those against whom he acts of the right of self-defence.¹⁷ The right of private defence is available if the person exercising the right had no reason to believe that the man arresting him was a police officer.¹⁸ In emergent cases in which police officers might act without being clothed in their uniform it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. If they fail to do so, they cannot validly seek the protection of the Court.¹⁹

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death¹ or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions² hereinafter enumerated, namely :—

When the right of private defence of the body extends to causing death.

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence³ of such assault;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt⁴ will otherwise be the consequence of such assault ;

Thirdly.—An assault with the intention of committing rape.⁵ ;

Fourthly.—An assault with the intention of gratifying unnatural lust⁶ ;

Fifthly.—An assault with the intention of kidnapping⁷ or abducting⁸ ;

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

¹⁴ *Ghulam Rasul*, (1926) 27 P. L. R. 430, 27 Cr. L. J. 756.

¹⁵ *Harbans Singh* (1945) 47 Cr. L. J. 358

¹⁶ *Halloway's Case*, (1628) 1 East P. C. 237,

Cro. Car. 131, 1 Hale P. C. 454.

¹⁷ M. & M. 76.

¹⁸ *Abdul Hakim*, [1942] All. 35.

¹⁹ *Ibid.*

COMMENT.

This section justifies the killing of an assailant when apprehension of atrocious crimes enumerated in the several clauses is caused. It should be read subject to the provision of s. 99.

The section gives the right of private defence against actual assailants. It does not authorize the killing or causing of hurt to persons who may in future when reinforced by others become assailants.

There is no principle of criminal law which prevents people from getting themselves prepared, if necessary, with arms if they anticipate attack upon their subsisting right by an armed set of people.²⁰

1. 'Voluntary causing of death.'—As to the meaning of the word 'voluntary', see s. 39, *supra*. The law most undoubtedly authorizes a man who is under a reasonable apprehension that his life is in danger or his body in risk of grievous hurt to inflict death upon his assailant either when the assault is attempted or directly threatened, but the apprehension must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence. It must be proportionate to and commensurate with the quality and character of the act it is intended to meet and what is done in excess is not protected.²¹

Homicide in self-defence is justifiable, although the party killing is guilty of an assault, or engages in an unlawful conflict; provided (1) that the party killing does not either commence or provoke the attack with intent to kill or do grievous bodily harm; (2) that he kills the assailant because he has reasonable cause for believing it to be necessary so to do, in order to avoid immediate death.²²

2. 'Any of the descriptions.'—A man is not justified in shooting another, who is about to arrest him, where there is nothing to show that he has reason to apprehend that any of the acts mentioned in this section would ensue.²³

3. 'Reasonably cause the apprehension that death will otherwise be the consequence.'—Whether the apprehension was reasonable or not is a question of fact. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances will be taken into account.²⁴ A man acting under an apprehension of death cannot be expected to judge too nicely the force of his own blow. He is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over; he is not obliged to retreat but may pursue his adversary till he finds himself out of danger and if in a conflict between them he happens to kill, such killing is justifiable.²⁵ Where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger but whether there was a reasonable apprehension of such danger.¹ Every attempt or threat to commit an offence would not, however, entitle a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution immediately, because there are many threats which people use as a form of abuse, but which are never intended to be taken seriously and, still others, which the persons saying them have not the capacity to put into immediate execution; for it is only against a danger present and imminent that the right of private defence avails. The law will always make just allowance for the sentiments of a person placed in a situation of peril who has no time to think. His blood is then hot and his sole object is to strike a decisive blow so as to ward off the danger.² In the excitement and confusion of the moment

²⁰ *Nathu Mahto*, (1946) 47 Cr. L. J. 749.

²¹ *Whittaker*, (1882) 2 A. W. N. 172; *Jaipal Kumbi*, (1922) 23 Cr. L. J. 313, [1922] AIR (N) 141; *Ajab Narain Singh*, (1938) 21 P. L. T. 86, 40 Cr. L. J. 611, [1939] AIR (P) 575; *Muhammad Akbar*, (1922) 24 Cr. L. J. 408, [1924] AIR (L) 227.

²² 10th Parl. Rep., 35.

²³ *Sher Baz*, (1879) P. R. No. 1 of 1880.

²⁴ *Gurlingappa Shidramappa*, (1921) 23 Bom. L. R. 817, 22 Cr. L. J. 618, [1921] AIR (B) 385.

²⁵ *Bhut Nath Dome*, (1909) 13 C. W. N.

1180, 1 Cr. L. J. 391; *Narveshi Singh*, (1923) 2 Pat. 595, 606; *Kamman Nair*, [1937] M. W. N. 568; *Nisar Husain*, [1941] O. W. N. 1331, (1941) 43 Cr. L. J. 436, [1942] AIR (O) 147.

¹ *Dalip Singh*, (1922) 25 Cr. L. J. 676, [1923] AIR (L) 155; *Fazal Hussain*, (1932) 34 Cr. L. J. 584, [1933] GIR (L) 665; *Gaya Prasad*, [1936] O. W. N. 974, 37 Cr. L. J. 1135; *Ajab Narain Singh*, (1938) 40 Cr. L. J. 611, [1939] P. W. N. 671, [1939] GIR (P) 575.

² *Sitaram*, (1924) 26 Cr. L. J. 587, [1925] AIR (N) 260.

it is not to be expected that an average man would weigh the means that he intends to adopt on the spur of the moment for self-defence in golden scales, though the counter-attack should not be out of all proportion to the force employed in the original attack.³

4. 'Grievous hurt.'—See s. 320, *infra*. If a person has genuine apprehension that his adversary is going to attack him and reasonably believes that the attack will result in a grievous hurt he can go to the length of causing the latter's death in the exercise of the right of private defence even though the latter has not inflicted any blow on him. A subsequent blow will also be justified on the same ground if there is every probability that the latter, if not altogether disabled, will try to hit the former. But where the subsequent blow is delivered not on account of this fear but because the latter goes on abusing the former, the subsequent blow is not protected by the right of private defence.⁴

5. 'Rape.'—See s. 375, *infra*. The right of private defence of the body of a person's wife extends to the voluntary causing of death if the offence which occasioned the exercise of the right was an assault with the intention of committing rape.⁵

6. 'Unnatural lust.'—See s. 377, *infra*. 7. 'Kidnapping'.—See s. 359, *infra*.

8. 'Abducting.'—See s. 362, *infra*. 9. 'Wrongfully confining'.—See s. 340, *infra*.

CASES.

First clause.—Apprehension of death.—The accused who were two in number were being searched by an armed gang who announced their intention to kill them. The accused took refuge in a dark kitchen of a house. The mob broke into the house and two of them made their way with torches to the kitchen and attacked the accused. One of the attacking party was hacked to death by the accused. It was held that the accused had committed no offence, since they were fighting for life with a murderous mob in front and an enemy who made his way into the room where they had taken refuge, and it was not surprising that they did their best to make sure that their enemy was dead.⁶ A party of armed men escorting ladies met with resistance from certain persons one of whom levelled a gun against a member of the escorting party, but was stabbed to death. It was held that the act of killing was done in self-defence.⁷ Accused, who were Sikhs, abducted a Mahomedan married woman and converted her to Sikhism. Nearly a year after the abduction, the relatives of the woman's husband came and demanded the return of the woman from the accused. The latter refused to return her and the woman herself expressed her unwillingness to go. Thereupon the husband's relative attempted to take her away by force. The accused resisted the attempt and in doing so one of them inflicted a blow on the head of one of the woman's assailants which caused the latter's death. It was held that the right of the accused to defend the woman against her assailants extended under this section to the causing of death and they had, therefore, committed no offence.⁸ The accused having got a decree against the deceased put up his house for sale in execution. As nobody from the place was prepared to bid, the accused went to a neighbouring place to proclaim that a certain house had been put up for sale. Deceased and another followed him, assaulted him, felled him to the ground and attempted to throttle him, whereupon the accused drew his knife and stabbed the deceased in the chest. The deceased died three days after, having developed pneumonia. It was held that the assault by the deceased, including an attempt by him to throttle the accused, occasioned the exercise of the right of private defence, as it was likely to cause the apprehension that death or grievous hurt would otherwise be the consequence, and that, therefore, the act of the accused was covered by the provisions of this section.⁹ Where the accused was waylaid and attacked by two persons, who

³ *Ahmad Din*, [1926] 28 Cr. L. J. 252, (1927) AIR (L) 194.

⁴ *Lal Bakhsh*, (1944) 46 P. L. R. 379, [1945] A. L. R. (L.) 43, (1944) Cr. L. J. 736.

⁵ *Mohammad Shafi*, (1984) 85 P. L. R. 659, 86 Cr. L. J. 281, [1984] AIR (L) 620.

⁶ *Gurlingappa Shidramappa*, (1921) 23 Bom. L. R. 817, 22 Cr. L. J. 618, [1921] AIR (B)

835.

⁷ *Ramzani*, (1924) 23 A. L. J. R. 68, 26 Cr. L. J. 669, [1925] AIR (A) 319; *Ghulam Rasul*, (1937) 40 P. L. R. 17, 39 Cr. L. J. 7.

⁸ *Nand Kishore Lal*, (1924) 25 Cr. L. J. 670, [1924] AIR (P) 789.

⁹ *Chhabil Das*, (1922) 26 Cr. L. J. 17, [1923] AIR (L) 172; *Nga Kyaw Dun*, (1903) 10 Burma

were armed with hatchets and he snatched the hatchet from one of them and hit one or both of them in order to save his life, it was held that he was not guilty of any offence.¹⁰ During a quarrel the deceased caught hold of the testicles of the accused and pressed them hard as a result of which the accused losing his self-control, struck the deceased two blows with a knife lying nearby. It was held that the squeezing of testicles could result in death and that, therefore, the accused had apprehension of death or grievous hurt.¹¹

Second clause.—‘Apprehension of grievous hurt.’—Plea allowed.—The deceased rushed at the accused, armed with a heavy weapon and showing every intention to assault him. The accused used his spear, when the deceased was in the very act of delivering a blow to him, and in doing so he killed the deceased. The Sessions Judge held that the right of private defence was exceeded, because the accused had an opportunity of running away. It was held that the accused reasonably anticipated grievous hurt to himself and consequently he had a right to use his spear to defend himself against the blow even to the causing of death.¹² Where the deceased, a sturdy and dissolute young man, upon a quarrel with the accused, his uncle and his uncle’s son, after an exchange of abuse, snatched up a heavy *jatu* (side post of a cart) three feet long and aimed a blow with it at his uncle and possibly another at his uncle’s son, and his uncle’s son seized a second *jatu* two feet long, and struck the assailant twice on the head with it in consequence of which he died, it was held that there was no excess of the right of private defence and the accused had committed no offence.¹³ Where the assailants who were armed with *dangs* (clubs) opened an attack on the accused, who were armed only with a *lathi*, and a blow given by one of the accused fell on the head of one of the assailants and caused a fatal injury, it was held that the accused did not exceed the right of private defence and were not guilty of any offence.¹⁴

The deceased S and three others, who formed his party, attacked with clubs the accused B and his party, three in number, as the result of a quarrel. One of the party of the deceased struck a blow on the accused which felled him to the ground. The accused rose up and inflicted a blow on the head of S, which fractured his skull causing death within a short time. It was held that under the circumstances of the case the accused did not exceed his right of private defence by inflicting the blow on the head of the deceased, as the circumstances were such as reasonably caused the apprehension that grievous hurt would, but for his action, have been the consequence of the attack that was being made upon him.¹⁵ Where after having picked up a quarrel with the accused and after having inflicted an injury on him with a cutting weapon the deceased was on the point of cutting the accused a second time, and he had had his similar weapon raised for the purpose, when the accused struck the deceased on the head with his weapon and the injury resulted in the death of the deceased, it was held that the deceased’s action in getting ready to cut the accused a second time reasonably caused the accused to apprehend that grievous hurt, if not, indeed, death, would befall him if he did not strike the deceased and therefore he did not exceed the right of private defence.¹⁶ Where persons grew crops on a piece of land which another person cut and carried away and stacked in a field of a third party without interruption and retired from the field and then the persons growing the crops came up in numbers armed with clubs and other weapons, not to commit a premeditated riot but merely to take away the crops they were entitled to and not to use any force unless they were opposed or attacked, and, while so acting within their rights in collecting their own crops with a view to take them away, they were attacked by the party of the person who had stacked the crops, who were also similarly armed,

L. R. 99, 1 Cr. L. J. 380. See *Mi Hla So v. Nga Than*, (1911) 4 B. L. T. 268, 13 Cr. L. J. 53, *Nisar Husain*, [1941] O. W. N. 1381, (1941) 43 Cr. L. J. 436, [1942] AIR (O) 147.

¹⁰ *Fazal Hussain*, (1932) 34 Cr. L. J. 584, [1933] AIR (L) 665.

¹¹ *Sardari Lal*, (1936) 38 Cr. L. J. 867, [1937] AIR (L) 108; *Sardara Singh*, (1936) 38 P. L. R. 209; *Ram Bilas*, [1936] O. W. N. 225, 37 Cr. L. J. 325, [1936] AIR (O) 221; *Karamat Hussain Mulla*, (1937) 39 Cr. L. J. 506, [1938] AIR (L) 269.

¹² *Nga Kyaw Zan*, (1903) 9 Burma L. R.

191. See *Nga Kyaw Dun*, (1903) 10 Burma L. R. 99, 1 Cr. L. J. 380; *Hafiz-ul-Rehman*, (1941) 43 P. L. R. 721, 43 Cr. L. J. 439, [1942] AIR (L) 33.

¹³ *Purān*, (1905) 27 P. L. R. 21, 3 Cr. L. J. 232. See *Yusuf Khan*, (1919) 21 P. L. R. 2, 21 Cr. L. J. 335, [1920] AIR (L) 302.

¹⁴ *Mahandi*, (1929) 31 P. L. R. 621, 31 Cr. L. J. 654, (1930) AIR (L) 93.

¹⁵ *Bhut Nath Dome*, (1909) 13 C. W. N. 1180, 10 Cr. L. J. 391.

¹⁶ *Nga Chit Tin*, (1939) 40 Cr. L. J. 725, [1939] AIR (R) 225.

first, by clods of earth and, then, with spears, it was held that the persons growing the crops had the right to defend their persons from an attack with clods and spears, an attack which reasonably caused apprehension that death would be the result, and to cause any injury short of death.¹⁷

Where, after picking up a quarrel and trying to hit the deceased, accused ran for his safety from a subsequent attack with sticks made on him by the deceased, and after running some distance, found that he could not very well make his escape and he turned round and hit the deceased a blow and killed him, it was held that the accused acted in self-defence and was not guilty of any offence.¹⁸ Where a man is attacked by another man who uses a weapon such as a *lathi*, it is impossible to lay down with any sort of accuracy the extent to which the attacked person rightfully acts in his defence. Where in a quarrel and beating brought about by the illegal act of the deceased himself, the accused while resisting his attack hit him in the head, rather harder than perhaps he intended to have done and thus killed him, it was held that he could not be said to be exceeding his right of self-defence.¹⁹ Similarly, the accused, when confronted with persons armed with *lathis*, killing one of them in the course of a drunken brawl, was held to have the right of private defence.²⁰ Accused insulted the deceased and the deceased struck him with a stick. Accused retaliated by striking the deceased on the head with a *lathi*, fractured his skull and killed him. It was held that the accused had acted in the exercise of the right of private defence and could not be held to have exceeded that right.²¹ Where the accused persons were in possession of the land in dispute, and while ploughing the same, they were attacked by a number of men and one of their assailants was armed with a sword stick, and three persons on the side of the accused were assaulted and one of their assailants was struck by a spear by one of the accused as a result of which he died, it was held that the accused were justified by the right of private defence.²²

Plea disallowed.—The accused had an intrigue with one S, wife of A. S and A were sleeping one night in a house about eighty paces from the place where the accused slept. In the early morning S left her cot to visit the accused. A missed her, and suspecting where she had gone followed her with a hatchet. He assaulted the accused and wounded him, whereupon the accused stabbed him with a knife and killed him. It was held that as the accused had not established that voluntarily causing the death of his assailant was necessary for the purpose of defence he could not plead the right of defence.²³ Where a person armed with a dagger went to the house of another to commit an offence, knowing that he might be discovered, and on being so discovered and pursued, he stabbed and killed one of his pursuers, who were unarmed, it was held that he could not claim the right of self-defence.²⁴ Where the accused were in possession of disputed land and the affray originated from the prosecution party trespassing upon it and obstructing the accused's party from ploughing it, it was held that the accused's party was entitled to defend their land and their bodies against any violence used by the prosecution party, but it extended to the right of causing death only when exercised against such an assault as might reasonably cause the apprehension that death or grievous hurt would otherwise be the result.²⁵ Where the accused was the aggressor and the deceased attacked him with a knife and the accused stabbed him in self-defence, it was held that the accused was not entitled to claim entire acquittal pleading the right of self-defence but was guilty of culpable homicide not amounting to murder.¹ A certain amount of abuse was bandied about by members of a tea party, in the course of which the deceased picked up a *dhama* from the floor and slashed with it at the accused who thereupon went outside the hut. He returned, however, armed with a stick and struck the deceased with it on the head and the deceased died

¹⁷ *Baburam Raut*, (1912) 17 C. L. J. 394, 12 Cr. L. J. 295.

¹⁸ *Ram Sewak*, (1924) 23 A. L. J. R. 131, 26 Cr. L. J. 542, [1925] AIR (A) 313.

¹⁹ *Allah Ditta*, (1934) 35 P. L. R. 725, 36 Cr. L. J. 305, [1934] AIR (L) 696.

²⁰ *Balwant Singh*, (1935) 37 P. L. R. 561.

²¹ *Imam Din*, (1924) 26 Cr. L. J. 730, [1925] AIR (L) 514, 26 P. L. R. 14; *Pahlad*, (1923) 26 Cr. L. J. 61, [1924] AIR (O) 334; *Mangal Singh*, (1924) 26 Cr. L. J. 1305, 7 L. L. J. 167,

[1925] AIR (L) 370; *Bishen Singh*, (1928) 30 P. L. R. 97, 31 Cr. L. J. 47, [1929] AIR (L) 443.

²² *Sakaldip Rai*, [1941] P. W. N. 18, (1940) 41 Cr. L. J. 939, [1941] AIR (P) 2; *Nga Thein*, (1941) 42 Cr. L. J. 661, [1941] AIR (R) 175.

²³ *Hakim*, (1884) P. R. No. 41 of 1884.

²⁴ *Mohammad Khan*, [1940] Lah. 564.

²⁵ *Ponthala Narisi Reddi*, (1914) 15 Cr. L. J. 447.

¹ *Kesavulu Naidu*, [1980] M. W. N. 502;

of the injury. It was held that as the accused was able to leave the hut quite unscathed, it could not be held that, at the time when he returned to the hut and struck the deceased, the right of private defence of the body by the accused was occasioned by any offence committed by the deceased.²

Third clause.—Rape.—Where the husband and other relations of a girl assaulted a man while he was in the very act of violating her, it was held that they were justified under this clause.³

Fifth clause.—Abducting.—The accused owed some money to a moneylender. The latter sent two persons armed with *lathis* and *kirpans* to collect the dues. They met the accused and insisted on his accompanying them to their master and on his refusal to do so, dragged him along. On the way the accused stabbed one of the peons in the abdomen and the peon died on the next day. It was held that the act of the peons constituted abduction, but in stabbing the peon the accused exceeded the right of private defence and was guilty of culpable homicide not amounting to murder.⁴

PRACTICE.

Evidence.—Where the defence is that the party was about to commit such a crime as would justify his death, this must be proved, not indeed so as to establish the fact conclusively, but so as to prove that the accused had such grounds for supposing violence was intended as would warrant a rational man in so acting, and he must prove that the offence about to be committed could not have been prevented by milder means.⁵

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

When such right extends to causing any harm other than death.

COMMENT.

When dealing with questions relating to the right of private defence of the body, ss. 100 and 101 must be read together.⁶

Under this section any harm short of death can be inflicted in exercising the right of private defence in any case which does not fall within the provisions of the preceding section which deals with offences in which the harm is likely to be very serious, and hence justifies the killing of the assailant.

CASES

A dispute arose between two parties, Mollahs and Shikdars. Shikdars attacked and killed one of the Mollahs who were exercising the right of retaking their own property. Three of the Shikdars were also wounded. The Shikdars were convicted of culpable homicide not amounting to murder and rioting. The Mollahs were held entitled to the protection conferred by this section.⁷ A public servant while acting in the execution of his duties had his conveyance stopped by a number of camel-drivers whose camels were trespassing on the banks of a canal belonging to Government. A prisoner who had been legally arrested was forcibly rescued from his possession. He thereupon apprehending personal violence fired his gun without taking a careful aim at his assailants and wounded one of them. It was held that he was protected under this section.⁸

² *Nga Chit Tin*, [1939] 40 Cr. L. J. 725, [1939] AIR (R) 225.

³ *Jhakri Chamar*, (1912) 16 C. L. J. 440, 18 Cr. L. J. 905, F.B.; *Suraj Narain Lal*, [1933] A. L. J. R. 472, 34 Cr. L. J. 882, [1933] AIR (A) 218.

⁴ *Daroga Lohar*, (1929) 32 Cr. L. J. 84, 11

P. L. T. 881, [1930] AIR (P) 347.

⁵ *Josef Casorati*, (1879) P. R. No. 36 of 1879.

⁶ *Razu*, [1945] Kar. 103.

⁷ *Tanoo Shikdar*, (1865) 3 W. R. (Cr.) 47.

⁸ *Mukerji*, (1900) P. R. No. 5 of 1901; *Sardara*, (1929) 30 Cr. L. J. 863, [1929] AIR (L) 494.

Commencement
and continuance of
the right of private
defence of the body.

102. The right of private defence of the body commences as soon as a reasonable apprehension¹ of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

COMMENT.

This section indicates when the right of private defence of the body commences and till what time it continues. It commences and continues as long as danger to body lasts.

1. 'Reasonable apprehension.'—The right commences only on a reasonable apprehension of danger to the body caused by an attempt or threat to commit an offence.⁹ There must be an attempt or threat, and consequent thereon an apprehension of danger; but it is not a mere idle threat, or every apprehension of a rash or timid mind, that will justify the exercise of the right. Reasonable ground for the apprehension is requisite. Suppose the threat to proceed from a woman or a child and to be addressed to a strong man; in such a case there would hardly be a reasonable apprehension. Present and imminent danger seems to be meant. But if a man is preparing himself, as by seizing a dangerous weapon in such a way that he manifestly intends immediate violence, this seems sufficient justification of the exercise of the right; for his conduct amounts to a threat and the other has reason to consider the danger to be imminent.¹⁰

When danger is not present but may be avoided, can a man who voluntarily seeks it be said to have a reasonable apprehension of such danger? As if A knowing that B is waiting to attack and rob him, proceeds on his road with the deliberate purpose of resisting the attack with all necessary force, and does so, and thereby causes B's death. A appears to be entitled to the benefit of the exception, for he had a reasonable apprehension of danger when B attacked him, notwithstanding the attack was not unforeseen.¹¹ The view that a person should not exercise his right of self-defence, if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.¹² The law does not require that a person placed in such circumstances should weigh the arguments for and against, 'in golden scales.' It would be unnatural to expect him to do so, and the law in fact does not require any such thing from such person. The question to be asked is not, what a perfectly cool by-stander would think absolutely necessary, but whether there was reasonable apprehension of danger to life or property on the part of the accused having regard to all the circumstances; and allowance should be made for one who with the instinct of self-preservation strong upon him pursues his defence a little further than might appear to be absolutely necessary to a cool by-stander.¹³ A man may justify a battery if he proves merely an assault on the part of the prosecutor, and he need not stay until the prosecutor has actually struck him but the battery must be such only as was necessary for his defence.¹⁴

The law does not require a person labouring under a reasonable apprehension of death or grievous hurt to his companion to postpone his right of defending the body of his companion till it is seen that the latter, unaided, fails to eradicate the source of danger.¹⁵

A bare fear of any offence, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act, indicative of such an

⁹ *Gobardhan Bhuyan*, (1870) 4 Beng. L. R. Appx. 101, sub-nom. *Gobadur Bhooyan*, (1870) 18 W. R. (Cr.) 55; *Narain Das*, (1922) 3 Lah. 144.

¹⁰ *M. & M.* 78.

¹¹ *Ibid.*, 79.

¹² *Alingal Kunhinayan*, (1905) 28 Mad.

454; *Kuppu Naicken*, [1935] M. W. N. 952.

¹³ Per Anantakrishna Aiyar, J., in *Kuppusamier*, [1929] M. W. N. 511, 514, 31 Cr. L. J. 452, [1929] AIR (M) 748.

¹⁴ *Deana*, (1909) 2 Cr. App. R. 75.

¹⁵ *Nga Than*, (1933) 34 Cr. L. J. 1248, [1933] AIR (R) 273.

intention, will not warrant him in killing that other by way of prevention. There must be an actual danger at the time.¹⁶ But, if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition kill him, although it should afterwards appear that there was no such design, the act would amount to culpable homicide or even accident, according to the degree of the caution used and the probable grounds for such belief.¹⁷

CASES.

Reasonable apprehension.—Where the accused apprehending opposition went armed to appraise crops and on the arrival of the opposite party similarly armed did not wait till that party had attacked but proceeded to meet them and a fight took place, it was held that the accused had acted within the right of private defence which commenced as soon as the opposite party appeared with arms and began to move towards them which was a distinct threat to attack them.¹⁸ Deceased, a strong man of a dangerous character and brutal nature and reputed to have killed a man previously, had some quarrel with the accused but was taken back to his house. Later he returned armed with a stick, entered the shop of the accused who was comparatively a weakling, threw him on the ground, pressed his neck and bit on his hand and chest. When the accused was extricated from the assailant's grip he took up a light hatchet and struck three blows on the head of the deceased as a result of which he died after three days. It was held that the whole conduct of the deceased was aggressive and that even though no grievous hurt was actually caused to the accused, the circumstances were sufficient to raise a strong apprehension in his mind that he was under a reasonable apprehension of receiving such injury at the hand of his assailant unless he succeeded in disabling him and that he did not exceed the right of private defence.¹⁹

No reasonable apprehension.—A and B met at a drinking shop and drank together. On their departure A and B quarrelled about B having, as A declared, caused the death of the latter's four children by incantation. B admitted it, and said he would cause A to be taken by a tiger at once, at which A killed him with a club. It was held that A had no reasonable apprehension of danger.²⁰ Where the accused fired a gun at a person at a distance of twenty-five yards, without a reasonable apprehension of danger, and without any necessity for so doing, it was held that his act was not justifiable.²¹

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated; namely:—

First.—Robbery¹;

Secondly.—House-breaking² by night;

Thirdly.—Mischief³ by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.—Theft,⁴ mischief or house-trespass,⁵ under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

¹⁶ 1 East P. C. 272.

¹⁷ *Ibid.*, P. 273.

¹⁸ *Hafiz Ali*, (1907) 10 O. C. 196, 6 Cr.L. J.

271.

¹⁹ *Kala Singh*, (1933) 34 P. L. R. 259, 34

Cr. L. J. 1175, [1933] AIR (L) 167.

²⁰ *Gobardhan Bhuyan*, (1870) 4 Beng. L. R. Appx. 101.

²¹ *Hussainuddi*, (1872) 17 W. R. (Cr.) 46.

COMMENT.

This section indicates when a person can be killed in defence of one's own property; s. 100 indicates when a person can be killed in defence of one's body. But both the sections are subject to the provisions of s. 99.

A person employed to guard the property of his employer is protected by ss. 97, 99, this section and s. 105, if he causes death in safeguarding his employers' property, when there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in this section, or to attempt to commit one of those offences. A person whose duty it is to guard a public building is in the same position, that is to say, it is his duty to protect the property of his employer and he may take such steps for this purpose as the law permits. The fact that the property to be guarded is public property does not extend the protection given to a guard.²²

A distinction is observed between such offences as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different sort, if no resistance be made by the offender: and, therefore, a party would not be justified in killing another who was attempting to pick his pocket.²³ A police constable on guard duty at a magazine or other public building is not entitled to fire at a person merely because the latter does not answer his challenge.²⁴

Scope.—The right extends not only when the offences enumerated in the section are committed, but also when an attempt to commit any such offences is made.²⁵

1. **'Robbery.'**—See s. 390, *infra*. Robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker, and if, in the course of such resistance, death is caused, it may be justified if the right of self-defence was exercised reasonably and properly, but the measure of self-defence must always be proportionate to the *quantum* of force used by the attacker and which it is necessary to repel.¹

2. **'House-breaking.'**—See s. 445, *infra*. The right of private defence of property to the extent of causing death arises not only when the house is broken into but when an attempt is made to break into the house. It is not the intention of the law that the right to defend property is available only when the thief has already effected entry, for property may be protected by attacking the thief inside the house as much as by preventing his entry into it. Where the accused was led honestly to believe that a burglar was attempting to enter his house and thus caused the death of that person, who was his own nephew, it was held that he did not exceed the right of private defence of property and had not committed any offence.²

The inmates of a house have the right, in the exercise of the right of private defence of property, of causing even the death of an offender who commits burglary or house-breaking in their house, but this right of killing an offender who commits burglary is subject to the provisions of this section which lays down very clearly that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Where the owners of a house have the thief at their mercy as he is coming out of a hole in the wall, it is not necessary for them to beat him to death with *lathi* blows and if they cause his death by fracture on his skull, they exceed the right of private defence of property and Exception (2) to s. 300 applies to their case.³

3. **'Mischief.'**—See s. 425, *infra*. 4. **'Theft'**—See s. 378, *infra*.

5. **'House-trespass.'**—See s. 442, *infra*.

CASES.

Robbery.—The accused, in resisting a sudden attack made upon them by other persons, for the purpose of cutting their crops, and when they had no time to complain

²² *Jamuna Singh*, (1944) 23 Pat. 908.

²³ 1 East P. C. 273.

²⁴ *Jamuna Singh*, *sup.*

²⁵ *Ali Mea*, (1926) 43 C. L. J. 532, 27 Cr. L. J. 1287, [1926] AIR (C) 1012.

¹ *Ram Prasad Mahlon*, (1919) 4 P. L. J. 289, 20 Cr. L. J. 375, [1919] AIR (P) 534; *Ajab Narain Singh*, (1938) 21 P. L. T. 86,

40 Cr. L. J. 611, [1929] AIR (P) 575.

² *Ali Mea*, *sup.*; *Dhu Ram*, [1929] A. L. J. 148, 30 Cr. L. J. 504, [1929] AIR (A) 299.

³ *Mahabir*, (1930) 7 O. W. N. 797, 32 Cr. L. J. 44, [1930] AIR (O) 408; *Bachchu Lal*, [1935] O. W. N. 934, 36 Cr. L. J. 1209, [1935] AIR (O) 442.

to the police, inflicted a wound on one of them with a bamboo, from the effects of which the man died. It was held that the force used, or the injuries inflicted, by the accused were not such as to exceed the right of private defence of property.⁴

House-breaking.—The accused found two men close to an aperture made in his house for committing burglary. One of them made off but the other advanced to attack the accused, when the latter gave him a blow in the dark with a club, which killed him. It was held that the accused was justified in his act.⁵

The accused, on being awakened in the middle of the night, discovered the deceased in his courtyard, the latter having effected his entrance by scaling the wall, which surrounded it on all four sides. The courtyard, of which the small gate was locked, adjoined the room in which the accused had been sleeping, and was for practical purposes one of the rooms of the house, and an integral part of the building. In the scuffle the accused killed the deceased by striking him on the head with a club. It was held that the courtyard was a building though unroofed, and that the accused, not knowing in the dark, whether the burglar was armed or not, did not exceed his right of self-defence under clause 4 of this section, by striking him three times and causing his death.⁶

Theft.—A thief entered the sugar plantation of the accused and began to cut sugar canes with a *dah* (edged instrument). The accused on hearing the sound aimed with a cross-bow in the direction of the sound and shot. The bolt hit the thief in the side and caused his death. It was held that as the thief had the *dah* with him the accused was justified in defending his property by shooting an arrow at the thief, and with a deadly weapon not actually intending to kill him, but knowing it to be likely that he would kill him, and that the accused had acted in good faith for the protection of his person and property.⁷

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

When such right extends to causing any harm other than death.

COMMENT.

Section 101 and this section restrict the right of private defence in certain cases to voluntarily causing hurt or grievous hurt. This section is connected with s. 103 just as s. 101 is with s. 100. Thus, where the offence which occasions the right of private defence of property is theft,⁸ mischief,⁹ or criminal trespass,¹⁰ the right of defence under this section only extends to the voluntarily causing to the wrong-doers some harm other than death.

This section has no application by way of defence to a charge under s. 504 (insult to provoke breach of the peace). The accused was taking earth from a tank whereupon the complainant having objected, the accused filthily abused him. The accused was thereupon tried for an offence under s. 504 and his defence was that the tank was in his possession and belonged to him. The Magistrate held that, as the complainant had failed to prove his possession of the disputed tank, the accused was justified under this section in voluntarily using abusive language. He therefore acquitted the accused.

⁴ *Guru Charan Chang*, (1870) 6 Beng. L. R. Appx. 9, 14 W. R. (Cr.) 69.

⁵ *Pelko Nushyo*, (1865) 2 W. R. (Cr.) 43; *Ram Lall Singh*, (1874) 22 W. R. (Cr.) 51.

⁶ *Ismail*, (1925) 6 Lah. 463.

⁷ *Kyaw Zam Hla*, (1904) 1 Cr. L. J. 997, 10 Burma L. R. 263.

⁸ *Hasham*, (1935) 37 C. L. J. 428, [1936] AIR (L) 28.

⁹ *Gulla Din Sharaf Din*, (1940) 31 Cr. L. J. 561, [1940] AIR (Pesh.) 6.

¹⁰ *Goburdhun Pari*, (1870) 14 W. R. (Cr.) 74; *Narain Das*, (1922) 3 Lah. 144.

On appeal, a retrial was ordered on the ground that this section could have no application by way of defence to a charge under s. 504.¹¹

CASES.

In an affray respecting land, one of the aggressive party was killed. The accused, who were exercising the right of private defence of property, were not found guilty of culpable homicide, but were convicted of rioting. It was held that the accused, not being legally guilty of culpable homicide, were not legally guilty of any other offence coupled with rioting, and, not being rioters, or members of an unlawful assembly, could claim the benefit of this section.¹² Where a person assisted by a friend retaliated severely on another, who trespassed into his house with the object of having intercourse with his wife, they were held to have committed no offence.¹³ Where A trespassed on the lands of B, whose servants seized and confined A till the following day, when B gave information to the police, it was held that the conduct of B and his servants in confining A could not be supported on the ground that they were exercising the right of private defence of property.¹⁴ Where a police-officer entered into the house of a person of suspicious character at midnight to see whether he was in the house and he was pushed out of the house by that person, it was held that the act of the police-officer in entering into the house was house-trespass and that that person was justified in pushing him out.¹⁵

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.¹

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.²

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.³

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.⁴

COMMENT.

This section defines the commencement and continuance of the right of private defence of property just as s. 99 does in the case of defence of body. In both the cases the right commences with the reasonable apprehension of danger.

1. First clause.—The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences the owner of the property is not called upon to apply for protection to the public authorities. See Comment on cl. (8) under s. 99, *supra*.

It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his person. The

¹¹ *Rakhal Das Roy v. Kailash Banu*, (1909) 11 C. L. J. 113, 11 Cr. L. J. 213.

¹² *Mitto Sing*, (1865) 3 W. R. (Cr.) 41.

¹³ *Dhaumun Teli*, (1873) 20 W. R. (Cr.) 86.

¹⁴ *Shurufoddin v. Kassinath*, (1870) 13 W. R. (Cr.) 64.

¹⁵ *Dorasamy Pillai*, (1903) 27 Mad. 52; *Indar Singh*, (1937) 39 Cr. L. J. 288, [1938] AIR (L) 60.

person in possession of property is entitled to defend himself and his property by force and to collect such members and such arms as are necessary for the purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code and when there is no time to get police help. It is lawful for a person, who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such person, if the opposite party is armed, to take suitable weapons for his defence.¹⁶

2. Second clause.—“Till the offender has effected his retreat with the property.”—“We are not sure of the meaning intended by the expression ‘till the offender has effected his retreat with the property.’ We know not certainly when he is to be considered as having effected his retreat; probably it is when he has once got clear off, having escaped *immediate* pursuit, or pursuit not having been made;.... We presume that the protection of parties pursuing robbers, &c., for the recovery of property which they have succeeded in carrying off, or for bringing them to justice, was thought not to be within the scope of the provisions touching the right of private defence.”¹⁷ It was suggested “that the privilege of this clause should operate till the offender is taken and delivered to an officer of Justice.”¹⁸

Where certain cattle were illegally attached by an official and his party but were recovered by the accused as they were being taken away, and there was a fight between the attaching party and the accused, it was held that the accused had a right of private defence of their property as it could not be said that the official and his party had effected their retreat with the property.¹⁹

This provision only applies to stolen property and not to property acquired dishonestly within the meaning of ss. 403 and 411.²⁰

“Or either the assistance of the public authorities is obtained.”—These words did not exist in the draft Code. They were added subsequently.

“Or the property has been recovered.”—A recapture of the plundered property, while it is in course of being carried away, is authorized, for the taking and re-taking is one transaction. But when the offence has been committed and the property removed, a recapture after an interval of time by the owner or by other person on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which the section contemplates seems to be a recovery either immediate or made before the offender has reached his final retreat; as where stolen cattle are tracked until ultimately overtaken in their retreat and recaptured.²¹ Mayne²² is of opinion that “resistance, within the justifiable limits, may be continued so long as the wrongful act is going on. But when the robber, for instance, has made his escape, the principle of self-defence would not extend to killing him if met with on a subsequent day. If, however, the property were found in his possession, the right of defence would revive for the purpose of its recovery. It by no means follows, however, that the right would revive to the same extent as it formerly existed at the commission of the original offence. Only such violence is lawful as would be justifiable against a person who has stolen property without intimidation; and if he resists by means which create no apprehension of death or grievous hurt, he cannot be killed, by virtue of anything contained in these sections. This is the ground of the distinction drawn in Explanation 2 and 3 between theft and robbery. In the former case, the right of defence appears to last longer than it does in the latter. What is meant is, that the right of defence against robbery, *as such*, only lasts as long as the robbery. While the fear of death, hurt, or wrongful restraint, which causes theft to grow into robbery (s. 390) continues, the offender may be killed. But when he takes to his heels with the booty the robbery is over, and the right of defence is reduced to what would have been admissible against a pickpocket.” Mayne’s view has received support from a ruling of the Judicial Commissioner of the Central Provinces, which lays down that while in all other cases the right only exists for the purposes of prevention of the offences named, in the particular case of theft the right continues for the recovery of

¹⁶ *Summa Behera*, [1944] P. W. N. 278.

¹⁷ 1st Rep., s. 158.

¹⁸ *Ibid.*, s. 156.

¹⁹ *Prag*, (1942) 17 Luck. 591.

²⁰ *Agra*, (1914) P. R. No. 37 of 1914. 16

Cr. L. J. 209, (1914) AIR (L) 579.

²¹ M. & M. 81.

²² Criminal Law of India, 4th Edn., Part II, pp. 231, 232.

the property even after the theft has been accomplished. The extent of such right is that mentioned in s. 104.²³

The Lahore High Court has differed from this view in a case in which the accused followed up tracks purporting to be those of their stolen cattle, and, prior to the arrival of the police (for whose assistance one of their party had ridden away) proceeded to the complainants' village and fired at them. It was held that the accused's right of private defence of their property had been put an end to by the successful retreat of the thieves and that their alleged re-discovery of the cattle in the complainants' possession could not revive that right.²⁴ The Nagpur High Court has doubted the earlier decision and held that the right of private defence of property against theft comes to an end if the offender has effected his retreat with the property or the assistance of the public authorities has been obtained or the property has been recovered.²⁵

Certain persons without any bona fide right removed paddy sheaves belonging to the accused who attacked the cartmen in whose carts the sheaves were being carried. The cartmen jumped out and ran off, the accused chasing them and the persons at whose instance the sheaves were carted. Injuries were inflicted and death of one of them was caused by the accused. It was held that the accused had undoubtedly a right of private defence to their property and were entitled to prevent the paddy sheaves being taken away, but their right of private defence ceased from the moment the cartmen jumped down to make their escape leaving the paddy sheaves in the possession of the accused; that they had no right to chase the cartmen and in so doing their actions were not covered by any right of private defence at all. It was also held that the accused were guilty of offences under cl. (1) of s. 304 read with s. 34 in connection with the causing of the death of the deceased, even though the author of the injuries be not known.¹

3. Fourth clause.—Against criminal trespass the person in possession of the property has the right of private defence of property so long as the trespass continues and this right extends to causing to the trespassers any harm other than death subject to the restrictions mentioned in s. 99, namely, that no more harm should be inflicted than is necessary for the purposes of defence and that there is no time to have recourse to the protection of the authorities. If, in the exercise of this right, such resistance is offered by the trespassers that a reasonable apprehension is caused to the owners that death or grievous hurt would be the result, the right of private defence of person then arises and extends to the causing of death.²

Where land in the possession of A was encroached on by the servants of B, who committed mischief on the land, and the servants of A assembled after the alleged mischief had been completed, there being no suggestion that the mischief was likely to be renewed, it was held that the servants of A could not claim the right of private defence of property which had ceased under this clause.³

The complainant's party, consisting of twelve or thirteen persons, went with pickaxes to a *bund* (embankment) erected on the land of the master of the accused in order to cut it, as it obstructed the flow of water from their lands and destroyed their crops. The accused hearing of this at once assembled to the number of 50 or 60, armed themselves with clubs and proceeded to the *bund*. At this time the complainant's party had either finished the cutting or ceased to do so, when they saw the accused approaching. The latter attacked the complainant's party and drove them to their village. One or more of the assailants also beat a man, who was present there, but was not connected with the cutting of the *bund*, both in the first attack and when they returned from the chase, and fractured his skull, in consequence of which he died shortly after. It was held that the accused were members of an unlawful assembly from the beginning, as they went armed with clubs and in large numbers to enforce their right at all hazards, that, if not so at the beginning, they became an unlawful assembly, and had no right of private defence, when the opposite party had ceased cutting the *bund*, and that, even if they had, they exceeded their right by attacking

²³ *Jārha Chamar v. Surit Ram*, (1907) 3 N. L. R. 177, 180, 181, 7 Cr. L. J. 49, 52.

²⁴ *Mir Dad*, (1925) 7 Lah. 21.

²⁵ *Punjab Rao*, [1945] Nag. 381.

¹ *Nga Pu Ke*, (1933) 35 Cr. L. J. 267, [1933]

AIR (R) 848; *Rakhia*, (1934), 35 P. L. R. 66, 36 Cr. L. J. 292, [1934] AIR (L) 595.

² *Dukshii Sha*, (1920) 22 Cr. L. J. 177, [1920] AIR (P) 752.

³ *Raj Kisto Doss*, (1869) 12 W. R. (Cr.) 43.

their opponents and chasing them and by beating the deceased.⁴ Certain cattle belonging to the accused trespassed on the complainant's field and grazed there. An attempt was made by the complainant to seize them with a view to take them to the cattle pound. The cattle ran away towards the field of the accused and were chased by the complainant and his friends. The chasers were joined by the deceased who lagged behind. The accused inflicted fatal injuries on him. It was held that the accused had no right of private defence as the deceased had not seized any cattle and was a mere straggler.⁵

4. Fifth clause.—The right of private defence against house-breaking continues only so long as the house-trespass continues, hence where a person followed a thief and killed him in the open, after the house-trespass had ceased, it was held that he could not plead the right of private defence.⁶

106. If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Right of private defence against deadly assault when there is risk of harm to innocent person.

ILLUSTRATION.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

COMMENT.

This section should be read in the light of s. 100. It provides for the risk which a person may have to run to defend himself against an assault reasonably causing the apprehension of his death.

⁴ *Ambika Lal*, (1908) 35 Cal. 443.

⁵ *Waryami*, (1928) 30 Cr. L. J. 627, [1928] AIR (L) 692.

⁶ *Balakee Jolahed*, (1868) 10 W. R. (Cr.) 9; *Gulbadan*, (1885) P. R. No. 25 of 1885.

CHAPTER V.

OF ABETMENT.

THIS Chapter applies to offences punishable under ss. 121A, 124A, 225A, 225B, 294A and 304A.¹

Abetment of a thing. **107.** A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

ILLUSTRATION.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

COMMENT.

When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal act.

The act may be done by the hands of one person while another is present, or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person: and besides these participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement or aid. It is proper to mark the nature and degree of participation which is essential to criminal liability, but it will be seen that the several gradations of action above referred to are not always treated as denoting necessarily different measures of guilt with a view to distinction in respect of punishment.

We have seen that if several persons, combining both in intent and act, commit an offence jointly, each is guilty, as if he had done the whole alone; and that so it is, if each has his several part to do, all contributing to one result. When all combine, each does the act so far as his own part extends, and as to the residue may be regarded as procuring it to be done by means of guilty agents: all the parties, so concerned, stand in the mutual relation of principals and agents. The present Chapter treats of co-agency of a less direct and immediate kind: the agent being urged forward by a person who will not himself act, but who procures or instigates another to put in execution his criminal intention.² Under this Chapter persons rendering any kind of assistance to the criminal are punishable. Jeremy Bentham³ says: "The more

¹ Act XXVII of 1870, s. 13, as amended by Act XI of 1891.

² M. & M. 83.

³ Jeremy Bentham's Works, Vol. I, Part III, Ch. XV, p. 560.

these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy, with the intention of stopping his enterprises. He places, in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances, but connected among themselves, in such manner that the enemy finds in each, new dangers and new obstacles."

Abetment under the Penal Code involves active complicity on the part of the abettor at a point of time prior to the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Nowhere concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose is punishable under the Code.

Abetment is a separate and distinct offence provided the thing abetted is an offence.⁴ Abetment does not in itself involve the actual commission of the crime abetted. "It is a crime apart."⁵ If no one commits an offence nobody else can be said to abet that offence.⁶

As a general rule a charge of abetment fails if the substantive offence is not established against the principal. But there may be an exception where the substantive offence was undoubtedly committed, and there is evidence, such as a retracted confession by the abettor, on which the jury might have found, as against him, that the offence was committed by the principal, though, as against the latter, the confession would be insufficient for a conviction of murder.⁷

Scope.—The definition of 'abetment' given here applies to all Acts passed by the Government of India.⁸

Ingredients.—Abetment is constituted (1) by instigating a person to commit an offence; or (2) by engaging in a conspiracy to commit it; or (3) by intentionally aiding a person to commit it.⁹

(1) **Abetment by instigation.**—**First clause.**—A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act by any means or language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement.¹⁰ The word 'instigate' means to goad or urge forward or to provoke, incite, urge or encourage to do an act. A mere intention or preparation to instigate is neither instigation nor abetment.¹¹ Advice can become 'instigation' if it is meant actively to suggest or stimulate the commission of an offence. Advice *per se* cannot necessarily be instigation.¹² A mere acquiescence, or permission, does not amount to an instigation. Nor can deliberate absence from the scene of offence amount to instigation.¹³ Instigation implies knowledge of the criminality of an act. Words which amount merely to a permission may perhaps amount to an instigation, but this will depend on the position of the speaker and the occasion on which they are spoken.* Where the accused expressed approval of the conduct of certain persons who were maltreating a tenant for committing extortion and as a result of his suggestion that "the tenants ought to be beaten," blows were inflicted, it was held that the accused's remarks stimulated the commission of an offence and, therefore, his conviction under s. 330 and this section was proper.¹⁴

The word 'instigation', as used in this section, may be an instigation of an unknown person.¹⁵

⁴ *Sesha Ayyar v. Venkatasubba Ghetty*, (1923) 19 L. W. 201, [1924] M. W. N. 268, 25 Cr. L. J. 442, [1924] AIR (M) 487.

⁵ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 159, 52 Cal. 196.

⁶ *Abdul Karim*, (1930) 6 Luck. 358.

⁷ *Umadasai Dasi*, (1924) 52 Cal. 112.

⁸ General Clauses Act (X of 1897), ss. 3 (1), 4 (2).

⁹ *Imamdi Bhooyah*, (1873) 21 W. R. (Cr.) 8.

¹⁰ *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 542, 23 Cr. L. J. 466, [1923] AIR (B) 44.

¹¹ *Parimal Chatterji*, (1932) 60 Cal. 327;

Lakshminarayana Aiyar, [1917] M. W. N. 831, 6 L. W. 677, 19 Cr. L. J. 29, [1918] AIR (M) 738.

¹² *Raghunath Dass*, (1920) 4 P. L. J. 129, 1 P. L. T. 60, 21 Cr. L. J. 213, [1920] AIR (P) 502; *Nazir Ahmad*, (1926) 25 A. L. J. R. 149, 28 Cr. L. J. 313, [1927] AIR (A) 730.

¹³ *Etim Ali Majumdar*, (1900) 4 C. W. N. 500.

¹⁴ *Nazir Ahmad*, (1926) 25 A. L. J. R. 149, 28 Cr. L. J. 313, [1927] AIR (A) 730.

¹⁵ *Ganesh D. Savarkar*, [1909] 12 Bom. L. R. 105, 34 Bom. 394.

Explanation 1 to this section says that a person who (1) by wilful misrepresentation, or (2) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. The illustration is an example of instigation by 'wilful misrepresentation.' Instigation by 'wilful concealment' is where some duty exists which obliges a person to disclose a fact. A mere omission to bring certain facts within the knowledge of the accused to the notice of the higher authorities does not itself constitute abetment, unless the omission is one which can be said to be an illegal omission, i.e., involves a breach of a duty imposed by law, and not merely a breach of a departmental rule of conduct or discipline. It cannot be said that the mere omission to bring to the notice of the higher authorities offences committed by other persons amounts to abetment of those offences. It may form the foundation for departmental action against him in a departmental way, but it cannot in law amount to abetment of the offence committed by a fellow clerk.¹⁶ Mere failure to prevent the commission of an offence is not by itself an abetment, when there is nothing to show that the accused instigated the commission of the offence or helped in any way to do it.¹⁷

The offence is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not, or whether, having consented he commits the crime or not. This form of abetment depends upon the intention of the person who abets, and not upon the act, which is actually done by the person whom he abets.¹⁸

Instigation through a third party.—It is immaterial whether the instigation be personal, or through the intervention of a third person.¹⁹ A person may constitute himself an abettor by the intervention of a third person without any direct communication between himself and the person employed to do the thing, and in the case of abetment by conspiracy, it is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.²⁰

Cases.—**Master's liability.**—Where, of several persons constituting an unlawful assembly, some only were armed with sticks, and A, one of them, was not so armed, but picked up a stick, and used it, B (the master of A), who gave a general order to beat, was held guilty of abetting the assault by A.²¹ The carrying off of certain buffaloes, belonging to the complainant, by order of the accused, and the retention of them in the custody of the latter's servant, were held to amount to an abetment of theft.²²

Suppression of evidence.—Where the accused asked a witness to suppress certain facts in giving his evidence, it was held that this was an abetment of giving false evidence.²³

Deliberate absence is no instigation.—Where persons of influence being aware of the objects of the members of an unlawful assembly deliberately absented themselves from the locality where such assembly was formed, it was held that that was not such sympathy as amounted to instigation.²⁴

Instigation to commit offence by letter or telephone.—Where one person instigates another to the commission of an offence by means of a letter sent through the post, the offence of abetment by instigation is completed as soon as the contents of such letter become known to the addressee.²⁵ If the letter never reaches him the act is only an attempt to abet.¹ The accused telephoned to W asking if he could have two boys for immoral purposes. No particular boys were named or indicated. The accused was charged with inciting W "to procure the commission by certain male unknown persons of acts of gross indecency with him", the accused. It was held that as the accused was inciting W to commit what, if he had done the acts, would have been a criminal

¹⁶ *Anantachari*, [1938] M. W. N. 908, [1938] 2 M. L. J. 574, 48 L. W. 4781, 40 Cr. L. J. 302, [1938] AIR (M) 996.

¹⁷ *Upendra Chandra*, (1941) 45 C. W. N. 683, (1941) 42 Cr. L. J. 796, [1941] AIR (C) 456.

¹⁸ *Tha La Aung*, (1906) 12 Burma L. R. 70, 3 Cr. L. J. 437.

¹⁹ *Robert Carr (Earl of Somerset)*, (1616) 2 St. Tr. 965.

²⁰ *Kuhro*, [1945] K. R. 275.

²¹ *Rasookoolah*, (1869) 12 W. R. (Cr.) 51; *Ghanshyam Singh*, (1927) 6 Pat. 627.

²² *Tarinee Prasaud Banerjee*, (1872) 18 W. R. (Cr.) 8.

²³ *Andy Chetty*, (1865) 2 M. H. C. 438, 1 Weir 114.

²⁴ *Etim Ali Majumdar*, (1900) 4 C. W. N. 500.

²⁵ *Sheo Dial Mal*, (1894) 16 All. 389.

¹ *Ransford*, (1874) 18 Cox 9

offence, it was immaterial that the male persons whom he was to procure were not at the time ascertained or that the accused was inciting W to incite another to commit an offence, and that the accused was rightly convicted.²

Consent to hold stakes.—Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight, each put down £1, so that £2 might be paid to the winner. The accused consented to hold the £2, and to pay it over to the winner. Otherwise, he had nothing to do with the fight and he was not present at it. There was no reason to suppose that the life of either man would be endangered. The men fought, and one of them received injuries of which he afterwards died. The accused having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner. It was held that the mere consent to hold the stakes could not be said to amount to a participation in the fight.³

(2) **Abetment by conspiracy.**—**Second clause.**—"Conspiracy" consists in a combination and agreement by persons to do some illegal act or to effect a legal purpose by illegal means. "So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as *Grose, J.*, said in *The King v. Briscoe*,⁴ is generally 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.' The number and the compact give weight and cause danger."⁵

Conspiracy is now made a substantive offence in India. In order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy, and an act, or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.⁶ Where parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan is the act of the whole.⁷ Where persons combine to attack a common enemy, each is abetting the conduct of the other.⁸

A mere conspiracy would not amount to abetment, and it would appear that if conspirators were detected before they had done more than discussed plans, with a general intention to commit an offence, they would not be liable as abettors.

Before the introduction of Chapter VA, conspiracy, except in cases provided⁹ for by ss. 121A, 311, 400, 401 and 402 of the Code, was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy, and amounted to a distinct offence for each distinct offence abetted by conspiracy.¹⁰

A conviction for conspiracy cannot stand when the charge against the other alleged conspirators has failed.¹¹ When a conspiracy between several persons is alleged, it is not necessary for the prosecution to prove, before it can be held established, that each conspirator knew and had personal communication with all the rest, because some of them might be intermediaries.¹²

Cases.—**Suicide.**—**Sati.**—Evidence that a woman prepared herself to commit suicide in the presence of the accused, that they followed her to the pyre, and stood by her, her step-sons crying "Ram, Ram," and one of the accused admitted that he told the woman to say "Ram, Ram," and she would become *suttee*, was held to prove active connivance and unequivocal countenance of the suicide by the accused, and to justify

² *Bentley*, [1923] 1 K. B. 403.

³ *Taylor*, (1875) L. R. 2 C. C. R. 147.

⁴ (1803) 4 East 164, 171.

⁵ *Per Willes, J.*, in *Mulcahy*, (1868) L. R. 3 H. L. 306, 317. *Abdul Hamid*, (1943) 46 P. L. R. 255; *Abdul Hamid*, (1943) 46 Cr. L. J. 341.

⁶ *Explan. 5 to s. 108; Kahl Munda*, (1901) 28 Cal. 797; *Gobind Dobe*, (1874) 21 W. R. (Cr.) 35.

⁷ *Ameer Khan*, (1871) 17 W. R. (Cr.) 15.

⁸ *F.B.*

⁹ *Jaimangal*, (1935) 37 Cr. L. J. 864, [1936] A. L. J. 462, [1936] AIR (A) 437.

¹⁰ *Sher Ali*, (1878) P. R. No. 18 of 1879.

¹¹ *See Tirumal Reddi*, (1901) 24 Mad. 523.

¹² *Jogjiban Ghose*, (1909) 9 C. L. J. 663, 13 C. W. N. 861, 10 Cr. L. J. 125. *See Plummer*, [1902] 2 K. B. 339.

¹³ *Burn*, (1909) 11 Bom. L. R. 1153, 10 Cr. L. J. 530.

the inference that they had engaged with her in a conspiracy for the commission of the *suttee*.¹³ It is no defence that the abettors were expecting a miracle and did not anticipate that the pyre would be ignited by human agency.¹⁴

Forgery.—To prepare, in conjunction with others, a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document, are facts which would support a conviction for abetment of forgery as being acts done to facilitate the commission of the offence.¹⁵

Abortion.—A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.¹⁶

Giving false information.—When, as the result of a conspiracy to make a false report, one person makes a false report in pursuance of the conspiracy and another accompanies him and says nothing, the person who tells the story is guilty under the provisions of s. 182 and the other of abetment.¹⁷

(3) **Abetment by aid.**—Third clause.—(a) **By an act.**—A person abets by aiding, when by any act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof (*vide* expln. 2). For instance, the supplying of necessary food to a person known to be engaged in crime is not *per se* criminal; but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it.¹⁸ “The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence. But if the person who lends his support does not know or has no reason to believe that the act which he was aiding or supporting was in itself a criminal act, it cannot be said that he intentionally aids or facilitates the doing of the offence. I will give an example. A, B and C are friends. A and B have fallen out, so much so that A is determined to shoot B. A goes to the house of C, and on some pretext or other induces C to call B to his house. C has not the least idea that A would shoot B on his arrival. B arrives and is murdered by A. A committed murder. Can it be said that C is guilty of abetment, because he ‘intentionally aided’ A? C did give his aid in calling B to his place. But he never knew why A wanted him to send for B. Whatever C did, he did intentionally, for his intention it certainly was that B should come. But it was not C’s intention that a crime should be committed. C cannot be held guilty of abetment of murder.”¹⁹

A person who knowingly aids in the disposal of stolen property is an accomplice within the meaning of this clause.²⁰

Presence does not amount to aiding.—Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement or unless some specific duty of prevention rests on him, which he leaves unfulfilled in such wise that he may be safely taken as having joined in conspiracy for perpetration of the offence.²¹ An offence of abetment by presence falls through, if the principal offence is not substantiated.²² A priest who officiated at a bigamous mar-

¹³ *Mohit Pandey*, (1871) 3 N. W. P. 316.

¹⁴ *Vidyasagar Pande*, (1928) 8 Pat. 74.

¹⁵ *Padala Venkatasami*, (1881) 3 Mad. 4.

¹⁶ *Whitchurch*, (1890) 24 Q. B. D. 420.

¹⁷ *Ram Jiawan*, (1926) 3 O. W. N. 96, 27 Cr. L. J. 822, [1926] AIR (O) 448.

¹⁸ *Lingam Ramanna*, (1880) 2 Mad. 137.

¹⁹ *Per Mukerji, J.*, in *Ram Nath*, (1924) 47 All. 268, 275; *Shivani*, (1928) 29 Cr. L. J. 561, [1928] AIR (N) 257.

²⁰ *Maouthaiayam*, (1934) 58 Mad. 86.

²¹ *Lakshmi*, (1886) Cr. R. No. 51 of 1886, Unrep. Cr. C. 303; *Shidlingappa*, (1896) Cr. R. No. 13 of 1896, Unrep. Cr. C. 844; *Chattru Gope*, (1917) 19 Cr. L. J. 63, [1918] AIR (P) 584; *Yunus Ali*, (1928) 32 C. W. N. 783, 30 Cr. L. J. 820; *Allah Wasaya*, (1947) 49 P. L. R. 95, 48 Cr. L. J. 605.

²² *Raja Khan*, (1920) 32 C. L. J. 478, 22 Cr. L. J. 448, [1920] AIR (C) 834.

riage was held to have intentionally aided it, but not the persons who were merely present at the celebration or who permitted its celebration in their house, when such permission afforded no particular facility for the act.²³ Where in a murder case a co-accused stated that she remained an unwilling spectator while the offence was being committed by the other accused, it was held that the alleged omission of a co-accused to intervene or raise an alarm did not constitute an abetment of murder, inasmuch as her inaction did not constitute criminality.²⁴

Cases.—Lending house to extort confession.—A zemindar who had lodged a complaint of theft lent a house belonging to him to the police-officer who was conducting the investigation in the theft case for the purposes of such investigation. It was found that at the time of lending the house the zemindar knew that it was likely to be used for the purpose of putting illegal pressure upon persons suspected of complicity in or knowledge of the theft, and also that the zemindar was at times present while the police-officer was engaged in that house in torturing certain persons summoned there by him, though he did not actually take part in the torturing. It was held that the zemindar was, by virtue of Explanation 2, guilty of doing an act in order to facilitate the commission of an offence under s. 330.²⁵

Ordering assault.—Where orders were given to assault a particular person, who died in consequence of the injuries inflicted, the person giving the orders was held guilty of abetting the commission of voluntarily causing grievous hurt.¹ But if no definite orders were given there would be no abetment.²

Giving weapon to hurt another.—Where A gave a *dao* (an edged weapon) to B, who had given out his intention to coerce the party against whom he was acting, and who inflicted grievous hurt on such party with the *dao*, A was held guilty of abetment in the commission of that act.³

Acceptance of unstamped receipt.—Where a debtor paid a sum of money to his creditor, and asked for a stamped receipt from him, who had not at hand a stamp, and then accepted an unstamped receipt, saying he would affix a stamp thereto, which he did not do, it was held that this did not constitute abetment of the offence of giving an unstamped receipt because he had done or omitted nothing which it was in his power to effect.⁴

Attestation or writing of document.—G, a prostitute, purchased a child for purposes of prostitution: at her request the first accused wrote a document evidencing the transaction; the other three accused attested the document, and all the four accused were present when the child was handed over to G. G also put into the hands of the first accused the price of the child, which money he handed over to the child's mother. It was held that the accused could not be convicted for abetment by intentionally aiding the illegal disposal of the child under s. 372.⁵

Act abetted illegal but not offence.—A guardian of a Mahomedan married a female infant aged six years who caused a marriage ceremony to be gone through in her name with another man, during the lifetime of her husband, but in her absence and without her consent, was held not to have committed the offence of abetting bigamy.⁶ Because to constitute abetment the accused must be proved either to have instigated or aided some person to commit an offence. This case has been distinguished in a subsequent case in which a Hindu having given his daughter, said to be eight years old, in marriage to a certain person, again gave her in marriage to another in the lifetime of her first husband. It was held that he was guilty of an offence under s. 109 read with s. 494, although his daughter had not the knowledge and intelligence necessary to enable her to commit an offence under s. 494.⁷

(b) **By illegal omission.**—To prove abetment by 'illegal omission', it is necessary to show that the accused intentionally aided the commission of the offence

²³ *Umi*, (1882) 6 Bom. 126.

²⁴ *Sarju Prasad*, (1914) 15 Cr. L. J. 617, [1914] AIR (Q) 262.

²⁵ *Faiyaz Husain*, (1896) 16 A. W. N. 194.

¹ *Doorgessur Surmah*, (1867) 7 W. R. (Cr.) 61, [97].

² *Luchmun Singh*, (1904) 31 Cal. 710.

³ *Eshan Meah*, (1869) 12 W. R. (Cr.) 52.

⁴ *Mitthu Lal*, (1885) 8 All. 18; *Janki*, (1882)

7 Bom. 82; *Nga Shwe Buin*, (1904) 11 Burma L. R. 34, 1 Cr. L. J. 874; *Madansing*, (1898)

7 C. P. L. R. (Cr.) 21.

⁵ *Bondili Sankara Singh*, (1884) 1 Weir 47.

⁶ *Abdool Kurreem*, (1878) 4 Cal. 10.

⁷ *Nand Lal Singh*, (1902) 6 C. W. N. 343.

by his non-interference,⁸ and the omission involved a breach of a legal obligation.⁹ Thus every police-officer is bound to shelter a person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury and if he omits to perform this duty, he is guilty of abetment.¹⁰ Where at a public meeting an unknown person committed an offence under the Calcutta Police Act, 1866, by the blowing of a bugle and the evidence showed that the accused, who was the president of the meeting, had not arranged for the blowing of the bugle and that he had no knowledge that the bugle would be blown at intervals, it was held that the accused could not be convicted on a charge of abetment under s. 109. Failure to request the blower of the bugle to desist would not amount to an intentional aiding of the blowing of the bugle after it had been prohibited by the police.¹¹

Cases.—Non-interference where there is duty to interfere.—A village Magistrate, who was present while certain police constables were wrongfully confining and causing hurt to a resident of the village to extort a confession and who did not interfere with nor stop the criminal acts committed in his presence nor report them to a Magistrate, was held guilty of abetment of offences under ss. 330 and 348 of the Penal Code.¹² But the mere fact that the offence of extortion was committed in the presence of a village *chowkidar* without eliciting any disapproval on his part was held not to render him liable as an abettor.¹³ Where a head constable, who knew that certain persons were likely to be tortured for the purpose of extorting confession, purposely kept out of the way, it was held that he was guilty of abetment.¹⁴

Omission must be of legal obligation.—A motor car was driven by the chauffeur of the accused, on a road in Mahabaleshwar, driving over which was forbidden under s. 9 of the Motor Vehicles Act (Bom. II of 1904). The accused was at Poona then but was convicted of abetment of the offence under s. 18 of the Act on the ground that it was his duty to inform the driver of the existence of the prohibition. It was held on revision by the High Court that as no legal obligation was imposed on the accused to instruct his servant he was not liable.¹⁵ Where it was not proved that accused's intention in omitting to report a plot, under s. 44 of the Criminal Procedure Code, was with a view to aiding the waging of war, it was held that the accused could not be convicted of the offence of abetment of waging war.¹⁶ A and B entered into a conspiracy that B should falsely personate X, and withdraw money held in deposit at the Collectorate. A wrote a letter to C saying that B was X, and C on the faith of this assurance and in good faith identified B as X at the treasury and B withdrew the amount. It was held that the mere failure on the part of C to inform the treasury officer that he was identifying X only on the assurance of A did not amount to an illegal omission within the meaning of this section, and C could not be convicted for abetment of cheating by personation unless he knew that the man whom he identified was not X.¹⁷

Attempt.—The abetment of an offence, within the meaning of s. 40, being itself an offence punishable under this Chapter, an attempt to commit the offence of abetment is provided for in s. 511, and there is therefore no legal obstacle to punishing such offence.¹⁸

English law.—According to English law, criminals are divided into four classes. The distinction is based on the consideration whether a party was present or absent at the commission of the offence.

(1) *Principal in the first degree.*—One who is the actual perpetrator of the crime. It is not necessary that he should be actually present when the offence is consummated; thus one who lays poison or a trap for another is a principal in the first

⁸ *Khajjah Noorul Hossein v. C. Fabre-Tonnerre*, (1875) 24 W. R. (Cr.) 26.

⁹ *Khadim Sheikh*, (1869) 4 Beng. L. R. (A. Cr. J.) 7; *Cooverji*, (1906) 9 Bom. L. R. 159, 161, 5 Cr. L. J. 173, 176; *Shevanti*, (1928) 29 Cr. L. J. 561, [1928] AIR (N) 257.

¹⁰ *Latifkhan*, (1895) 20 Bom. 394.

¹¹ *Jagdish Narayan*, (1932) 56 C. L. J. 231, 36 C. W. N. 722, 34 Cr. L. J. 36, [1933] AIR (C) 36.

¹² *Appanna Hegade*, (1899) 1 Weir 52; *Krishna Shetti*, (1891) 1 Weir 50.

¹³ *Kali Churn Gangooly*, (1873) 21 W. R. (Cr.) 11.

¹⁴ *Gopal Chunder Sirdar*, (1882) 8 Cal. 728; but, see, *Lakshmi*, (1886) Cr. R. No. 51 of 1886. Unrep. Cr. C. 303.

¹⁵ *Cooverji*, (1906) 9 Bom. L. R. 159, 5 Cr. L. J. 173.

¹⁶ *Goman Saya*, (1913) 14 Cr. L. J. 610.

¹⁷ *Radhe Kishun*, (1929) 10 P. L. T. 657, 30 Cr. L. J. 642, [1929] AIR (P) 157.

¹⁸ *R. Spier*, (1887) P. R. No. 49 of 1887. See *Baku*, (1899) 24 Bom. 287, 1 Bom. L. R. 678.

degree. Nor need the deed be done by the principal's own hands ; for it will suffice if it is done through an innocent agent, as for instance, if one incites a child or a mad-man to murder. Even an animal may be employed as an innocent agent. For example, a person who sets a dog upon people is himself guilty of assaulting them.

(2) *Principal in the second degree.*—One by whom the actual perpetrator of the crime is aided and abetted at the very time when it is committed. He may or may not be actually present at the scene of the crime. It will suffice, if he has the intention of giving assistance, and is sufficiently near to give the assistance : as when one is watching outside, while others are committing a felony inside the house; or seconds in a prize-fight which ends fatally. An aider or abettor is only liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose.

Both the above classes of principals are liable to the same punishment.

(3) *Accessory before the fact.*—One who being absent at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony. He is punishable in all respects as the principal felon. If present at the commission he would be a principal.

(4) *Accessory after the fact.*—One who, knowing a felony to have been committed by another, receives, relieves, comforts, assists, harbours or maintains the felon.

A felony must be actually committed, or there cannot be any accessories.

Principals are dealt with in the Penal Code under ss. 34 to 38. There is no distinction between 'principals in the first degree' and 'principals in the second degree,' in the Code. Under English law this distinction is confined to felonies only. It does not exist in cases of misdemeanour or serious offences as high treason or forgery.

The offence of abetment corresponds as nearly as one word can be said to correspond to another to the offence which is known in England of being an 'accessory before the fact.' But mere concurrence—that kind of passive concurrence which is known in England as being an 'accessory after the fact'—is not abetment and is not to be treated as abetment.

'Accessory after the fact' is treated in scattered sections. See provisions relating to harbouring, ss. 52A, 212, 216; and, also ss. 130, 136, 137, 410-414.

PRACTICE.

Evidence.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.¹⁹ 'Conspiracy' is a fact which even in a criminal case can be inferred from circumstantial or oral evidence.²⁰ A conspiracy may be proved by other than oral evidence : it may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime.²¹ Direct evidence of conspiracy is hardly ever adduced but unlawful conspiracy is to be inferred from the conduct of the parties.²²

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.²³ It is necessary to prove criminal intention against the accused. The finding that accused No. 1 could not have acted in the illegal way without the approval and connivance of accused No. 2 is not sufficient to prove abetment.²⁴

¹⁹ Indian Evidence Act, I of 1872, s. 10.

²⁰ Per Fawcett, J., in *Mahomed Ibrahim Amiruddin Munshi*, Cr. Appeal No. 505 of 1926, decided on January 10, 1927 (Unrep. Bom.).

²¹ *Annappa Bharamguda*, (1907) 9 Bom. L. R. 347, 5 Cr. L. J. 323; *Jumo*, (1916) 9 S. L. R.

223, 16 Cr. L. J. 283, [1916] AIR (S) 22.

²² *Duffield*, (1851) 5 Cox 404.

²³ *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.

²⁴ *Ramnarayan Misra*, (1921) 2 P. L. T. 193, [1921] AIR (P) 304.

Procedure.—A person, having been charged with a substantive offence, can be convicted for abetment thereof if the facts justify such conviction. The principle is that, if evidence adduced in support of the charge for the substantive offence does not give notice to the accused of all the facts which constitute abetment, he cannot be convicted of abetment. A person can be convicted of abetment without a separate charge, where the circumstances bring the case under s. 237 of the Criminal Procedure Code.²⁵ But if on facts the accused may be charged with the principal offence, and abetment, he may be convicted of abetment though only charged with the principal offence.¹

In the light of the decision of the Privy Council in *Begu v. Emperor*² the cases which laid down that on a charge of a substantive offence the accused could not be convicted of the abetment of that offence are no longer of any authority.³

The second clause of this section read with the definition of 'conspiracy' in s. 120-A makes it clear, that the Crown has a right to file a prosecution under s. 120B whether or not in pursuance of the conspiracy to commit an offence the offence takes place. If it does take place, the prosecution have the option to treat the person who has conspired with another as an abettor within the meaning of this section. Where in a case there was evidence of criminal conspiracy between some persons to make a false statement in an affidavit and a false statement was in fact made in the affidavit in pursuance of that conspiracy, it was held that the Crown has the option to prosecute a conspirator for abetment upon the actual commission of the offence in pursuance of the conspiracy, and that the question of previous complaint or consent required by s. 196A, Criminal Procedure Code, did not arise.⁴

Separate sentences.—Where in pursuance of a conspiracy to commit an offence, that offence is committed, separate convictions may be had under s. 120B and for the offence committed. But if the time between the commission of two offences is short only one sentence may be awarded.⁵

108. A person abets¹ an offence, who abets either the commission of an offence, or the commission of an act² which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Abettor

Explanation 1.³—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.⁴—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

ILLUSTRATIONS.

(a) A instigates B to murder C: B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.⁵—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

²⁵ *Jnanadacharan Ghatak*, (1929) 57 Cal. 807; *Khumman*, (1931) 7 Luck. 102; *Provincial Government, Central Provinces and Berar v. Gomaji*, [1944] Nag. 589.

¹ *Yeditha Subbaya*, [1912]. M. W. N. 725, 23 M. L. J. 722, 13 Cr. L. J. 453.

² (1925) 52 I. A. 191, 6 Lah. 226, 27 Bom.

L. R. 707; *Syamo Maha Patro*, (1932) 55 Mad. 908, F.B.; *Bhikari Singh*, (1934) 13 Pat. 729.

³ *Chand Nur*, (1874) 11 B. H. C. 240; *Padmanabha Panjikannaya*, (1909) 33 Mad. 264.

⁴ *Amarlato* [1944] Kar. 411.

⁵ *Ismail*, (1946) 48 P. L. R. 410.

ILLUSTRATIONS.

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

ILLUSTRATION.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

ILLUSTRATION.

A consents with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section, and is liable to the punishment for murder.

COMMENT.

'Abettor' under this section means the person who abets (1) the commission of an offence, or (2) the commission of an act which would be an offence if committed by a person not suffering from any physical or mental incapacity. In the light of the preceding section he must be an instigator or a conspirator or an intentional helper. This section is in conformity with the English law except on one point. Under English law a person using an innocent agent as his tool is deemed to be a principal whereas under this section he is treated as an abettor. So far as the actual result is concerned this distinction has not much meaning.

1. 'Abets'.—See s. 107, *supra*. In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.⁶

2. 'Commission of an act.'—There must be abetment of the commission of an act. The section does not contemplate any act of subsequent abetment. Thus, a person cannot be convicted of abetment of a false charge solely on the ground of his having given evidence in support of such charge.⁷

An act done after an offence is complete which might help the offender does not amount to abetment.⁸

3. **Explanation. 1.**—If a public servant is guilty of an illegal omission of duty made punishable by the Code, and a private person instigates him he abets the offence of which such public servant is guilty, although the abettor, being a private person, could not himself have been guilty of that offence.

4. **Explanation 2.**—The offence of abetment is complete notwithstanding that the person abetted refuses to do the thing, or fails involuntarily in doing it, or does it and the expected result does not follow. The offence of abetment by instigation depends upon the intention of the person who abets; and not upon the act which is actually done by the person whom he abets.⁹ If it was impossible to accomplish the commission of an offence in a way suggested by the abettor and no offence is committed then the abettor would not be liable.

'Effect requisite to constitute the offence, etc.'—An offence can be abetted though the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should be caused by them.¹⁰ Where, therefore, the accused offered money for the killing or disabling of the deceased by means of charms and it was left to the persons who were to earn the money to decide whether their victim was to be killed or disabled, it was held that he was guilty of abetment of murder.¹¹ In a Bombay case a doubt has been expressed whether abetment of murder by sorcery or other impossible means is an offence under the Code.¹²

5. **Explanation 3.**—This Explanation makes it clear that the person abetted need not have any guilty intention in committing the act. It applies to abetment generally and there is nothing to indicate that it applies only to abetment by instigation and not to other kinds of abetment. The illustrations are not intended to be exhaustive.¹³ If a man does, by means of an innocent agent, an act which amounts to a crime, the employer, and not the agent, is accountable for the act.¹⁴ Illustrations (b), (c) and (d) exemplify this explanation. R sold to D certain trees which in fact and to the knowledge of R, though not to the knowledge of D, belonged to a third person. The trees were sold to D with the intention that they should be cut down and taken away. It was held that R committed the offence of abetment of theft.¹⁵

'Guilty intention or knowledge.'—The offence of abetment depends upon the intention of the person who abets and not upon the knowledge or intention of the person he employs to act for him. A person may be guilty of abetment even though the person whom he has abetted is not guilty because his act which would have been a criminal act if it had been done with guilty intention or knowledge has not been shown to have been done with such intention or knowledge.¹⁶

English law.—If the person abetted does not know that the act is illegal he is considered as an innocent agent only, and the abettor is held liable as a principal.

6. **Explanation 4.**—According to this Explanation a person may himself be an abettor by the intervention of a third person, without any direct communication between himself and the person employed to do the thing.

⁶ *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41; *Rajmal*, (1924) 26 Cr. L. J. 1069, [1925] AIR (N) 372.

⁷ *Ram Panda*, (1872) 9 Beng. L. R. Appx. 16; *Pann Pundah*, (1872) 18 W. R. (Cr.) 28; *Jugul Mohini Dasser*, (1881) 10 C. L. R. 4.

⁸ *Hazari Lal*, (1920) 22 Cr. L. J. 452, 2 P. L. T. 73, [1921] AIR (P) 286.

⁹ *Imamdi Bhooyah*, (1878) 21 W. R. (Cr.) 8.

¹⁰ *Sahib Dilla*, (1885) P. R. No. 20 of 1885.

¹¹ *Ibid.*

¹² *Pestanjí Dinsha*, (1878) 10 B. H. C. 75.

¹³ *Chaube Dinkar Rao*, (1933) 55 All. 654.

¹⁴ *Bleasdale*, (1848) 2 C. & K. 765; *Dhanram*, (1901) 14 C. P. L. R. 192.

¹⁵ *Ram Charan*, (1898) 18 A. W. N. 147.

¹⁶ *Khushi Mohammad*, (1940) 42 P. L. R. 447.

'Abetment of an offence being an offence.'—These words do not mean "when an abetment of an offence is actually committed" but that, when the abetment of an offence is by definition or description an offence under the Penal Code, that is, when an abetment of an offence is punishable under s. 109 or s. 116 or other provision of the Code, then the abetment of such abetment is also an offence. Where S instigated K, a bench clerk in the Court of M, a Presidency Magistrate, to instigate the latter to accept an illegal gratification for acquitting an accused in a case and granting sanction against the complainant in the case, and K received such gratification as a police-spy, and intending to get S arrested, and did not in fact instigate M to accept the same, it was held that S was guilty of the abetment of bribery under s. 161 read with s. 116.¹⁷ The accused paid Rs 15 to V to be handed over to a medical officer as a bribe. V did not pay the amount to the officer. On the complaint against V by the accused, V was convicted of misappropriation. The accused was subsequently prosecuted on the charge of abetting the commission by V of the offence of bribing a public servant. It was held that he was guilty of abetment of an offence under s. 161 read with s. 116. The defence that the offence which he abetted was not committed would not be tenable in view of Explanations 2 and 4 to this section.¹⁸

'Abetment of such abetment.'—It is not necessary to an indictment for the abetment of an abetment of an offence to show that such offence was actually committed.¹⁹ The abetment of an abetment of an offence is no more and no less than the abetment of the offence. A person may constitute himself an abettor by the intervention of a third person without any direct communication between himself and the person employed to do the thing, and in the case of abetment by conspiracy, it is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.²⁰

A sought the aid of B with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. It was held that though the offence of theft had not been committed yet A was liable for abetment of theft.²¹ Where the accused asked a native doctor to supply her with medicine for the purpose of poisoning her son-in-law, it was held that the offence committed might be treated as an instigating of the doctor to abet the accused in the commission of the murder, and, with reference to this Explanation, might have been punished under ss. 116 and 302.²²

7. Explanation. 5.—This Explanation applies to abetment by conspiracy.²³ It is not necessary that all persons joining in any conspiracy must be aware of every secret or every minute detail. When the number of persons conspiring to do a particular act is very large there will be a few amongst them who will plot and plan, and though the others are not fully cognizant of all facts yet their liability is not at all lessened. Where two persons were indicted for making and engraving a plate for the purposes of forgery, and it was proved that one of them gave the order for the manufacture of the plate to an innocent agent, who never saw the other until it was completed, it was held that they were both correctly charged as principals.²⁴

Mere knowledge.—Mere subsequent knowledge of the offence is insufficient to constitute abetment.²⁵ And mere knowledge of a design on the part of another to commit an offence and speaking to that other about it without evidence that the person aware of the design instigated the other by word or deed to commit the offence, does not constitute abetment.¹

Principal cannot be abettor.—A person who has been convicted of an offence as principal cannot also be punished for abetting it.²

¹⁷ *Srilal Chamaria*, (1918) 46 Cal. 607.

¹⁸ *Proc. Govt., C. P. & Berar v. Murlidhar*, [1942] N. L. J. 104.

¹⁹ *Troylukho Nath Chowdhry*, (1878) 4 Cal. 366; *Dinonath Burooa*, (1872) 18 W. R. (Cr.) 32.

²⁰ *Md. Ayub Khuhro*, [1945] Kar. 275.

²¹ *Troylukho Nath Chowdhry*, (1878) 4 Cal. 366.

²² *Musst. Bakhtawar*, (1882) P. R. No. 24

of 1882.

²³ *Chauhe Dinkar Rao*, (1933) 55 All. 654, 664.

²⁴ *Buli*, (1845) 1 Cox 281.

²⁵ *Shumeeruddeen*, (1865) 2 W. R. (Cr.) 40.

¹ *Venkatasami*, (1886) Weir, 3rd Edn., 187.

² *Jeetoo Chowdhry*, (1865) 4 W. R. (Cr.) 23; *Ramnarain Josh*, (1865) 4 W. R. (Cr.) 37.

PRACTICE.

The offence of abetment is a substantive one, and the conviction of an abettor is, therefore, in no way dependent on the conviction of the principal.³

108A. A person abets an offence within the meaning of this Code who, in British India, abets the commission of any act without and beyond British India which would constitute an offence if committed in British India.

Abetment in
British India of
offences outside it.

ILLUSTRATION.

A, in British India, instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder.

COMMENT.

Object.—This section was added by Act IV of 1898, s. 3. It provides for the punishment of abetment of the commission of an offence outside British India. The Select Committee in their Report observed: “We have made it an offence for a person in British India to abet any act which would be an offence if committed in British India, but, as a fact, is committed outside. In short, to put it in popular language, we have extended the law of abetment of offences committed outside British India. It has been held by the Bombay High Court that if a person in British India abetted or incited a murder in Goa, he would not be guilty of any offence. We have come to the conclusion that he ought to be deemed guilty of an offence, and that India is not to be made an *alsatia* for instigators of crime.”⁴

The section provides for the difficulty discussed in *Gunpatrao Ramchandra's* case⁵ in which it was held that an abetment in British India by a British subject of an offence committed in a foreign territory was not an offence punishable under the Penal Code, and could not, therefore, be tried by a Court in British India. Under the section it is essential that the offence abetted shall be an offence recognized in British India and that its abetment shall be complete in British India.

The section contemplates that the abetment shall be completed in British India. If the act committed in British India amounts to preparation only it will not be punishable. The Illustration is, however, not very clear. If A is in British India and B in Pondicherry, A can only abet an offence by him either by a letter or some other mode of communication. Even if the letter be written in British India yet until it reaches B it can hardly be said that B has been instigated. If the instigation, in fact, takes place when the letter reaches B, then the instigation has taken place in Pondicherry and not in British India.

PRACTICE.

Procedure.—No Court shall take cognizance of any offence punishable under this section unless upon complaint made by order of Government.⁶

Punishment of
abetment if the act
abetted is committed
in consequence
and where no express
provision is made for its punishment.

109. Whoever abets any offence¹ shall, if the act abetted is committed² in consequence of the abetment, and no express provision³ is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

³ *Maruti Dada*. (1875) 1 Bom. 15; *Dinonath Burooa*, (1872) 18 W. R. (Cr.) 32; *Sahib Ditta*, (1885) P. R. No. 20 of 1885.

⁴ G. I., 1897, Part VI, p. 238. See *Baku*,

(1899) 1 Bom. L. R. 678, 24 Bom. 287.

⁵ (1894) 19 Bom. 105.

⁶ Criminal Procedure Code, s. 196.

ILLUSTRATIONS.

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161.

(b) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

COMMENT.

Under this section the abettor is liable to any punishment which may be inflicted on the principal offender, (1) if the act of the latter is committed in consequence of the abetment, and (2) no express provision is made in the Code for the punishment of such an abetment. This section lays down nothing more than that if the Code has not separately provided for the punishment of an abetment as such then it is punishable with the punishment provided for the original offence.⁷

A person who aids and abets the actual preparation of the crime at the very time when it is committed, is a principal of the second degree and comes under this section.⁸ Active abetment at the time of committing the offence is covered by this section.⁹

This section is applicable to cases under s. 182.¹⁰

1. 'Abets any offence.'—See s. 40, *supra*. The law does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor.¹¹ Where the accused was nowhere near the scene of occurrence the mere facts that the unlawful assembly consisted mostly of his servants or tenants and that its common object was to do something which was in the interests of the accused, cannot lead to the conclusion that the accused must necessarily have ordered or instigated the formation of this unlawful assembly or the commission of this crime. Servants and partisans, not unoften, on their own responsibility, do things which they consider to be in the interests of their masters or principals without the latter's knowledge or consent.¹²

Abetment of an offence under a local law (e.g. Mad. Act V of 1920) is an offence falling within the purview of this section.¹³ But abetment of a breach of the bye-laws framed under a local Act is not an abetment of an offence within the meaning of this section unless the breach of the bye-laws is made punishable under the local Act.¹⁴

2. 'Is committed.'—Under this section the act abetted should be committed in consequence of the abetment,¹⁵ or in pursuance of the conspiracy (see Explanation). Assisting in the preparation of an offence which leads to nothing does not amount to an abetment under this section.¹⁶ Offering gratification as a reward or motive to withdraw a case against the accused under the Motor Car Act, which had already been dismissed, was held not to amount to an abetment of an offence under s. 161.¹⁷

⁷ *Sesha Ayyar v. Venkatasubba Chetty*, (1923) 19 L. W. 201, [1924] M. W. N. 268, 25 Cr. L. J. 442, [1924] AIR (M) 487.

⁸ *Brinchipada Dafadar*, (1937) 67 C. L. J. 45, 39 Cr. L. J. 964, [1938] AIR (C) 625.

⁹ *Jadunandan Jha*, (1936) 38 Cr. L. J. 790, 18 P. L. T. 628, [1937] AIR (P) 317.

¹⁰ *Dawar Singh*, [1937] A. L. J. R. 881, 39 Cr. L. J. 102, [1937] AIR (A) 755.

¹¹ *Anantachari*, [1938] M. W. N. 908, [1938] 2 M. L. J. 574, 48 L. W. 471, 40 Cr. L. J. 302,

[1938] AIR (M) 996.

¹² *Hira Singh*, (1944) 47 Cr. L. J. 955.

¹³ *Sesha Ayyar v. Venkatasubba Chetty*, *sup.*

¹⁴ *Ma Khwei Kyi*, (1928) 6 Ran. 791.

¹⁵ *Rajcoomar Banerjee*, (1862) 1 Ind. Jur. (O. S.) 105.

¹⁶ *Surat Bahadur*, (1924) 1 O. W. N. 362, 25 Cr. L. J. 1162, [1925] AIR (O) 158.

¹⁷ *Shamsul Huq*, (1920) 33 C. L. J. 379, 23 Cr. L. J. 1, [1921] AIR (C) 844.

3. 'No express provision.'—This section only applies to those cases of abetment about which 'no express provision is made by this Code.' Hence it does not apply to abetting the waging of war, ss. 121, 122, 123; to abetting the escape of State prisoners, s. 130; to abetting mutiny, s. 132; to abetting an assault of a soldier, sailor or airman on his superior officer, s. 134; and to abetting insubordination by the same, s. 138.

CASES.

Homicide.—In a case of *suttee*, A ordered the pile to be lighted, B did not then assist but afterwards when the woman fled from the pile induced her to return. A was held guilty of abetment of culpable homicide, but B of abetment of suicide only.¹⁸ The accused accompanied his brother who was taking a child to murder it; after accompanying him for a while he refused further to go along with his brother, but at the same time, though knowing full well that the child was being taken to be murdered, he made no attempt to take the child back with him and the child was subsequently murdered. It was held that the accused was guilty of murder.¹⁹ G and two others were charged under s. 304 of the Penal Code. The evidence showed that one of G's companions was armed with a spear and the other with a *lathi*; that G gave the order to "beat" P; and that the two others thereupon assaulted P so that he died of his injuries. It was contended that the order given by G did not include an order to assault P with a spear, and, therefore, that he could be convicted only of abetting the offence of causing hurt and not of abetting the offence under s. 304. It was held that G was rightly convicted under ss. 304/109 of the Penal Code.²⁰ It was found that two accused and the approver conspired to commit theft and in pursuance of that conspiracy to kill in order to enable them to commit theft but there was no direct evidence as to who dealt the fatal blow. It was held that the accused were guilty of abetment of murder under s. 302 read with s. 109.²¹

Assault.—Where a person merely said "beat" but did not take any part himself in beating, it was held that he was guilty of abetting the offence under s. 352.²²

Forgery.—Where a person took active part in the preparation of a document, but no part in the forgery of the name of the executant, it was held that he was not guilty of forgery, but simply of abetment of that offence.²³

Marrying married girl.—Where a Hindu having given his daughter, eight years old, in marriage to a certain person, again gave her in marriage to another in the lifetime of her first husband, it was held that he was guilty of an offence under this section read with s. 494, although his daughter had not the knowledge and intelligence necessary to enable her to commit an offence under s. 494.²⁴

Abetment of kidnapping.—Where a Hindu woman left her husband's house, taking with her her infant daughter, and went to the house of A, and on the same day the daughter was married to B, the brother of A, without her father's consent, it was held that A was rightly convicted under this section and s. 363 of abetting the offence of kidnapping which was committed by the mother of the girl.²⁵ The Allahabad High Court has not accepted this view. One C, by making certain false representations to the mother of J, a married girl of eleven years of age, induced her to part with the custody of her daughter. C took the girl away from her own village to a neighbouring village where she was joined by one T. Thence C and T took the girl about with them from place to place making unsuccessful attempts to dispose of her in marriage, until they were arrested by a chowkidar of Tiabpur, on his being informed that an attempt was made to sell the girl in that village. Upon these findings C was convicted of the offence punishable under s. 366 and T of abetment of that offence, following the rule in

¹⁸ *Sahebloll Reetloll*, (1863) 1 R. J. P. J. 174.

¹⁹ *Sadu*, (1884) Unrep. Cr. C. 207.

²⁰ *Ghanshyam Singh*, (1927) 6 Pat. 627.

²¹ *Sheo Barhi*, (1929) 11 P. L. T. 520, 32 Cr. L. J. 5, [1930] AIR (P) 164.

²² *Mir Hyder Saheb*, (1915) 16 Cr. Cr. L. J. 456, [1916] AIR (M) 1038.

²³ *Kashi Nath Naek*, (1897) 25 Cal. 207. See

Chhotalal Babar (No. 2), (1912) 14 Bom. L. R. 387, 13 Cr. L. J. 542.

²⁴ *Nand Lal Singh*, (1902) 6 C. W. N. 343. See *Thandavarayudu*, (1891) 14 Mad. 364; *Balambal*, (1902) 26 Mad. 463; *Moss*, (1893) 16 All. 88.

²⁵ *Prankrishna Surma*, (1882) 8 Cal. 969; *Samia Kaundan*, (1876) 1 Mad. 173.

Samia Kaundan.¹ On appeal to the High Court, the appeal of C was summarily rejected. As to T it was held, dissenting from *Samia Kaundan* and agreeing with the view taken in *Ram Sundar*² and *Rakhal Nikari*,³ that the offence of kidnapping having been completed so soon as the minor was actually taken out of the custody of her guardian, T could not properly be convicted of abetment on the hypothesis that the offence was a continuing one. But, inasmuch as there was evidence on the record that the assistance given by T in attempting to dispose of J was the result of a conspiracy entered into before the kidnapping took place, the conviction of T for abetment of kidnapping was sustained.⁴ The former Chief Court of the Punjab held that there could be no abetment of the offence of kidnapping after the person had once been taken out of the keeping of the lawful guardian.⁵ A married woman cannot abet her own abduction under s. 498.⁶

Using forged document.—Where a party to a judicial proceeding relied on a forged document in support of his case, and a witness stated that he saw the execution of the document by the person by whom it purported to have been executed, it was held that the witness intentionally aided by his deposition the using of the document as genuine and was liable to prosecution for an offence under s. 471 read with this section although he could not be charged with abetment of the forgery itself.⁷

PRACTICE.

Evidence.—To substantiate a charge under this section it is necessary to show intentional aid by some act or illegal omission.⁸ It is necessary to prove abetment, and that the act abetted was committed in consequence of the abetment.

Procedure.—The general procedure for cases of abetment is in accordance with that for the offence abetted. Abetments therefore are cognizable or non-cognizable, bailable or non-bailable, compoundable or non-compoundable, according to the procedure for the offence abetted. Where the Court is dealing with a charge of abetment of a specific offence which offence is a summons case, then the abetment is also a summons case. An offence under s. 117 of the Penal Code read with s. 17 (1), Criminal Law Amendment Act, can, therefore, be tried as a summons case.⁹

Conspiracy is one form of abetment and where the offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under this section.¹⁰

Jurisdiction.—A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.¹¹ The Court competent to try the offence of abetment is the Court declared competent to try the offence abetted.

Summary trial.—Whether an abetment is triable summarily or not, depends upon whether the offence abetted is triable summarily or not.¹²

Joint trial.—An abettor may be tried either jointly with, or separately from, the principal offender.¹³

Complaint.—Under sub-section (4) of s. 195, Criminal Procedure Code, a complaint in writing is necessary for the prosecution of a person who abets any of the offences referred to in sub-section (1).

¹ (1876) 1 Mad. 173.

² (1896) 19 All. 109.

³ (1897) 2 C. W. N. 81.

⁴ *Tika*, (1903) 26 All. 197.

⁵ *Muhammad Bakhsh*, (1893) P. R. No. 8 of 1894; *Chanda*, (1892) P. R. No. 13 of 1893.

⁶ *Phalla v. Jivan Singh*, (1871) P. R. No. 6 of 1871; *Natha Singh*, (1883) P. R. No. 11 of 1883; contra, *Syud Ahmad*, (1868) P. R. No. 17 of 1868.

⁷ *Gajadhar Prasad*, (1925) 2 O. W. N., 707, 26

Cr. L. J. 1567, [1925] AIR (O) 610.

⁸ *Khandu*, (1899) 1 Bom. L. R. 351.

⁹ *Narsinha Chundur*, (1931) 33 Bom. L. R. 353, 32 Cr. L. J. 718, [1931] AIR (B) 199.

¹⁰ *Venkataramiah*, [1937] M. W. N. 996, [1937] 2 M. L. J. 862, 46 L. W. 709, 39 Cr. L. J. 266, [1938] AIR (M) 130.

¹¹ Criminal Procedure Code, s. 180, ill. (a).

¹² *Ibid.*, ss. 260, 261.

¹³ *Ibid.*, s. 239.

Section 196A of the Criminal Procedure Code applies only to a prosecution for conspiracy punishable under s. 120B, and not for abetment by conspiracy punishable under this section.¹⁴

Sentence.—A sentence of less than transportation for life is not a legal sentence for abetment of murder under s. 302 and this section when the offence of murder is actually committed in consequence of the abetment. The legal punishment for such abetment is the punishment provided for murder.¹⁵

It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.¹⁶

Charge.—In a charge of abetment, the section of the principal offence, and the particular section of this Chapter under which the case falls should be mentioned with the circumstances which brings it under the said section.¹⁷

The charge should run thus :—

I (*name and office of Magistrate, etc.*) hereby charge you———as follows :

That XY (if the person is not known say that an unknown person) on the ——day of———, at———, committed the offence of———, and that you at———, abetted the said XY (*or person unknown*) in the commission of the said offence of———, which was committed in consequence of your abetment, and you have thereby committed an offence punishable under ss. 109 and———of the Indian Penal Code, and within my cognizance (*or within the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*omit the words "by the said Court" in cases tried by Magistrate*)] on the said charge.

When the abettor is charged with the person committing the offence the charge should run thus :—

That you———, on or about the———day of———, at———, abetted the commission of the offence of———by———which was committed in consequence of your abetment, and that you have thereby committed an offence punishable under ss. 109 and———of the Indian Penal Code, and within the cognizance of my Court [*or the Court of Session*].

110. Whoever abets the commission of an offence¹ shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Punishment of abetment if person abetted does act with different intention from that of abettor.

COMMENT.

This section says that though the person abetted commits the offence with a different intention or knowledge yet the abettor will be punished with the punishment provided for the offence abetted. The liability of the person abetted is not affected by this section.

Explanation 3 to s. 108 bears relation to this section. See ill. (d).

1. 'Offence'.—Offence under this section denotes a thing punishable under this Code, or under any special or local law (s. 40).

PRACTICE.

Procedure.—Same as that for the offence abetted.

111. When an act is abetted¹ and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it :

Liability of abettor when one act abetted and different act done.

¹⁴ *Abdul Salim*, (1921) 49 Cal. 573; *V. M. Abdul Rahman*, (1924) 3 Ran. 95.

¹⁵ *Nga Kyaw Din*, (1896) P. J. L. B. 269.

¹⁶ *Sita Ram Rai*, (1880) 3 All. 181.

¹⁷ (1865) 3 W. R. (Cr. L.) 5; (1864) 1 W. R. (Cr. L.) 9.

Provided the act done was a probable consequence² of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Proviso.

ILLUSTRATIONS.

(a) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(b) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

COMMENT.

Principle.—This section proceeds on the maxim “every man is presumed to intend the natural consequences of his act.” The main provision of the section is applicable only when the act done is the probable consequence of the abetment.¹⁸

“If one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but, in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last-mentioned crime, if it is one which, as a reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. For example, if A says to B :—‘You waylay C on such and such a road and rob him, and if he resists, use this sword, but not more than is absolutely necessary;’ and B kills C, A is responsible as an abettor of the killing, for it was a probable consequence of the instigation. To put it in plain terms, the law virtually says to a man :—‘If you choose to run the risk of putting another in motion to do an unlawful act, he, for the time being, represents you as much as he does himself; and if, in order to effect the accomplishment of that act, he does another which you may fairly from the circumstances be presumed to have foreseen would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former’ ”.¹⁹

Foster²⁰ says : “If the principal totally and substantially varies, if being solicited to commit a felony of one kind he *wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. ... But if the principal in substance complies with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases the persons soliciting to the offence will, if absent, be an accessory before the fact, if present a principal... A commands B to murder C by poison, B does it by a sword, or other weapon, or by any other means. A is accessory to this murder : for the murder of C was the object principally in his contemplation, and that is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such orders or advice will be an accessory to that felony. A, upon some affront given by B, orders his servant to waylay him and give him a sound beating; the servant does so,

¹⁸ *Mumtaz Ali*, [1935] O. W. N. 909, 36 Cr. L. J. 1201, [1935] AIR (O) 473.

¹⁹ Per Straight, J., in *Mathura Das*, (1884)

6 All. 491, 494.

²⁰ Crown Cases, pp. 369, 370.

and B dies of this beating. A is accessory to this murder ... A solicits B to burn the house of C; he does it; and the flames taking hold of the house of D that likewise is burnt. A is accessory to the burning of this latter house. These cases are all governed by one and the same principle. The advice, solicitation, or orders in substance were pursued, and were extremely flagitious on the part of A. The events, though possibly falling out beyond his original intention, were *in the ordinary course of things the probable consequences of what B did under the influence, and at the instigation of A.* And therefore, in the justice of the law, he is answerable for them."

1. 'When an act is abetted.'—The definition of abetment in s. 107 includes not merely instigation, which is the normal form of abetment, but also conspiracy and aiding, and those three forms of abetment are dealt with in the proviso to this section. Where, therefore, an act is abetted, and the abetment takes the form of instigation of an act, and a different act is done, that different act must be a probable consequence, and committed under the influence of instigation; and where the abetment takes the form of aiding or a conspiracy the different act must be a probable consequence and also with the aid or in pursuance of the conspiracy.²¹

2. 'Probable consequence.'—Under this section an abettor may be liable for the commission of a different act than the one he instigated, provided the different act was a probable consequence of the abetment and was committed under the influence of the instigation. A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such act; an unusual or unexpected consequence cannot be described as a probable one. When the act done is different from the act instigated, an abettor is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation.²² An unusual or expected consequence cannot be described as a probable one. The test of guilt in charges of abetment must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. But it is sufficient for a conviction if the act done was a probable consequence of the abetment. It is not necessary that the abettor should know it to be a probable consequence.²³

See illustrations to this section, but the act done must have been committed in pursuance of the conspiracy.²⁴ The illustrations show that the section contemplates cases not only where a different act is done but also where a different person is attacked in pursuance of the conspiracy.²⁵

CASES.

Where several persons turned out to beat a man, but one of them killed him, it was held that as the intention of all of them was to beat him only they would be liable for grievous hurt, but the killing of the deceased went so far beyond the common purpose that it could not be said to have been a probable consequence of the abetment.¹ Where A ordered B and C to seize and forcibly take D in the contemplation of an assault upon D, and D was so beaten and tortured as to have died in consequence, it was held that A was guilty at least of abetting the commission of voluntarily causing grievous hurt.² B and C instigated A to rob the deceased on his return home after receiving a sum of money : whereupon A killed the deceased. A was convicted of murder and B and C of abetment of murder under this section and s. 302. But the High Court altered the convictions of B and C to those under ss. 109 and 392.³ Where A instigated B, who had a *lathi* in his hand, to chastise or thrash C, but B stabbed C with a spear-head of the existence of which A was unaware, and C died, it was held that the act of stabbing, which was different from the act of thrashing which was the

²¹ Per Beaumont, C. J., in *Sonappa Shina Shetty*, (1930) 42 Bom. L. R. 205, 207; *Ganesh Prasad*, (1930) 32 Cr. L. J. 478, [1931] AIR (P) 52.

²² *Girja Prasad*, (1934) 57 All. 717; *Shafi Ahmed*, (1925) Case No. 22, Second Criminal Sessions, 1925, decided on May 23, 1925 (Unrep. Bom.); *Naimuddi*, (1941) 75 C. L. J. 410,

44 Cr. L. J. 377, [1943] AIR (C) 47.

²³ *M. & M.* 91.

²⁴ *Nilkantha*, (1912) 35 Mad. 247.

²⁵ *Mangta*, (1936) 38 Cr. L. J. 628.

¹ *Goluck Chung*, (1866) 5 W. R. (Cr.) 75.

² *Doorgessur Surmah*, (1867) 7 W. R. (Cr.)

61 [97].

³ *Mathura Das*, (1884) 6 All. 491.

act instigated, was not a probable consequence of the instigation to thrash, and A was guilty of abetment of assault only and not of abetment of murder.⁴

PRACTICE.

Evidence.—Prove (1) that the accused abetted the commission of a particular act.

(2) That the act actually committed was done under the influence of such abetment.

(3) That the act done was a probable consequence of the abetment.

Procedure.—Same as that for the offence abetted.⁵

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence,¹ the abettor is liable to punishment for each of the offences.

Abettor when liable to cumulative punishment for act abetted and for act done.

ILLUSTRATION.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress. A will also be liable to punishment for each of the offences.

COMMENT.

This section is a further extension of the principle enunciated in the preceding section; it is much wider than the English law on the point. Under it the abettor is punished for the offence abetted as well as the offence committed.

1. 'Offence.'—See s. 40, *supra*.

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.

ILLUSTRATION.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

COMMENT.

This section should be read in conjunction with s. 111. Section 111 provides for the doing of an act different from the one abetted, whereas this section deals with the case where the act done is the same as the act abetted but its effect is different. To make the abettor liable it must be shown that he knew that the act abetted was likely to cause that effect. This can be done by showing that a reasonable man would draw an inference that a particular effect was likely to ensue from a particular act.

Abetment to attempt to murder.—It is somewhat difficult to conceive circumstances which constitute instigation to another to make merely an attempt to murder. *Prima facie* any incitement to use violence to another would fall under one of the two categories, viz., to cause death, or to cause hurt, either grievous or simple.⁶

PRACTICE.

Procedure.—Same as that for the offence abetted.

114. Whenever any person, who if absent would be liable to be punished as an abettor,¹ is present when the act or offence for which he would be punishable in consequence of the abetment is committed,² he shall be deemed to have committed such act or offence.³

Abettor present
when offence is
committed.

COMMENT.

Principal.—The meaning of this section is that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though in point of fact another man actually committed it. The section says that the person present is deemed to have committed the offence, not that he has committed it. It simply provides for the punishment of what the English law calls 'principals in the second degree.' A person present abetting an offence is to be deemed to have committed the offence though he does not, in fact, do so any more than a 'principal in the second degree' does.⁷ Where, for instance, a blow is struck by A, in the presence of, and by the order of, B, both are principals in the transaction. If two persons join in beating a man, and he dies, it is not necessary to ascertain exactly what the effect of each blow was.⁸ If A instigates B to murder Z, he commits abetment; if absent, he is punishable as an abettor, and if the offence is committed, then under s. 109; if present, he is by this section deemed to have committed the offence and is punishable as a principal.

Scope.—This section "... is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition ... Sec. 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitive. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by s. 114 brings the case within the ambit of s. 34."⁹ Thus suppose A meets his death as the result of a blow struck by B. C is present, but it is not clear what, if any, act was done by him. If any previous act or omission by C is proved which would amount to abetment of the killing of A by B, the Court is bound to presume that C was a participant within the meaning of s. 34.

This section applies to those cases only in which not only is the abettor present at the time of the commission of the offence but the abetment has been completed prior to and independently of his presence. The real test to see whether or not this section is applicable lies in its words "who if absent would be liable to be punished as an abettor." These words clearly show that abetment to come under this section must be one which is prior to the commission of the offence and complete by itself and not an abetment which is done immediately before or at the time of the commission of the

⁶ *Nga Po Kyau*, [1903] 9 Burma L. R. 190.

⁷ (1869) 4 M. H. C. Appx. xxxvii, 1 Weir 49; *Peer Mahomed*, (1872) 17 W. R. (Cr.) 52; *Chima*, (1871) 8 B. H. C. (Cr. C.) 164.

⁸ *Mahomed Asger*, (1874) 23 W. R. (Cr.) 11; *Mangta*, (1936) 38 Cr. L. J. 628.

⁹ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 52, 53, 27 Bom. L. R. 148, 159, 52 Cal. 197, 212; *S. P. Ghosh*, (1915) 8 L. B. R. 274, 16 Cr. L. J. 676, F.B.; *Abdul Karim*, (1930) 6 Luck. 358; *Nga Po Kyone*, (1933) 11 Ran. 354.

offence, for in the latter case the abettor would not have committed the abetment if he had not been present and would not therefore have been liable to punishment as an abettor.¹⁰ Further, it applies to those cases only in which the accused, if absent, would be liable to be punished as an abettor. But where the accused, if absent, could not have been liable as an abettor since there was no conspiracy between the accused and the co-accused, the section is not applicable.¹¹

In order to bring a person within this section, it is necessary first to make out the circumstances which constitute abetment, so that if absent, he would have been liable to be punished as an abettor, and then to show that he was also present when the offence was committed.¹² The abetment must have been completed before the actual offence is committed.¹³ The section is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission of the offence. In such a case the person is guilty of the offence itself and not merely of abetment except in cases like rape or bigamy where the person committing the offence alone can be guilty of it.¹⁴

Sections 34 and 114.—Under s. 34 if a criminal act is done by several persons, each is liable as if it were done by himself alone; so that if two or more persons are present aiding and abetting in the commission of a murder, each will be tried and convicted as a principal, though it might not be proved which of them actually committed the Act. The section refers to cases somewhat different, namely, where a person by abetment, previous to the commission of the act, renders himself liable as an abettor, is present when the act is committed, but takes no active part in the doing of it.¹⁵

The whole object of these two sections is to provide for cases in which the exact share of one of several criminals cannot be ascertained, though the moral culpability of each is clear and identical.¹⁶

Sections 109 and 114.—When a person is present and abets another to commit an offence, s. 114 is not applicable to the case. When a person who abets the commission of an offence is present and helps in the commission of the offence, he is guilty of the offence and not merely of abetment except in a few cases like rape or bigamy where the person committing the offence alone can be guilty of the offence. Section 114 applies to a case where a person abets the commission of an offence, some time before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission. Active abetment at the time of committing the offence is covered by s. 109 and s. 114 is clearly intended for an abetment previous to the actual commission of the crime, any time, that is, before the first steps have been taken to commit it. A person was on his way home in the evening when he was waylaid by M and B along with J at whose instigation M and B inflicted certain injuries on that person. M and B were convicted under ss. 324 and 325 respectively and J was convicted under ss. 324 and 325 read with s. 114. It was held that in the circumstances of the case it might have been more correct to convict J under s. 109, but he on either view was liable to exactly the same punishment, and, therefore, the interests of justice did not require any interference on what can only be regarded as a technical ground. Prima facie, it would seem illogical that a man should be deemed to have committed an offence if he has abetted it beforehand but does nothing at the time when it is committed and on the other hand shall not be deemed to have committed that offence if at the time when it is committed he has just abetted it, is still present and is still abetting it.¹⁷

¹⁰ *Sital*, (1935) 11 Luck. 384.

¹¹ *Mumtaz Ali*, [1935] O. W. N. 909, 36 Cr. L. J. 1201, [1935] AIR (O) 478.

¹² *Abhi Misser v. Lachmi Narain*, (1900) 27 Cal. 556; *Mian Gul*, (1932) 33 P. L. R. 679, 33 Cr. L. J. 564, [1932] AIR (L) 483; *Ahmed Hasham*, (1932) 35 Bom. L. R. 246, 57 Bom. 329; *Basharat*, (1934) 36 P. L. R. 37, 36 Cr. L. J. 308, [1934] AIR (L) 813; *Mahendranath Chakrabarti*, (1934) 62 Cal. 629.

¹³ *Ram Ranjan Roy*, (1914) 42 Cal. 422.

¹⁴ *Jogali Bhaigo Naiks*, (1926) 27 Cr. L. J. 1198, [1927] AIR (M) 97.

¹⁵ *Jan Mahomed*, (1864) 1 W. R. (Cr.) 49; *Sambasiva Mudali*, (1930) M. W. N. 1041, 35 L. W. 98, 32 Cr. L. J. 753, [1931] AIR (M) 225.

¹⁶ *Jaimangal*, (1936) 37 Cr. L. J. 864, [1936] AIR (A) 437.

¹⁷ *Jadunandan Jha*, (1936) 18 P. L. T. 628, 38 Cr. L. J. 790, [1937] AIR (P) 317.

1. 'Who if absent would be liable to be punished as an abettor.'—To bring a person within this section the abetment must be complete apart from the mere presence of the abettor.¹⁸ It is necessary first to make out the circumstances which constitute abetment, so that, "if absent", he would have been "liable to be punished as an abettor", and then to show that he was present when the offence was committed.¹⁹ Previous concert is an essential factor in the constitution of the offence of abetment under this section. Where both master and servant were present and the latter received money for selling *ganja* in contravention of the terms of the license, it was held that having regard to the provisions of s. 34 the servant was liable for the illegal sale, but that this section would not apply "unless the person present abetting the offence would, if absent, have been guilty of abetment."²⁰

Where no conspiracy, instigation, or act, or illegal omission, is proved and the abetment consists only of participation in the actual commission of the offence, s. 109 is the section applicable.²¹

2. 'Is present when the act or offence is committed.'—Presence is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should occasion arise. Presence during the whole of the transaction is not necessary. For instance, if several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.²² If a man is simply present whilst an offence is committed, but does not take any part in it he will not be liable merely because he takes no steps to prevent the offence.²³ The mere presence as an abettor of any person will not render him liable for the offence committed.²⁴ He must be sufficiently near to give assistance,²⁵ and there must be a participation in the act.¹ In a case under the Burma Gambling Act (Burma Act I of 1899) it was held that persons who are merely present at a set fight of birds or animals in a public place, and are mere spectators without participation or encouragement of any kind by gestures, expressions or actions, cannot be said to aid and abet the fight.²

The mere presence of a person on the occasion of giving a bribe and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.³

The act at the doing of which the abettor is present must amount to an offence. Thus this section is not applicable to the case of a person abetting the pledging of a thing entrusted to a stranger.⁴

If an abettor of an offence is, on account of his presence at its commission, to be charged under this section as a principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence cannot be held to have been committed with his continuing abetment.⁵

¹⁸ *Krishnasami Naidu*, (1927) 51 Mad. 263.

¹⁹ *Mussamut Nirum*, (1867) 7 W. R. (Cr.) 49; *Abhi Misser v. Lachmi Narain*, (1900) 27 Cal. 506; *Hansa Pathak v. Bansi Lal Das*, (1901) 8 C. W. N. 519, 1 Cr. L. J. 449; *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 52 Cal. 197.

²⁰ *Keshwar Lal Shaha v. Girish Chunder Dutt*, (1902) 29 Cal. 496.

²¹ *Abdulla Khan*, (1899) P. R. No. 15 of 1899.

²² *Bingley's Case*, (1821) Russ. & Ry. 446.

²³ 1 Hale P. C. 439; Foster, 350.

²⁴ *Abhi Misser v. Lachmi Narain*, (1900) 27 Cal. 506; *Deodhar Singh*, (1899) 27 Cal. 144; *Chatradhari Goala*, (1897) 2 C. W. N. 49. A doubt has been expressed, whether there can be abetment of a riot. Holmwood, J., said: "We can see no reason why a riot should not be abetted as well as any other crime. The only

difficulty arises from the presence of the accused at the riot, which renders them liable under s. 147 in the first instance, if they gave orders to the mob and thereby joined in the common object of the unlawful assembly": *Dadan Gazi*, (1906) 33 Cal. 1023, 1025.

²⁵ *Stewart's Case*, (1818) Russ. & Ry. 363; *Patrick Kelly*, (1820) Russ. & Ry. 421; *Howell*, (1839) 9 C. & P. 437.

¹ *Muradi*, (1916) P. W. R. (Cr.) No. 6 of 1917, 18 Cr. L. J. 827. See *Suraj Pandey*, (1920) 1 P. L. T. 641, 21 Cr. L. J. 793, [1917] AIR (L) 291.

² *Maung Aung Mye*, (1934) 12 Ran. 453.

³ *Deodhar Singh*, (1899) 27 Cal. 144; *Chatradhari Goala*, (1897) 2 C. W. N. 49.

⁴ *Subbaya*, (1912) 23 M. L. J. 722, [1912] M. W. N. 725, 13 Cr. L. J. 453.

⁵ *Amrita Govinda*, (1873) 10 B. H. C. 497.

A conviction under this section cannot stand where the abetment charged necessarily requires the presence of the abettor. To come within the section, the abetment must be complete apart from the presence of the abettor.⁶ One R was charged with having committed the murder of one B by being present and abetting one M in striking and thereby killing him. The allegation was that R gave orders to M to strike B who was thereupon hit on the head with a heavy stick. Two persons who were admittedly eye-witnesses to the occurrence were not called as witnesses by the prosecution. It was held that the conviction of R under s. 302 and this section could not stand as the only abetment charged necessarily required the presence of R, while to come within this section the abetment must be complete apart from the presence of the abettor.⁷

Cases.—Where the accused came with a number of armed men and forcibly carried off a crop without the consent of the owner, it was held that even if they took no part in the actual carrying off, they must be considered as principals.⁸

Where A urged B to attack C, and B stabbed with a knife, but there was no proof that B had the knife in his hand at the time of A's urging him on, or that A knew in any other way that B would be likely to use a knife. It was held that A could not be convicted of abetting an offence under s. 326, but only of abetting an assault.⁹

Persons who incite others to commit criminal trespass under s. 447 and are present when the trespass is committed, though they do not themselves commit it, are guilty of criminal trespass in virtue of the provisions of this section.¹⁰ One S was charged with having abetted the murder of one M by being present and instigating the other accused in striking and thereby killing him. It was held that the act of S amounted to an abetment of the offence of murder.¹¹

Person watching outside house while offence is being committed inside.—

Where a person watched the door of a house while a murder was being committed inside, he was held guilty of murder. A conspirator, who stood outside of a house, while his friends entered inside and looted it, and watched out in pursuance of the common design, was held guilty under this section.¹²

English cases.—A person waiting outside of a house to receive goods which a confederate was stealing in the house was held to be the 'principal' in the theft.¹³ Where several persons were acting together, some in the shop and some out, and the property was stolen by the hands of one of those who were in the shop, it was held that those who were outside were equally guilty as principals.¹⁴ J had employed M to load sacks of oats, the property of J, from a vessel on to the trams of K who was to carry them on the trams to the warehouse of J. By previous concert between M and K oats were taken by M from two of the sacks and put into a nose-bag in the absence of K, and hidden under a tram. K returned in a few minutes and took the nose-bag and its contents from under the tram and took them away, M being then within three or four yards of him. It was held that as both had been present at some parts of the transaction, both could be convicted as principals in the larceny.¹⁵ S was a barman at a refreshment bar, and C went up to the bar, called for refreshments and put down a florin. S served C, took up the florin, and took from his employers' till some money, and gave C as his change 18s. 6d., which C put in his pocket and went away with it. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between S and C, and C was present when S took the money from the till. It was held that C was liable as a principal in the second degree.¹⁶

3. 'He shall be deemed to have committed such act or offence.'—These words are very important. Their effect is that the person present is to be treated in the same way as if he had committed the offence. This is not the same thing as say-

⁶ *Ram Ranjan Roy*, (1914) 42 Cal. 422; *Annai*, (1924) 21 L.W. 19, 25 Cr. L. J. 1254, [1925] AIR (M) 364; *Jogali Bhaigo Naiks*, (1926) 27 Cr. L. J. 1198, [1927] AIR (M) 97; *Krishnasami Naidu*, (1927) 51 Mad. 263; *Chhotey*, [1947] A.L.J. 635.

⁷ *Ram Ranjan Roy*, (1914) 42 Cal. 422.

⁸ *Shib Chunder Mundle* (1867) 8 W. R. (Cr.) 59.

⁹ *Tha Mya*, (1908) 4 L. B. R. 271, 8 Cr.

L. J. 472.

¹⁰ *Patilbuva*, (1926) 28 Bom. L. R. 1020, 27 Cr. L. J. 1153, [1926] AIR (B) 512.

¹¹ *Dhani*, (1926) 27 P. L. R. 716, 28 Cr. L. J. 85.

¹² *Khandu*, (1899) 1 Bom. L. R. 351.

¹³ *Owen's Case*, (1825) 1 Mood. Cr. C. 96.

¹⁴ *Gogery's Case*, (1818) Russ. & Ry. 343.

¹⁵ *Kelly*, (1847) 2 C. & K. 379.

¹⁶ *Coggins*, (1873) 12 Cox 517.

ing 'he has committed the offence.' The person present is deemed to have committed the offence, not that he has committed it. It is upon this ground that the previous conviction of an accused for an offence cannot be taken into consideration at a subsequent conviction for abetment for the purpose of enhancing punishment under s. 75.¹⁷

When one thing is not the same as another thing, but the Legislature says that it "shall be deemed to be" the same thing, it creates a legal fiction, and in that case "the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."¹⁸ And fictions created by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purpose they may be contradicted.¹⁹

A Full Bench of the Rangoon High Court has dissented from the Bombay view in *Kashia Antoo*²⁰ and held that a person, who is punishable under a particular section of the Code read with s. 114, is punishable not as an abettor but as a principal and is guilty of the substantive offence and not merely of abetment of that offence. Heald, J., said: "I cannot read that section (s. 114) otherwise than as meaning that such a person is more than an abettor and that he is in fact what is called in English law a principal in the second degree."²¹

PRACTICE.

Evidence.—Prove (1) the committing of the principal offence.

(2) That the accused was present whilst it was being committed.

(3) That the accused was an abettor of the offence (s. 108).

It is necessary to prove acts which would constitute abetment if the accused was absent and then to show that the accused was present.

This section is evidentiary and not punitive because it establishes a presumption which is irrebutable that actual presence plus prior abetment can mean nothing else but participation.²²

Procedure.—Same as that for the offence abetted.

In a case covered by this section it is not enough to frame a charge as for the substantive offence without specifying the special circumstances which bring the case within its purview.²³

Abetment of offence punishable with death or transportation for life—if offence not committed;

115. Whoever abets the commission of an offence¹ punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision² is made by this Code for the punishment of such abetment,³ be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt⁴ to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

ILLUSTRATION.

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

¹⁷ *Kashia Antoo*, (1907) 10 Bom. L. R. 26, 7 Cr. L. J. 32.

¹⁸ *Walton*, (1881) 17 Ch. D. 746, 756.

¹⁹ *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161, 177; *Atanaram*, (1907) 9 Bom. L. R. 681, 31 Bom. 480.

²⁰ (1907) 10 Bom. L. R. 26, 7 Cr. L. J. 32.

²¹ *Maung Pu Kai*, (1929) 7 Ran. 329, 338, F.B.

²² *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 53, 27 Bom. L. R. 148, 159, 52 Cal. 197; *Muhammad Leovai*, [1930] M. W. N. 694, 32 Cr. L. J. 1116, [1931] AIR (M) 247.

²³ *Chhotey*, [1947] A. L. J. 685.

COMMENT.

This section punishes the abetment of certain offences which are either not committed at all, or not committed in consequence of abetment, or only in part committed. Abetment under this section need not necessarily be abetment of the commission of an offence by a particular person against a particular person.²⁴

Offences punishable with death only—see s. 303.

Offences punishable with death or transportation for life—see ss. 121, 132, 194, 302, 303, 305, 307 and 396.

Offences punishable with transportation for life—see ss. 121A, 122, 124A, 125, 128, 130, 131, 194, 222, 225, 226, 232, 238, 255, 304, 307, 311, 313, 314, 326, 329, 364, 371, 376, 377, 388, 389, 394, 400, 409, 412, 413, 436, 438, 449, 459, 467, 472, 474 and 477.

Three different states of fact may arise after an abetment :—

(1) No offence may be committed. In this case the offender is punishable under this section and s. 116 for the mere attempt to commit a crime.

(2) The very act at which the abetment aims may be committed, and will be punishable under ss. 109 and 110.

(3) Some act different, but naturally flowing from the act abetted, may be perpetrated, in which case the instigator will fall under the penalties of ss. 111, 112 and 113.

1. 'Offence.'—This term here denotes a thing punishable under the Code or any special or local law (s. 40).

2. 'Express provision.'—This refers to sections in which specific cases of abetment of offences punishable with death or transportation for life are dealt with.²⁵

3. 'Such abetment.'—These words refer to the abetment of the offences specified in the section itself, namely an offence punishable with death or transportation for life, and only ss. 121 and 131 provide for the punishment of the abetment of such offences.¹

4. 'Hurt.'—See s. 319, *infra*.

PRACTICE.

Evidence.—Prove that the offence abetted, though not committed in consequence, is one punishable with death, or transportation for life.

Procedure.—Not bailable; and see the offence abetted.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, abetted the commission by one XY of an offence of——punishable with death or transportation for life, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under s. 115 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

116. Whoever abets an offence¹ punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence, or with both;

²⁴ *Dwarkanath Goswami*, (1932) 60 Cal. 427.

²⁵ *Ibid.*

¹ *Lavji Mandan*, (1939) 41 Bom. L. R. 980, 41 Cr. L. J. 183, [1939] AIR (B) 452.

and if the abettor or the person abetted is a public servant,² whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence; or with both.

ILLUSTRATIONS.

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(b) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(c) A, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(d) B abets the commission of a robbery by A, a police-officer, whose duty it is to prevent that offence. Here though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

COMMENT.

This section provides for the abetment of an offence punishable with imprisonment. There is no corresponding provision in the Code for punishing abetment of an offence punishable with fine only, *e.g.*, offences under ss. 137, 154, 156, 278, 283, 290 and 294A (second para.)

1. 'Offence.'—This term here means a thing punishable under the Code or some local or special law (s. 40).

2. 'Public servant.'—Sec s. 21, *supra*.

The enhanced punishment provided in the second clause of this section only applies to those public servants whose duty it is to prevent the commission of such offence. Public servants not falling in this category will be dealt with under the first clause. Where the accused was charged with having abetted the commission of an offence punishable under s. 161 of the Penal Code, the person abetted having been a Civil Surgeon, it was held that the enhanced imprisonment prescribed by the latter part of this section could not be awarded, as the Civil Surgeon was not a public servant within the words of the section, 'whose duty it is to prevent the commission of such offence.'²

Illustration (a).—This illustration is only an example of abetment of an offence under s. 161. It makes an abortive attempt at giving a bribe an offence from the point of view of the person who offers it. There are many other ways of instigating a public servant to commit an offence under s. 161 besides by means of a direct offer of a bribe.³ Where a doctor in charge of a Government hospital was offered a bribe to retain a patient in the hospital for a period longer than it was necessary, and the doctor refused the bribe, it was held that the person offering the bribe was guilty under s. 161 and this illustration.⁴

CASES.

A Vakil of the High Court signed and sent a letter to another Vakil of that Court, who practised in District Courts subordinate thereto. The purport of this

² *Ramnath Surma Biswas*, (1873) 21 W. R. (Cr.) 9. See *Rameshwar Singh*, (1924) 3 Pat. 647.

³ *Amiruddin Salebhoy Tyabjee*, (1922) 24 Bom. L. R. 534, 23 Cr. L. J. 466, [1923] AIR (B) 44; *Ramachandriah*, (1927) 51 Mad. 86; *Puran*

Singh, (1928) 29 Cr. L. J. 601, [1928] AIR (L) 840; *Chaube Dinkar Rao*, (1938) 55 All. 654.

⁴ *Burham Sahib*, (1939) 32 L. W. 17, 31 Cr. L. J. 108, [1939] AIR (M) 671.

letter, which was one of several printed forms prepared for circulation to Vakils practising in districts, was to the effect that the Vakil, to whom it was addressed, "could easily send his clients' cases, both civil and criminal", to the writer, who would conduct them in that Court. And 'as a remuneration' the fees paid by the clients would be shared between the writer and the Vakil who had sent the cases. It was held that that was incitement within the meaning of this section.⁵

The accused who had got a warrant of attachment of certain land issued against a judgment-debtor wanted to have the warrant signed by the Revenue Assistant. He wished to bribe the Reader of the Revenue Assistant in order to get this done. While he was standing outside the Court-room of the Revenue Assistant he saw a person coming out of the Court-room and thinking that he was the Reader of the Revenue Assistant, placed Rs. 2 and the warrant in his hand, and asked him to get the warrant signed and take the money. The person accosted was not the Reader but was a Magistrate. It was held that the accused did request the Magistrate, in his capacity as a public servant, to render him the service of getting the warrant signed by another public servant, and, therefore, although the Magistrate did not render him the service required, yet the act would still be punishable as 'abetment' of the offence under s. 161 read with this section.⁶

PRACTICE.

Evidence.—Prove that the offence abetted, though not committed in consequence, is one punishable with imprisonment, or that the accused, or the person abetted, is a public servant; and that it was his duty to prevent the commission of such offence.

Procedure.—Same as that for the offence abetted.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, abetted the commission by one XY of an offence of——punishable with imprisonment, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under s. 116 of the Indian Penal Code and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

117. Whoever abets the commission of an offence¹ by the public²

Abetting—commission of offence by the public or by more than ten persons.

generally or by any number or class of persons exceeding ten,³ shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

ILLUSTRATION.

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

COMMENT.

This section covers all offences and is a general provision for abetment by any number of persons exceeding ten. When more than ten persons are instigated to commit an offence punishable with death, the offence clearly comes under s. 115 as well as this section.⁷ The view of the Lahore High Court that s. 115 applies only when the abetment is not punishable under another provision of the Code and that where s. 117

⁵ *Parbati Charan Chatterji*, (1895) 22 I. A. 193, 17 All. 498.

⁶ *Phul Singh*, (1941) 43 P. L. R. 273, 42

Cr. L. J. 636, [1941] AIR (L) 276.

⁷ *Dwarkanath Goswami*, (1932) 60 Cal. 427.

is applicable, the offence will not fall under s. 115 is not sound.⁸ Section 117 is not an express provision for abetment of an offence punishable with death or transportation.⁹

Under this section it will be sufficient to show any instigation or other mode of abetment, though neither the effect intended nor any effect follows from it. This section stood as clause 94 in the draft Code and contained another illustration as follows :—

“A inserts in a newspaper an article advising soldiers to shoot every commanding officer who uses them harshly. A has committed the offence defined in this clause.”

Sections 115 and 117.—Abetment has a reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. Section 117 deals with the former whatever be the nature of the offence abetted, while s. 115 deals with the latter, without having regard to the person or persons abetted. Abetment of the commission of murder, whether by a single individual or by a class of persons exceeding ten, falls under s. 115. In the latter case it may fall under s. 117 also, but as s. 117 prescribes a lesser punishment, s. 115 is the more appropriate provision for such an offence. Although both the sections are applicable, there cannot be separate sentences under the two sections for the same criminal act, and the conviction should properly be under that section which inflicts the higher punishment.¹⁰

1. ‘Abets the commission of an offence.’—Mere presiding at a meeting at which songs, criminally offensive, are sung in his presence, does not make the president liable for abetment, in the absence of evidence that he positively encouraged the singer or persuaded him to sing the particular songs or was a party to an agreement for singing them or specifically accorded permission to the singer to sing them.¹¹ The term ‘offence’ here denotes a thing punishable under the Code or some local or special law (s. 40).

2. ‘Public.’—This word includes any class of the public or any community (s. 12, *supra*). In order that there may be abetment, by means of a leaflet, of the commission of an offence by the public, it is necessary that the public should have read the leaflet or that it should have been exposed to the public gaze at a time when it was possible for the public to read the same. Consequently, when a leaflet inciting the public to commit offences is affixed at a public place at dead of night, but is removed by the police shortly afterwards before the public could see or read it, there is no offence under this section, even if some of the policemen removing the leaflet read it, it being impossible to class them as the public.¹²

3. ‘Any number or class of persons exceeding ten.’—The offence abetted must have been intended to be committed by the public or by any number of persons exceeding ten collectively and conjointly.¹³ Where, therefore, a person abetted twelve coolies to break their contracts, it was held that as each breach of contract was a separate and distinct offence, the abettor abetted twelve offences by twelve persons, and not one offence by twelve persons, and so was not punishable under this section.¹⁴ Where the accused instigated people to become members of a Jatha which would be unlawful association within the meaning of s. 16 of the Criminal Law Amendment Act, it was held that his act came within the purview of this section.¹⁵ Where the accused instigated railway workers, in the event of a strike, to lie on the railway line, it was held that this section was applicable.¹⁶ A speech by which the speaker was trying to foment a strike, when no strike had yet been started and was attempting to incite the prospective strikers against what are commonly known as black-legs, was held to fall under this section.¹⁷

The Bombay High Court has held that this section applies to the abetment of an offence which is punishable under s. 47 of the Bombay Salt Act (II of 1890), and

⁸ *Santa Singh*, (1933) 34 Cr. L. J. 1207, [1926] AIR (L) 115.

⁹ *Lavji Mandan*, (1939) 41 Bom. L. R. 980, 41 Cr. L. J. 183, [1939] AIR (B) 452, dissenting from *Santa Singh*, (1933) 34 Cr. L. J. 1207, [1926] AIR (L) 115.

¹⁰ *Ibid.*

¹¹ *Bepin Behari Ganguly*, (1931) 36 C. W. N. 191, 33 Cr. L. J. 699, [1932] AIR (C) 549.

¹² *Parimal Chatterji*, (1932) 60 Cal. 327.

¹³ *Mihan Singh*, (1923) 5 Lah. 1.

¹⁴ (1865) 3 W. R. (Cr. L.) 24.

¹⁵ *Kirpal Singh*, (1925) 26 Cr. L. J. 1874, [1933] AIR (L) 660.

¹⁶ *Subramania Ayyar*, [1932] M.W.N. 1153, 34 Cr. L. J. 524, [1933] AIR (M) 279.

¹⁷ *Shib Nath Banerji*, [1937] 1 Cal. 309.

which is committed by the public generally or any number or class of persons exceeding ten.¹⁸ The Chief Court of Oudh has taken a contrary view. It has held that s. 9 of the Indian Salt Act (XII of 1882) embraces all abetments whether aggravated or mitigated in their nature. The section does not provide for any exception in respect of such abetments as are provided for by this section and the punishment prescribed by s. 9 is clearly punishment which is prescribed for all abetments of acts which are declared to be offences under the Indian Salt Act. It is illegal to proceed under this section which allows a higher punishment for abetment of an offence for the punishment of which a lighter and separate penalty is provided by s. 9.¹⁹ The Allahabad and the Madras High Courts have taken the same view as the Bombay High Court. The Allahabad High Court has held that a person guilty of abetment of an offence under s. 9(a) of the Indian Salt Act may be convicted under this section if the abetment was of the commission of the offence by the public generally or by any number or class of persons exceeding ten.²⁰ The Madras High Court has held that an accused person who is guilty of having instigated more than ten persons to commit an offence under s. 74 of the Madras Salt Act (IV of 1889) is liable under this section. The gravamen of a charge under this section is the abetment itself, the instigation to general lawlessness, not the particular offence of which the commission is instigated. Section 74 of the Madras Salt Act refers to the direct abetment of particular acts and does not embrace the offence under this section.²¹

CASE.

Mere presiding at a meeting at which songs, criminally offensive, were sung in the presence of the president, was held not to make the president liable for abetment, in the absence of evidence that he positively encouraged the singer or persuaded him to sing the particular songs or was a party to an agreement for singing them or specifically accorded permission to the singer to sing them.²²

PRACTICE.

Evidence.—Prove (1) abetment of the offence in question by the accused.

(2) That such offence was to be committed by the public; or by more than ten persons.

Procedure.—Same as that for the offence abetted. An offence under this section read with s. 17(1) of the Criminal Law Amendment Act can be tried as a summons case, if the sentence imposed does not exceed imprisonment for six months.²³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission of an offence of——by——numbering more than ten persons, by (*state the act done by the accused in instigation*), and thereby committed an offence punishable under s. 117 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

118. Whoever, intending to facilitate or knowing it to be likely

Concealing design to commit offence punishable with death or transportation for life—

that he will thereby facilitate the commission of an offence¹ punishable with death or transportation for life,

voluntarily² conceals,³ by any act or illegal omission,⁴ the existence of a design⁵ to commit such offence

¹⁸ *Ganesh*, (1930) 33 Bom. L. R. 56, 55 Bom. 322.

¹⁹ *Oudh Bar Association, Lucknow*, (1930) 6 Luck. 266.

²⁰ *Joti Prasad Gupta*, (1931) 53 All. 642.

²¹ *Konda Satyavatamma*, (1931) 55 Mad. 90.

²² *Bepin Behari Ganguly*, (1931) 36 C. W. N. 191, 33 Cr. L. J. 699, [1932] AIR (C) 549.

²³ *Narsimha Chandur*, (1931) 33 Bom. L. R. 353, 32 Cr. L. J. 713, [1931] AIR (B) 199.

or makes any representation which he knows to be false respecting such design,

shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to fine.

ILLUSTRATION.

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

COMMENT.

Under s. 107 concealment of a design to commit an offence constitutes an abetment. There must be an obligation on the person concealing the offence to disclose it. The concealment to be criminal must be intentional or at least with knowledge that it will facilitate the commission of an offence.

This section and ss. 119 and 120, all contemplate the concealment of a design by persons other than the accused to commit the offence charged.²⁴ These sections apply to the concealment of all offences except those which are merely punishable with fine. They deal with concealment prior to the commission of an offence. Sections 202 and 203 deal with subsequent concealment.

1. 'Offence'.—See ss. 43 and 33, *supra*. 2. 'Voluntarily'.—See s. 39, *supra*.

3. 'Conceals'.—A person cannot be punished if he is not legally bound to inform of the existence of a design and where he has not concealed the existence of the design by any overt act.²⁵ By s. 44 of the Criminal Procedure Code¹ every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under sections 121, 126, 130, 143-145, 147, 148, 302-304, 382, 392-399, 402, 435, 436, 449, 450, 456-460 of the Indian Penal Code shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

4. 'Illegal omission'.—See s. 43, *supra*. It must be shown that the omission was likely to facilitate the commission of an offence.² Concealment by illegal omission can be an offence only when the omission is by some person bound by law to make report of offences.

5. 'The existence of a design'.—There must exist a design to commit at some future time an offence of the kind described, and no conviction should take place until the Court has sufficient proof that such a design existed.

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

(2) That such offence was one punishable with death, or transportation for life.

(3) That the accused concealed the existence of such design (a) by his act or illegal omission; or (b) by his knowingly false representation.

²⁴ *Rajcoomar Banerjee*, (1862) 1 Ind. Jur. (O. S.), 105; *Khandu*, (1899) 1 Bom. L. R. 351.

²⁵ *Bahadur*, (1882) P. R. No. 34 of 1882. See *Jhugroo*, (1865) 4 W. R. (Cr.) 2, where it is held that the knowledge of a design to commit a dacoity, and voluntary concealment of

the existence of that design, with the knowledge that such concealment would facilitate the commission of dacoity, do not amount to an abetment of dacoity.

¹ Act V of 1898.

² *Kesree*, (1866) 1 Agra 37.

(4) That he did so voluntarily.

(5) That he thereby intended to facilitate or knew that he would thereby facilitate, the commission of such offence.

(6) That the offence concealed has been committed (if the case falls under the first clause).

Procedure.—Not bailable, if the concealment is of an offence punishable with death or transportation for life and the offence is committed. Bailable, if the offence is not committed.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——with the intention of facilitating, or with the knowledge that you will thereby facilitate the commission of the offence of——(*specify the act*) (or omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 118 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

119. Whoever, being a public servant¹ intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence² which it is his duty as such public servant to prevent—

Public servant concealing design to commit offence which it is his duty to prevent—
voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both ;

if offence be committed ;
or, if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years ;

or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment or with such fine as is provided for the offence, or with both.

ILLUSTRATION.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.

COMMENT.

Section 118 deals with persons who are not public servants. In this section the same principle is extended to public servants but with severe penalty. Every omission on the part of a public servant to disclose a design to commit an offence which it is his duty to prevent will be punishable under this section.

1. 'Public servant.'—See s. 21, *supra*. The section only applies to that class of public servants whose duty it is to prevent such offence.

2. 'Offence.'—See s. 40, *supra*.

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

(2) That the accused was a public servant.

(3) That it was the duty of the accused, as such public servant, to prevent the commission of that offence.

(4) That the accused concealed the existence of such design (a) by his act or illegal omission; or (b) by his knowingly false representation.

(5) That the accused did so voluntarily.

(6) That the accused thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

(7) That the offence concealed has been committed (if the case falls under the first clause).

Procedure.—Not bailable, if the concealment is of an offence punishable with death or transportation for life. Otherwise, the procedure is the same as that for the offence abetted.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant, to wit—, whose duty it was to prevent the commission of the offence of—, with the intention of facilitating, or with the knowledge that you will thereby facilitate, the commission of the offence of—did (*specify the act*) (or omit to do—*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 119 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Concealing design to commit offence punishable with imprisonment—

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence¹ punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed; if offence be not committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

COMMENT.

Section 118 deals with offences punishable with death or transportation for life : this section deals with offences punishable with imprisonment. The basic principle in both the sections is one and the same. All offences except those punishable with fine are included in these two sections.

The illegal concealment by act or omission contemplated by this section has reference to the existence of a design on the part of third persons to commit an offence.³

1. 'Offence.'—Sec s. 40, *supra*.

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

³ *Rajcoomar Banerjee*, (1862) 1 Ind. Jur. (O. S.) 105.

- (2) That such offence was punishable with imprisonment.
- (3) That the accused concealed the existence of such design
 - (a) by his act or illegal omission, or
 - (b) by his knowingly false representation.
- (4) That he did so voluntarily.
- (5) That he thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

If the case falls under the first clause, prove

- (6) That the offence concealed has been committed.

Procedure.—Same as that for the offence abetted.

Charge.—See s. 118, *supra*.

CHAPTER V A.

CRIMINAL CONSPIRACY.

Definition of criminal conspiracy. **120A.** When two or more persons agree¹ to do, or cause to be done,—

(1) an illegal act,² or

(2) an act which is not illegal by illegal means,³ such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement⁴ in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

COMMENT.

This Chapter has introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy. It was introduced by the Criminal Law Amendment Act.¹ Conspiracy is a substantive offence and has nothing to do with abetment. This section provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of s. 107. Where a criminal conspiracy amounts to an abetment under s. 107, it is unnecessary to invoke the provisions of this section or s. 120B, because the Code has made specific provision for the punishment of such a conspiracy.²

Conspiracy differs from other offences in this respect, that in other offences the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or the attempting to do some act to carry out the intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not.³

There is not much substantial difference between conspiracy, as defined in this section, and acting on a common intention as contemplated in s. 34. While in the former, the gist of the offence is bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under s. 34 is the commission of a criminal act in furtherance of a common intention of all the offenders, which means that there should be unity of criminal behaviour resulting in something, for which an individual would be punishable, if it were all done by himself alone.⁴

Object.—The Statement of Objects and Reasons stated :—“The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and s. 121A of that Code. Under the latter provision it is an offence to conspire to commit any of the offences punishable by s. 121 of the Indian Penal Code or to conspire to deprive the King of the sovereignty of British India or of any part thereof, or to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof. Under s. 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission

¹ VIII of 1913.

² *Jugeshwar Singh*, (1935) 15 Pat. 26.

³ *Anrita Lal Hazra*, (1915) 42 Cal. 957 ;
Gulab Singh, (1916) 14 A. L. J. R. 688, 17 Cr.

L. J. 431, [1916] AIR (A) 141.

⁴ *Provul. Govt., C. P. and Berar v. Dinanath*,
[1939] Nag. 644.

takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other words, except in respect of the offences particularized in s. 121A, conspiracy *per se* is not an offence under the Indian Penal Code.

"On the other hand, by the common law of England if two or more persons agree together to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so agree, commit the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

"Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in s. 121A of the Indian Penal Code, and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine or with both."⁵

Scope.—The section is not applicable to offences committed before it came into force.⁶

Ingredients.—The ingredients of this offence are :—

(1) That there should be an agreement between the persons who are alleged to conspire; and

(2) That the agreement should be—

(i) for doing of an illegal act, or

(ii) for doing by illegal means an act which may not itself be illegal.⁷

To constitute a criminal conspiracy there must be an agreement of two or more persons, to do an act which is illegal or which is to be done by illegal means. The object in view or the methods employed should be illegal, as defined in s. 43, *supra*. A distinction is drawn between an agreement to commit an offence, and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there must be some act done by one or more of the parties to the agreement to effect the object thereof, that is, there must be an overt act.

A mere agreement between two or more persons to do an illegal act, or an act which is not illegal by illegal means, is of itself a criminal conspiracy. It is one thing to say that a mere agreement constitutes a conspiracy in certain circumstances, but it is entirely another thing to say that an agreement having been made it is impossible that the conspiracy should exist beyond the actual moment of time at which the agreement is born. It is true that a mere agreement may bring the conspiracy into existence but nowhere is it said in the Code that after that the offence no longer exists. Criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting in accord, in furtherance of the objects for which they entered into the agreement.⁸

1. 'Agree.'—The gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not.⁹ A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a

⁵ *Gazette of India*, 1913, Part V, p. 44.

⁶ *Monmohan Roy*, (1915) 20 C. W. N. 292,

17 Cr. L. J. 439.

⁷ *Chandiram*, (1925) 20 S. L. R. 140, 27

Cr. L. J. 286, (1926) AIR (S) 174.

⁸ *Abdul Rahaman*, (1935) 62 Cal. 740, 779.

⁹ *O'Connell*, (1844) 11 Cl. & F. 155, 233; *B. N. Mukerji*, [1945] Nag. 176.

legal act by illegal means.¹⁰ A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two or more agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, becomes capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means.¹¹ When one of the two accused is acquitted of the charge under ss. 120B and 302, the other cannot be convicted of the charge.¹² Where the conspiracy alleged in the charge is one in which only three persons are said to have been participants and two of them are acquitted, the other is entitled to an acquittal as a matter of course.¹³

2. 'Illegal act.'—The word "illegal" is defined in s. 43. It is not necessary that the agreement of conspiracy should be limited to the commission of only a single act and that it could not comprise the commission of many acts within its scope.¹⁴

Where a person was aware of the fact that a large amount of jewellery had been handed over by a lady to another person in order that he might deposit it for safe custody in a bank and of the fact that that person had pawned that jewellery and kept the proceeds, but not only did the person, who was aware, not inform the lady whose property had been misappropriated of the fact, although he was married to her granddaughter but he told her deliberate untruths upon the subject, it was held that both those men were engaged in a criminal conspiracy.¹⁵

3. 'Illegal means.'—An agreement to effect something which in itself may be indifferent or even lawful by unlawful means amounts to conspiracy.¹⁶ A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.¹⁷

4. 'Unless some act besides the agreement is done by one or more parties to such agreement.'—When the agreement is not for commission of an offence an overt act in pursuance of the conspiracy is necessary. The law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to the intention. The overt act in a case of conspiracy consists in the agreement of the parties to do an unlawful act or to do a lawful act by unlawful means.¹⁸ Mere study of communist literature and profession of communist doctrine not being contrary to law are not punishable *per se* in the absence of any overt act.¹⁹

120B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy,¹ be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

COMMENT.

An offence under this section consists in the conspiracy without any reference to the subject-matter of the conspiracy and it is not necessary to establish the offence that

¹⁰ *Amrita Lal Hazra*, (1914) 42 Cal. 957.

¹¹ *Gulab Singh*, (1916) 14 A. L. J. R. 688, 17 Cr. L. J. 431, [1916] AIR (A) 141.

¹² *Osman*, (1923) 39 C. L. J. 264, 25 Cr. L. J. 1048, [1924] AIR (C) 809; *Kasem Ali*, (1926) 45 C. L. J. 204, 28 Cr. L. J. 449, [1927] AIR (C) 949.

¹³ *Profulla Kumar Roy Chowdhury*, (1925) 30 C. W. N. 94, 27 Cr. L. J. 147, [1926] AIR (C)

345.

¹⁴ *Ramachandrayya*, [1936] M. W. N. 627.

¹⁵ *Muhammad Hadi Husain Mirza*, (1928) 3 Luck. 494.

¹⁶ *O'Connell*, (1844) 11 Cl. & F. 155, 233.

¹⁷ *Whitchurch*, (1890) 24 Q. B. D. 420.

¹⁸ *Nirmal Chandra De*, (1925) 31 C. W. N.

239, 28 Cr. L. J. 241, [1927] AIR (C) 265.

¹⁹ *B. N. Mukerji*, [1945] Nag. 176.

there must have been definite property about which the parties are negotiating or which they have conspired to possess.²⁰

The punishment for a criminal conspiracy is more severe if the agreement is one to commit a serious offence; it is less severe if the agreement is to commit an act which, although illegal, is not an offence punishable with death, transportation, or rigorous imprisonment for more than two years.

Sub-section (2) does not apply to trade unions (*vide* s. 17 of the Indian Trade Unions Act, XVI of 1926).

Scope.—This section only applies where no offence has been actually committed.²¹

1. 'Where no express provision is made in this Code for the punishment of such a conspiracy'.—This section provides a punishment for criminal conspiracy where no express provision is made in the Code for the punishment of such a conspiracy. Where, therefore, a criminal conspiracy amounts to an abetment under s. 107, it is unnecessary to invoke the provisions of ss. 120A and 120B, because the Code has made specific provisions for the punishment of such a conspiracy.²² The Chief Court of Sind has laid down that where an offence is committed in conspiracy, it is optional for the prosecution to proceed either under s. 107 for abetment of the offence of conspiracy, or under s. 120B for the conspiracy as a substantive offence. The words "where no express provision has been made in this Code for the punishment of such a conspiracy" in this section, do not mean that when there is proof of an abetment of an offence, the charge should be for such an abetment. They only include cases where there is express provision for the punishment of the particular conspiracy alleged and the only such case in the Penal Code is under s. 121A.²³

An agreement to commit murder being an agreement to commit an offence falls within this section, and none the less so because the means by which the murder is to be perpetrated are not agreed upon, or the means which are agreed upon are such as are not likely to prove, and do not in fact prove, effective. If once there is a conspiracy to commit murder, the case falls within the section, the offence under it being the conspiracy and not the acts by which the subject-matter of the conspiracy is to be carried into effect. But if the conspiracy is merely to do an act which is not illegal, though in the hope and belief that that act may result in the death of or injury to some person, that does not amount to a conspiracy to do an illegal act. Hence where there is an agreement between the accused to perform witch-craft ceremony, the mere fact that the accused or some of them may have anticipated that the death of the intended victim will ensue will not constitute an offence under this section. But where the real agreement is to cause the death of the victim, the means to be tried in the first instance being a form of witch-craft, the nature of which none of the accused understands when they enter into the conspiracy, there is a conspiracy to murder punishable under this section.²⁴

PRACTICE.

Evidence.—Prove (1) that the accused agreed to do or caused to be done an act.
(2) That such act was illegal or was done by illegal means.

Where the act itself is not illegal prove further

(3) That some overt act was done by one of the accused in pursuance of the agreement.

The gist of the offence is the agreement itself, and where the object of the agreement is to do an unlawful act, and not to do a lawful act by unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object.²⁵ Mere evidence of association is not sufficient to lead to an inference of conspiracy.¹ It is not necessary that there should

²⁰ *Nirmal Chandra De*, (1925) 31 C. W. N. 239, 28 C. L. G. 241, (1927) A. I. R. (C) 265.

²¹ *Venkataramiah*, [1937] M. W. N. 996, 46 L. W. 709, [1937] 2 M. L. J. 862, 39 Cr. L. J. 261, [1938] AIR (M) 129.

²² *Jugeshwar Singh*, (1935) 15 Pat. 26. See *Kishinchand*, (1925) 20 S. L. R. 18, 27 Cr. L. J. 243, [1926] AIR (S) 171

²³ *Udhasing Tahilsing*, (1916) 10 S. L. R. 69, 17 Cr. L. J. 366, [1916] AIR (S) 95.

²⁴ *Shankarayya Gurushiddayya*, (1940) 42 Bom. L. R. 777, [1940] Bom. 695.

²⁵ *Haji Samo*, (1926) 22 S. L. R. 91, 28 Cr. L. J. 426, [1927] AIR (S) 161.

¹ *Pran Krishna*, (1934) 39 C. W. N. 188, 36 Cr. L. J. 1322, [1935] AIR (C) 580, s.b.

be express proof of conspiracy. From the acts and conduct an agreement can be inferred. If it is proved that the accused pursued by the acts the same object, often by the same means, one performing one part of the act and the other another part of the same act, so as to complete it with a view to the attainment of the object which they were pursuing, the Court is at liberty to draw the inference that they conspired together to effect that object.²

To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means, provided that where the agreement is other than one to commit an offence, the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. But where the agreement is one to do or cause to be done an act which is itself an offence, no overt act, i.e., any act done by one of the parties to the agreement in pursuance of it, need be proved; the crime of criminal conspiracy is established once such an agreement is proved. Hence where the conspiracy alleged is one to commit a series of serious crimes mere proof of such an agreement between the accused is sufficient to sustain a conviction. Proof of overt acts committed by the accused or any one of them is not strictly necessary on this charge, but needless to say, proof that they or some of them were concerned in the overt acts alleged would go far to establish that the agreement alleged was in fact made between them. Though proof of overt acts is not necessary in a case, yet it may well be that if such acts are proved, the Court will be bound to infer that they are not unconnected and isolated acts, but acts which must have been committed in pursuance of an agreement made between the accused.³

On a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the accused took part in it. Before evidence is let in under s. 10 of the Evidence Act, the defence is entitled to insist upon proof of reasonable ground for belief that the persons named in the charge have conspired together.⁴ Though general evidence of the existence of the conspiracy may first be given before particular facts are proved to show that one or more of the accused took part in it, it does not mean that conspiracy cannot be proved by circumstantial evidence only and that general evidence must be given.⁵ In cases of conspiracy direct evidence will be seldom forthcoming and it is necessary to look at the circumstances to see whether the conspiracy actually existed.⁶ A cipher code of revolutionary significance is good evidence that the persons named therein have conspired to commit an offence. Such a cipher code is substantive evidence of conspiracy.⁷

It is not sufficient, in order to convict a person under this section, to merely prove that he had been associating with the other accused at a certain place and on his arrest endeavoured to extricate himself from being accused of some thing connected with the conspiracy; and the prosecution cannot complete what is necessary in order to show that he was a person who concerted with others by proving that he was friendly with the other accused and was anxious to escape observation or even was doing his best to conceal his whereabouts.⁸

In cases of conspiracy, the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts in the case.⁹ A conspiracy need not be established by evidence of an actual agreement between the conspirators and overt acts raise a presumption of an agreement and knowledge of the purpose of the conspiracy. The connection has to be established with the conspiracy and not with the separate acts of different conspirators which are the overt acts of the

² *Binayendra Chandra Pande*, (1936) 63 Cal. 929; *Nitai Chandra Jana*, (1937) 38 Cr. L. J. 852, [1937] AIR (C) 433, S.B.

³ *Bachcha Babu*, (1934) 36 Cr. L. J. 684, [1935] AIR (A) 162; *Moti Lal Roy*, (1935) 37 Cr. L. J. 999, 39 C. W. N. 754, F.B.; *Mohammad Ismail*, [1936] Nag. 152; *Ramachandrayya*, [1936] M. W. N. 627; *Golak Biharee Takal*, [1938] 1 Cal. 290.

⁴ *Amrita Lal Hazra*, (1915) 42 Cal. 957.

⁵ *Abdulla*, (1926) 21 S. I. R. 244, 28 Cr. L. J. 421, [1928] AIR (S) 73; *B. N. Mukerji*,

[1945] Nag. 176.

⁶ *Gour Chandra Das*, (1928) 32 C. W. N. 1004, 30 Cr. L. J. 475, [1929] AIR (C) 14.

⁷ *Indira Chandra Narang*, (1929) 11 P. L. T. 42, 30 Cr. L. J. 646, [1929] AIR (P) 145, F.B.

⁸ *Rakhal Chandra Das*, (1930) 32 Cr. L. J. 399, [1930] AIR (C) 647, F.B.

⁹ *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153; *Punjab Singh*, (1933) 15 Lah. 84; *Thakin Ba Sein*, (1937) 38 Cr. L. J. 801, [1937] AIR (R) 161.

different individuals in proof of the conspiracy.¹⁰ Overt acts may properly be looked at as evidence of the existence of a concerted intention and in many cases it is only by means of overt acts that the existence of the conspiracy can be made out. But the criminality of the conspiracy is independent of the criminality of the overt act.¹¹ To prove conspiracy it is not necessary that there should be direct communication between each conspirer and every other, but the criminal design alleged must be common to all.¹²

Where two persons took a house in which a considerable number of pieces of fire-arms was found with tools and implements, and work had been actually done to some of the parts of fire-arms, it was held that the Court may and ought to infer a conspiracy to manufacture arms.¹³

Where the proof of a conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on their trial for that offence.¹⁴ Mere participation in one dacoity is not sufficient to prove the charge of conspiracy under this section, and, therefore, proof of one offence of dacoity or robbery is not sufficient to support a charge of conspiring to commit robberies and dacoities.¹⁵

The testimony of persons who have been members of a criminal conspiracy or else have joined it for the purpose of betraying its secrets must be very carefully scrutinised and much weight cannot be attached to it unless it is corroborated by other circumstances.¹⁶

The words and acts of any member of the conspiracy in reference to the common intention are relevant to determine the exact scope and details of the intention of any member or of all members of the conspiracy. Corroboration of the nature of the programme which was agreed upon by the strike committee can be obtained from the speeches and acts of any person present at the meetings of the committee and of the strikers.¹⁷

A conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. In a case of conspiracy when there is no direct evidence, inferences from proved circumstances must to a large extent form the basis of the Court's conclusions, but in dealing with such cases based on circumstantial evidence an inference of guilt may be drawn only when the circumstances are such as to be incapable of any other reasonable interpretation. Where there are circumstances which are inconsistent with the charge of conspiracy, the charge should fail.¹⁸

The offence of conspiracy is one which requires detailed and specific proof against each of the accused that he individually participated in a particular design to do a particular criminal thing.¹⁹

Procedure.—If the offence falls under clause (1)—Cognizable, if the offence which is the object of the conspiracy is cognizable, but not otherwise—Warrant or summons, as the offence for which conspiracy is entered into—Bailable, if the offence which is the object of the conspiracy is bailable, otherwise not—Not compoundable—Court of Session, if the offence which is the object of the conspiracy is triable exclusively by such Court; in the case of all other offences, Court of Session, Presidency Magistrate or Magistrate of the first class.

If the offence falls under clause (2)—Warrant—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first class.

When several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transac-

¹⁰ *Bishambar Nath Tandon*, (1925) 2 O. W. N. 760, 26 Cr. L. J. 1602, [1926] AIR (O) 161; *Kishanchand*, (1925) 27 Cr. L. J. 243, 20 S. L. R. 18, [1926] AIR (S) 171; *Haji Samo*, (1926) 22 S. L. R. 91, 28 Cr. L. J. 426, [1927] AIR (S) 161.

¹¹ *Pulin Behari Das*, (1911) 16 C. W. N. 1105, 15 C. L. J. 517, 13 Cr. L. J. 609.

¹² *Kate Evelyn Meyrick*, (1929) 21 Cr. App. R. 94.

¹³ *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153.

¹⁴ *Kali Das*, (1915) 30 C. L. J. 151, 26 Cr. L. J. 33; *Golak Biharee Takal*, [1938] 1 Cal. 290.

¹⁵ *Jagan*, (1934) 11 O. W. N. 208, 35 Cr. L. J. 796, [1934] AIR (O) 106.

¹⁶ *Pulin Behari Das*, *supra*.

¹⁷ *Mukundlal Sircar*, [1930] M. W. N. 1264.

¹⁸ *Rahimtulla Haji Karim*, (1930) 70 C. L. J. 471.

¹⁹ *Aftab Mohammad Khan*, [1940] A. L. J. R. 206, (1939) 41 Cr. L. J. 647, [1940] AIR (A) 291.

tion, which embraces the conspiracy and the acts under it. The common concert and agreement which constitute the conspiracy serve to unify the acts done under it.²⁰ In cases of indictment for conspiracy, when two persons are indicted and are tried together either both must be convicted or both must be acquitted. Where, therefore, three persons were charged with having entered into a conspiracy, and two of them were acquitted, the third person could not be convicted of conspiracy, whether the conviction be upon the verdict of a jury or upon his own confession.²¹

Where several persons are charged with conspiracy the prosecution must prove that there is one conspiracy involving all the accused with a unity of will and purpose amongst them all and not a number of unrelated conspiracies entered into by different groups of the accused. If a number of unrelated conspiracies only is proved, the trial will be bad for misjoinder of parties under s. 239, Criminal Procedure Code.²²

In a charge of conspiracy, the object of the conspiracy must be proved as laid. Where a particular conspiracy is charged in the indictment, a different conspiracy cannot be found. Where the object of the conspiracy as charged is to commit murder, it is not open to the prosecution to prove a conspiracy the object of which is to commit a minor offence, namely grievous hurt.²³

Once a charge of conspiracy is framed, anything done in pursuance of the conspiracy can be tried at the trial for conspiracy. It is not an irregularity or an improper exercise of discretion in putting in the form of charges specific acts specially relied on as against each individual accused to show that they joined in the conspiracy. Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from them the existence of the conspiracy may be proved.²⁴

When conspiracy is charged, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy have been carried out.²⁵

Where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, s. 120A and this section are wholly irrelevant. Where the offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under s. 109.¹

When in pursuance of a conspiracy an offence is committed, when the criminal purpose and object of a conspiracy has been carried out, it is idle to contend that it is not sufficient that the persons concerned be proceeded against for the crime itself and abetment thereof, but that they must necessarily be charged also with conspiracy. The prosecution are not bound to frame a charge of conspiracy under this section so as to attract the provisions of s. 196A of the Criminal Procedure Code.²

Joint trial.—All the accused against whom the prosecution alleges that there was unity of criminal behaviour actuated by a common intention to extort a confession can be jointly tried under s. 239 of the Criminal Procedure Code.³

Jurisdiction.—It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court.⁴ Hence, where the conspiracy was hatched in Bombay, where the accused lived, they were not held triable at Pollachi in Madras on a charge of criminal conspiracy for cheating the public at large.⁵

²⁰ *Babulal*, (1938) 40 Bom. L. R. 787, [1938] 2 Cal. 295, 65 I. A. 158.

²¹ *Gulab Singh*, (1916) 14 A. L. J. R. 688, 17 Cr. L. J. 431, [1916] AIR (A) 141; *Balmokand*, (1915) P. R. No. 17 of 1915, 16 P. L. R. 701, 16 Cr. L. J. 354; *Osman*, (1923) 39 C. L. J. 264, 25 Cr. L. J. 1048, [1924] AIR (C) 809.

²² *Mohammad Ismail*, [1936] Nag. 152.

²³ *Golak Biharee Takal*, [1938] 1 Cal. 290.

²⁴ *Abdul Salim*, (1921) 40 Cal. 573; *P. E. Buldinghurst v. H. P. Blackburn*, (1923) 27 C. W. N. 821, 25 Cr. L. J. 1313, [1924] AIR (C) 18.

²⁵ *Karamalli Gulamalli*, (1938) 40 Bom. L. R. 1092, [1939] Bom. 42.

¹ *Venkataramiah*, [1937] M. W. N. 996, [1937] 2 M. L. J. 812, 46 L. W. 709.

² *Pir Muindin*, [1944] Kar. 316.

³ *Provl. Govt., C. P. and Berar v. Dinanath*, [1939] Nag. 644.

⁴ *Gokaldas*, (1933) 27 S. L. R. 392, 35 Cr. L. J. 585, [1933] AIR (S) 833.

⁵ *Dani*, [1935] M. W. N. 1163, 37 Cr. L. J. 684, [1936] AIR (M) 317.

Sanction.—Sanction of the Provincial Government is necessary before instituting proceedings under this section;⁶ but no sanction is needed where the object of the conspiracy was to commit cognizable offences punishable with rigorous imprisonment for more than two years.⁷

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, agreed to do (*or caused to be done*) [an illegal act, to wit—] [an act, viz.—by illegal means, to wit—] and that same act, viz.—, was done in pursuance of the agreement] and thereby committed an offence punishable under s. 120B of the Indian Penal Code and within my cognizance [*or the cognizance of the Court of Session (or High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

The charge of conspiracy must not be indefinite. The counts must state the illegal purpose and design of the agreement entered into between the accused with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law.⁸

It is legal to try accused persons on a charge of conspiracy to commit an offence even if the substantive offence has been carried out.⁹

When two or more persons have conspired together for committing some offence, and one or more of them have committed that offence in pursuance of the conspiracy but others have not, it is permissible to charge and try them together for the conspiracy as also for the substantive offence.¹⁰

A charge is not bad because it states no definite date on which the accused agreed, or the names of persons in respect of whom the conspirators agreed to commit an offence.¹¹

A charge of criminal conspiracy under this section to commit an offence does not vitiate a charge of abetment of another offence if the charge of criminal conspiracy under this section does not relate to the latter offence.¹²

There is no misjoinder of charges where the accused are charged with criminal conspiracy to steal Government timber during a stated period and also with the offence of habitually receiving and dealing in such stolen timber during the same period in pursuance of the said conspiracy. But if the charge includes dealings with persons outside the conspiracy, there would be a misjoinder such as would vitiate the trial.¹³ The joinder of charges for specific acts of cheating and forgery with the charge of conspiracy, at one trial, is not illegal especially in a case where the specific counts of cheating as well as forgery are so closely connected that they really form part of one and the same transaction.¹⁴

Punishment.—The punishment for conspiracy is the same as if the conspirator had abetted the offence. The punishment varies according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed, the punishment is that provided by s. 109 of the Code, though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment. If it has not been committed, the punishment is governed by s. 116 of the Code.¹⁵ Where, for instance, there is only a conspiracy to manufacture arms, without an actual manufacture, the sentence should be imposed under this section read with s. 19(a) of the Arms Act (XI of 1878) and s. 116 of the Code, and the maximum term of imprisonment awardable under these sections is nine months' rigorous imprisonment.¹⁶ In a case

⁶ Criminal Procedure Code, s. 196A; *Ali Mia*, (1926) 54 Cal. 155; *Nibaranchandra Bhattacharya*, (1929) 57 Cal. 99; *Hari Charan Misra*, (1933) 12 Pat. 353; *Hamumantha Rao*, (1933) 57 Mad. 545; *Bhikhari Singh*, (1934) 13 Pat. 729.

⁷ *Ramjanam Tewari*, (1935) 14 Pat. 717.

⁸ *Amrita Lal Hazra*, (1915) 42 Cal. 957.

⁹ *Surajpalsingh*, [1933] Nag. 516.

¹⁰ *Amrita Lal Hazra*, (1915) 42 Cal. 957.

¹¹ *Balmokand*, (1915) P. R. No. 17 of 1915, 16 P. L. R. 701, 16 Cr. L. J. 354, [1915] AIR (L)

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¹² *Sahebrao*, [1939] Nag. 534.

¹³ *Maung Ba Chit*, (1929) 7 Ran. 821.

¹⁴ *Kunwar Sen*, (1932) 8 Luck. 286.

¹⁵ *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153; *Balmokand*, (1915) P. R. No. 17 of 1915, 16 Cr. L. J. 354, [1915] AIR (L) 16.

¹⁶ *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153; *Khagendra Nath Chaudhuri*, (1914) 19 C. W. N. 706, 21 C. L. J. 201, 16 Cr. L. J. 9; *Balmokand*, (1915) P. R. No. 17 of 1915, 16 Cr. L. J. 354, [1915] AIR (L) 16.

of conspiracy to murder under s. 109 if the deceased was murdered in consequence of that conspiracy, the punishment is either death or transportation for life. If, on the other hand, murder is not committed in consequence of the conspiracy then under s. 115 the maximum punishment is rigorous imprisonment for seven years. In any case a sentence of ten years' rigorous imprisonment is illegal.¹⁷

The offence of conspiracy is a separate offence from the offence of participation in a particular dacoity or the dishonest reception of property stolen in a dacoity knowing it to be stolen. Separate sentences can be awarded to run consecutively for participation in separate dacoities and to these can also be added a consecutive sentence of participation in conspiracy.¹⁸ Acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularised as required by the Criminal Procedure Code.¹⁹

Where the objects of a conspiracy are actually and in fact carried out within a very short time, separate sentences under this section are not called for.²⁰

¹⁷ *Alim Jan Bibi*, [1937] 1 Cal. 484.

¹⁸ *Hazari Beria*, (1928) 5 O. W. N. 985, 987,
30 Cr. L. J. 473, [1928] AIR (O) 507.

¹⁹ *Karamalli Gulamalli*, (1938) 40 Bom. L. R.
1092, [1939] Bom. 42.

²⁰ *Punjab Singh*, (1933) 15 Lah. 84.

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

Waging or attempting to wage war or abetting waging of war against the Queen.

121. Whoever¹ wages war² against the Queen³, or attempts to wage such war, or abets the waging of such war⁴, shall be punished with death, or transportation for life, and shall also be liable to fine.

ILLUSTRATIONS.

(a) A joins an insurrection against the Queen. A has committed the offence defined in this section.

(b) A in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.

COMMENT.

Principle.—The section embraces every description of war, whether by insurrection or invasion, or war beyond our territories; and complicity in an abetment of insurrection, invasion, or foreign war; and further a British subject residing in British territory, who abets the waging of war against the British Government outside British territory, is guilty, no matter whether the British Government takes the initiative and invades the hostile territory or awaits the attack of the enemy, or whether the persons waging war are foreigners or persons owing allegiance to the Queen.¹

To constitute this offence no specified number of persons is necessary.² Neither the number of persons nor the manner in which they are assembled or armed is material to constitute an offence under this section. The true criterion is the purpose or intention with which the gathering assembled. The object of the gathering must be to attain by force and violence, an object of a general public nature thereby striking directly against the King's authority.³

There is a difference, says Foster,⁴ "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned.

"I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours, etc., have been added. But I think the merits of the case have never turned singly on any of these circumstances.

"In the cases of *Damaree* and *Purchase*, . . . there was nothing given in evidence of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoners' counsel insisted much on that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crowes, and other tools of the like nature, proper for the mischief they intended to effect. . .

"The true criterion therefore in all these cases is, *Quo animo* did the parties assemble? For if the assembly be upon account of some *private* quarrel, or to take revenge on *particular* persons, the statute of treasons hath already determined that point in favour of the subject. . .

"Upon the same principle and within the reason and equity of the statute, risings to maintain a *private* claim of right, or to destroy *particular* inclosures, or to remove

¹ *Muhamad Shuffee*, All. Unrep.

² 3 Coke's Inst., ch. I, 9.

³ *Maganlal*, [1946] Nag. 126.

⁴ Crown Cases, pp. 208, 209, 210.

nuisances, which affected or were thought to affect in point of interest the parties assembled for these purposes, or to break prisons in order to release particular persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute."

The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war against the King, under this section, are offences against the Penal Code only, and are not treason or misprison of treason.⁵ Compare Act XI of 1857, s. 1.

1. 'Whoever.'—The Law Commissioners say :—"The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, &c., or temporary as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question."⁶

2. 'Wages war.'—These words "seem naturally to import a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of this Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm."⁷ There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature.⁸

The word "wages" has the same meaning as "levying" used in the English statute. In *Lord George Gordon's case*⁹ Lord Mansfield said : "There are two kinds of levying war :—one against the person of the king; to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors :—the other, which is said to be levied against the majesty of the king, or, in other words, against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the king; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn government; and by force of arms, to restrain the king from reigning according to law."

"Every insurrection which in judgment of law is intended against the person of the King, be it to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors from about him,—these risings all amount to levying war within the statute, whether attended with the pomp and circumstances of open war or not : and every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the King's death..."

"Insurrections in order to throw all inclosures, to alter the established law or change religion, to enhance the price of all labour or to open all prisons,—all risings in order to effect these innovations of a public and general concern by an armed force are, in construction of law, high treason, within the clause of levying war : for though they are not levelled at the person of the King, they are against his Royal Majesty; and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and all government too, by numbers and an armed force. Insurrections likewise for redressing national grievances, or for the expulsion of foreigners in general, or indeed of any single nation living here under the protection of the King, or for the reformation of real or imaginary evils of a public nature and in which the insurgents have no special interest,—risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war : for they are levelled at the King's Crown and Royal Dignity."¹⁰

An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percussum*. Lifting and marching are sufficient overt acts without coming to a battle or action.¹¹

No amount of violence, however great, and with whatever circumstances of a

⁵ *Ameerodeen*, (1871) 15 W. R. (Cr.) 25, 7. Beng. L. R. 63.

⁶ 2nd Rep., s. 13.

⁷ *Ibid.*, s. 10. See *Suriya Kumar Sen*, (1938) 35 Cr. L. J. 334, [1934] AIR (C) 221, F.B.

⁸ *Frost*, (1839) 9 C. & P. 129, 4 St. Tr. (N. S.) 85.

⁹ (1784) 21 St. Tr. 485, 644.

¹⁰ *Foster on Crown Cases*, pp. 210, 211; *Lord George Gordon*, (1784) 21 St. Tr. 485, 490; *Kunhi Kadir*, (1921) 15 L. W. 311, 42 M. L. J. 108, [1922] M. W. N. 71, 23 Cr. L. J. 203.

¹¹ *Foster*, p. 218.

warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the King will be high treason, and as soon as violence has any political object, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power.¹² Where the object of a mob is not mere resistance to a District Magistrate but the total subversion of the British power and the establishment of the Khilafat Government, a person forming part of it and taking part in its actions is guilty of waging war.¹³ When a multitude rises and assembles to attain by force and violence any object of a general public nature, it amounts to levying war against the King. It is not the number of the force, but the purpose and intention, that constitute the offence and distinguish it from riot or any other rising for a private purpose. The law knows no distinction between principal and accessory, and all who take part in the treasonable act incur the same guilt. In rebellion cases it frequently happens that few are let into the real design, but yet all that join in it are guilty of the rebellion. A deliberate and an organized attack upon the Crown forces would amount to a waging of war if the object of the insurgents was by armed force and violence to overcome the servants of the Crown and thereby to prevent the general collection of the capitation-tax.¹⁴

"There is a diversity between levying of war and committing of a great riot, a rout, or an unlawful assembly. For example, as if three, or four, or more, do rise to burn, or put down an inclosure in Dale, which the lord of the manor of Dale hath made there in that particular place; this or the like is a riot, a rout, or an unlawful assembly, and no treason. But if they had risen of purpose to alter religion established within the realm, or laws, or to go from town to town generally, and to cast down inclosures, this is a levying of war (though there be great number of the conspirators) within the purview of this statute, because the pretence is public and general, and not private in particular.¹⁵

Where the rioting or tumult is merely to accomplish some private purpose, interesting only to those engaged in it, not resisting or calling in question the King's authority or prerogative, then the tumult, however numerous or outrageous the mob may be, is only a riot. But whenever the rising or insurrection has for its object a general purpose, not confined to the peculiar interests of the persons concerned in it, but common to the whole community, and striking directly against the King's authority, then it assumes the character of treason. The numbers concerned and the manner in which they were equipped or armed are not material.¹⁶

The Calcutta High Court has held that the expression 'wages war' must be construed in its ordinary sense, and a conspiracy to wage war, or the collection of men, arms and ammunition for that purpose, is not waging war.¹⁷

3. 'Against the Queen.'—The word 'Queen' denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland (s. 13).

4. 'Abets the waging of such war.'—It is not essential that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the waging of the war. It should not be merely a remote and incidental purpose, but the thing principally aimed at by the instigator. The mere fact that a person may try to do it in an indirect and disguised manner would not be sufficient to save him from the operation of the section; but the Court ought to be satisfied that he has instigated the waging of war, i.e., the use of violence for the purpose of effecting innovations of a general and public nature.¹⁸

The authors of the Code say: "We have...made the abetting of hostilities against the Government, in certain cases, a separate offence, instead of leaving it to the operation of the general law laid down in the chapter on abetment. We have done so for two reasons. In the first place, war may be waged against the Government by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person

¹² Stephen's History of Criminal Law of England, Vol. II, p. 269; Foster, 208, 211.

¹³ *Kunhi Kadir*, (1921) 15 L. W. 311, 42 M. L. J. 108, [1922] M. W. N. 71, 23 Cr. L. J. 203.

¹⁴ *Aung Hla*, (1931) 9 Ran. 404.

¹⁵ Coke's Inst., Ch. I, 9.

¹⁶ *Jubba Mallah*, (1943) 22 Pat. 662.

¹⁷ *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

¹⁸ *Hasrat Mohani*, (1922) 24 Bom. L. R. 885, 24 Cr. L. J. 923, [1922] AIR (B) 284.

residing in the British territories who should abet a subject of the British Government in waging war against that Government; but they would not reach the case of a person who, while residing in the British territories, should abet the waging of war by any foreign prince against the British Government. In the second place, we agree with the great body of legislators in thinking, that though in general a person who has been a party to a criminal design which has not been carried into effect, ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the state; for state-crimes, and especially the most heinous and formidable state-crimes, have this peculiarity, that if they are successfully committed, the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations. We have therefore not thought it expedient to leave such plots and preparations to the ordinary law of abetment. Under that general law, a conspiracy for the subversion of the Government would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions and interchange promises of fidelity. A conspiracy for the subversion of the Government, which should be carried as far as the gun-powder treason or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged cheque. We have, therefore, thought it absolutely necessary to make separate provision for the previous abetting of great state offences. The subsequent abetting of such offences may, we think, without inconvenience, be left to be dealt with according to the general law."¹⁹ It may be noted in view of the last sentence that s. 121A which deals with conspiracies was added to the Code subsequently.

Under the English law, mere words spoken or written, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King or the levying of a war against him and in the contemplation of the speaker, do not amount to treason. Under the Penal Code, the waging or levying of a war and the abetting of it are put upon the same footing by this section. That is, the abetting of the waging of war is under the Code as much an offence of treason as the waging of war itself.

According to the general law as to abetment (s. 108, expln. 2), to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. This applies to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, this section does away with that distinction so far as the offence of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever.²⁰

The word "abets" in this section does not mean something less than that word as used in s. 107. The abetment contemplated under the former section need not be abetment of some war in progress; there may be and usually is instigation of rebellion before rebellion actually begins: instigation of this kind is abetting the waging of war against the King. So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore of abetting the waging of war.²¹

The accused published a book of poems wherein a spirit of blood-thirstiness and murderous eagerness directed against the Government and "White" rulers ran through the poems; the urgency of taking up the sword was conveyed in unambiguous language; and an appeal of blood-thirsty incitement was made to the people to

¹⁹ Note C, p. 119.

²⁰ *Ganesh D. Savarkar*, (1909) 12 Bom. L. R. 105, 116, 34 Bom. 394, 404; *Magantlal*, [1946]

Nag. 126.

²¹ *Ibid.*, pp. 119, 120.

take up the sword, form secret societies, and adopt guerilla warfare for the purpose of rooting out "the demon" of foreign rule. It was held that the poems conveyed to readers an instigation to wage war; and that the offence of abetting the waging of war was committed.²²

Inducing or assisting subjects of a State at war to return to their own country after declaration of war will amount to abetment.²³

If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King and of the country to resist or attack the enemies of the King and country, he gives aid and comfort to the King's enemies within the meaning of the Treason Act.²⁴ The United Kingdom being at war with Germany, a British subject went to Germany and there endeavoured to persuade other British subjects, who were prisoners of war in Germany, to join the armed forces of the enemy, and took part in an attempt to land arms and ammunition in Ireland for the use of the enemy, it was held that he was guilty of high treason.²⁵ Such conduct will amount to abetment under this section.

Constructive levying of war.—"Constructive levying of war is in truth more directed against the government than the person of the king; though in legal construction it is a levying of war against the king himself. This is when an insurrection is raised to reform some national grievance, to alter the established law or religion, to punish magistrates, to introduce innovation of a public concern, to obstruct the execution of some general law by an armed force, or for any other purpose which usurps the government in matters of a public and general nature. On the trial of Lord George Gordon the Court of King's Bench declared their unanimous opinion that an attempt, by intimidation and violence to force the repeal of a law, was a levying war against the king. The statute in question was the 18 Geo. 3, c. 60, for relieving Roman catholics from certain penalties; and the treasonable acts given in evidence against the prisoner was the assembling a great multitude of people, and encouraging them to surround the two houses of parliament and commit different acts of violence there and elsewhere, with a view to intimidate them to a repeal of the statute. Insurrections of this nature, though not levelled directly against the person of the King, are yet an attack upon his regal office, and tend to dissolve all government, society, and order. The king is bound in duty to enforce the acts of the legislature and uphold their authority: any resistance, therefore, to these, must, in its consequences, extend to the endangering of his person and government, by involving the state in a general distraction; on which account this species of treason falls properly within the clause of levying war against the king...

"Of the same nature is an assembling together for the purpose of destroying all meeting houses or all bawdy houses, under colour of reforming a public grievance; or an insurrection to reduce by force the general price of victuals, to enhance the common rate of wages, to level all enclosures, to expel all foreigners, to release all prisoners, or to reform by numbers or an armed force any real or imaginary grievance, of a public and general nature, in which the insurgents have no peculiar interest. Against such insurrections magistrates, sheriffs, and indeed all private persons, may use force to suppress them without any special commission, in the same manner as they may oppose foreign enemies coming hostilely into the kingdom."¹

Compulsion.—Compulsion is not a defence to a charge under this section.²

Foreigners.—All persons owing allegiance to the sovereign may be guilty of this offence, but not foreigners, who owe no allegiance and for whom the Indian Legislature has no power to make laws. Therefore, a prince or subject of a foreign State by which war is lawfully waged against our Government, is not within the meaning of the section. But foreigners owing local allegiance are within the section.³

Jurisdiction.—Where the accused was charged with having, at Calcutta, abetted the waging of war against the Queen, and was tried at the Sessions Court of

²² *Ganesh D. Savarkar*, (1909) 12 Bom. L. R. 105, 84 Bom. 394, 404.

²³ See *Ahlers*, [1915] 1 K. B. 616.

²⁴ *Casement*, [1917] 1 K. B. 98.

²⁵ *Ibid.*

¹ 1 East P. C., Chap. 2, s. 17. To the same

effect is *Foster*, Cr. C., 208, 211, cited in *Lord George Gordon's case*, (1784) 21 St. Tr. 485, 490.

² *Maganiat*, [1946] Nag. 126.

³ *M. & M. See Lynch*, [1903] 1 K. B. 444, where a British subject joined the Boers to fight against the British.

Patna, it was held that the Court of Session at Patna had jurisdiction to try him, because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the accused had sent money from Calcutta to Patna by *hundis*, and, until that money reached its destination, the sending continued on the part of the accused.⁴

Amendment.—The words “also be liable to fine” were substituted for the words “forfeit all his property” by Act XVI of 1921, s. 2.

CASES.

The accused was seen in the front rank of a crowd of two or three thousand persons which attacked a force of police and military with swords, knives and bludgeons. The police had to fire in self-defence and it was only after nine persons were killed and three wounded that the mob retreated. The accused was then arrested and at his direction the mob dispersed. The accused had for some time previously been engaged in a propaganda to the effect that no revenue should be paid to the Government and that people should non-co-operate with it. The accused had also been setting up a mock Court of Justice. On the morning of the occurrence the accused had addressed a meeting saying that those present should subvert the British Raj and establish the Khilafat Government and that all Government offices, railways and telegraphs must be destroyed. In the crowd there was carried by the side of the accused a flag in the front of the mob in which there was the following inscription: “God the greatest. The Khilafat go to work light-mindedly and you will certainly succeed and God will be with you.” It was held that the accused was guilty of the offence of waging war against the King.⁵

The accused delivered a speech in support of his plea for a change in the wording of the aims and objects of the Muslim League, viz. “the attainment of Swaraj by the people of India by all peaceful and legitimate means”, by substituting the words “possible and proper” for the words “peaceful and legitimate”. In the course of the speech, he advocated the immediate starting of a parallel Government independent of all British control, by setting up on a separate and permanent foundation Courts, schools, art, industry, commerce, army, police and national parliament, with a view to obtain Swaraj. The speaker contemplated the present establishment of the above by peaceful and non-violent means; but he dipped into the future and foresaw that if the British Government resorted to repression and martial law, he apprehended that the Mahomedans at least would carry on guerilla warfare or in the words of the Koran “Kill them whenever you find them.” He further developed the point by stating: “So long as the Government confines to the use of chains and fetters non-co-operation can remain peaceful as it is to-day, but if things go further and Government has recourse to gallows or machine-guns it will be impossible for the moment to remain non-violent.” It was held that the main theme of the speech having been the change in the aims and objects of the League and the immediate starting of a parallel Government, the accused had committed no offence under this section which required a clear and direct incitement to action as distinguished from a state of mind.⁶

The District Magistrate of a district marched to a place called Tirurangadi with a posse of soldiers and reserve police to arrest certain Khilafat leaders. Next morning after arrests had been effected a large body of Mopillas were marching from the west. The District Magistrate and the Deputy Inspector-General took a column of 120 police and 60 soldiers to meet them. One and a half miles from Tirurangadi they saw a big mob fifty yards away. The Deputy Superintendent went forward and ordered the mob to disperse but it came straight on in regular formation with two flags and a number of men in front. There were twenty-four swords. The police charged them with the bayonet and some of the police fired their guns. The mob then retired about thirty yards and those who had weapons dropped them. The accused was seen in front of the mob with a stick. It was held that it was doubtful whether the part taken by the accused could be said to be waging war under this section.⁷

⁴ *Amir Khan*, (1871) 9 Beng. L. R. 36, 17 W. R. (Cr.) 15.

⁵ *Kunhi Kadir*, (1921) 15 L. W. 311, [1922] M. W. N. 71, 42 M. L. J. 108, 23 Cr. L. J. 203.

⁶ *Hasrat Mohani*, (1922) 24 Bom. L. R. 885,

24 Cr. L. J. 923, [1922] AIR (B) 284.

⁷ *Public Prosecutor v. Peedikakkal Muhammad*, [1924] M. W. N. 548, 20 L. W. 98, 26 Cr. L. J. 323, [1924] AIR (M) 768.

Where, with the object of overthrowing the existing Government, certain rebels planned a raid with a view of obtaining recruits from a certain place and of punishing those who did not help the rebel cause, it was held that those who took part in the raids were guilty of waging war.⁸

The accused was an 'influential' man in a village which was a hot-bed of the rebellion. He was the president of the *wounthun athin* whose activities in regard to capitation tax were the preliminaries to the rebellion. When the rebellion broke out he assisted the rebels by feeding them after a battle and helped in getting persons tattooed, i.e., enrolled as participants in, or sympathisers of, the rebellion. He took a leading part in the resistance of the villagers to the payment of capitation tax, and it was within a few days of his holding a meeting in regard to the non-payment of capitation tax that several of the villagers disappeared and joined the rebels. It was held that there were sufficient grounds for holding that the accused abetted the waging of war against the King-Emperor.⁹

PRACTICE.

Evidence.—Prove (1) that the accused waged war, or attempted to do so, or abetted the same.

(2) That such war was against the King-Emperor.

It is not incumbent on the accused to show what the object and meaning of the acts done was, but it is the duty of the prosecutors to make out their case against the accused.¹⁰ In a case in which the accused was charged with abetting the waging of war against the Queen it was held that the *Calcutta Gazette* and the *Gazette of India* were admissible in evidence to prove the proclamation and official communications of the Government relating to the war.¹¹

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Sanction.—Sanction of Government is necessary before prosecution could be instituted under this section.¹²

Where an order under s. 196 of the Criminal Procedure Code authorized a particular police-officer to prefer a complaint of offences under ss. 121A, 122, 123 and 124 of the Penal Code, "*or under any other section of the said Code which may be found applicable to the case,*" and the examination of the complainant also referred to the same sections, it was held that no complaint under this section was thereby authorized by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter; nor did s. 532 of the Criminal Procedure Code apply in such a case.¹³

The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance shall be taken by the Court of an offence mentioned in s. 196 of the Criminal Procedure Code, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this respect. An order authorizing a complaint under certain specified section "*or under any other section found applicable*" if it means found by any one other than Government, involves a delegation which cannot be sustained.¹⁴

The sanction of the Local Government must be strictly proved in the manner laid down in s. 78 of the Evidence Act, and the identity of the accused with the person named in the sanction must be established.¹⁵

⁸ *Nga Aung Pa*, (1932) 34 Cr. L. J. 929, [1933] AIR (R) 116.

⁹ *Nga Po Au Gyi*, (1936) 38 Cr. L. J. 715, [1937] AIR (R) 118.

¹⁰ *Frost*, (1839) 9 C. & P. 129.

¹¹ *Ameeroddeen*, (1871) 15 W. R. (Cr.) 25, 7 Beng. L. R. 63.

¹² Criminal Procedure Code, s. 196.

¹³ *Barindra Kumar Ghose*, (1909) 37 Cal. 467, *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, dissented from.

¹⁴ *Barindra Kumar Ghose*, (1909) 37 Cal. 407.

¹⁵ *Aung Do*, (1886) S. J. L. B. 389.

In enacting this section, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against it may be commenced as in the case of the English statute.¹⁶

Joinder of charges.—Charges under ss. 121A, 122 and 123 can be joined together.¹⁷

The waging of war is a continuing offence and a charge against the accused under this section, specifying more than three offences committed in the course of the war, and spread over a period of more than one year, does not contravene the provisions of s. 134 of the Code of Criminal Procedure, and is not illegal.¹⁸

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused person*) as follows :—

That you, on or about the — day of —, at —, waged war (or attempted to wage war, or abetted the waging of war) against His Majesty the King-Emperor of India, and thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session (*when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court*).

And I hereby direct that you be tried by the said Court on the said charge.¹⁹

121A. Whoever¹ within or without British India² conspires³ to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India⁴, of British Burma or of any part thereof, or conspires to overawe, by means of criminal force⁵ or the show of criminal force, the Central Government or any Provincial Government⁶ or the Government of Burma, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

COMMENT.

Object.—This section provides for the offence of conspiring to wage war against the King. Before this section was introduced²⁰ such a conspiracy was punishable only when it amounted to an abetment, that is, when an act or illegal omission took place in pursuance of that conspiracy. The present section immensely tightens the grip of the law on treasonable combinations. It is similar to the Treason Felony Act²¹ passed in 1848.

Under this section conspiracy itself is a crime and it is not necessary to establish any illegal act or illegal omission as overt acts of the conspiracy the existence of which has to be established. The illegal acts or omissions, if established, support the case of the existence of the conspiracy itself, the offence being complete even though two persons conspiring together go no further than the original agreement. There cannot be strictly speaking direct evidence of the inception of a conspiracy, if any of the conspirators themselves do not choose to speak to the same.²²

It was thought right to make the offence of conspiring by criminal force, or by show of criminal force, more severely penal than the offence of actually taking part in an unlawful assembly, having for its object the overawing of the Government. The reason was this, that persons who, by conspiring to bring about such a result, set the whole matter in motion, seemed more criminal and far more deserving of punishment than those who were their mere tools, and only took part in such an assembly.

¹⁶ *Amegroddeen*, (1871) 15 W. R. (Cr.) 25, 27, 7 Beng. L. R. 63.

¹⁷ *Barindra Kumar Ghose*, (1909) 37 Cal. 467,

¹⁸ *Mallayya*, (1924) 49 Mad. 74.

¹⁹ Criminal Procedure Code, Sch. V, No.

xxviii (1).

²⁰ Act XXVII of 1870, s. 4.

²¹ 11 & 12 Vic., s. 3.

²² *Jitendra Nath Gupta*, (1936) 38 Cr. L. J. 518, [1937] AIR (C) 99.

The essence of an offence under this section is the agreement to do all or any of the unlawful acts mentioned in the section.²³

The provisions of the section are comprehensive and no formidable elements either in men or means are required to satisfy the definition of a conspiracy to wage war. No act or illegal omission is necessary for such a conspiracy, the mere agreement of two or more being sufficient. The determination of the Court in any case that a conspiracy to wage war has been established may not therefore necessarily imply the existence of a serious menace to the constitution or the stability of constituted authority in India.

Chapters IV, V and XXIII apply to this offence.²⁴

Ingredients.—The section deals with two kinds of conspiracies.—

1. Conspiring within or without British India (a) to commit any of the offences punishable by s. 121, or (b) to deprive the King of the sovereignty of British India or any part thereof.

2. Conspiring to overawe by means of criminal force, or the show of criminal force, the Government.

1. 'Whoever.'—See s. 121. When people take part, however little, in committing this offence, the fact that they were foolish or ignorant does not mitigate the offence.²⁵

2. 'British India.'—See s. 15, *supra*.

3. 'Conspires.'—See s. 107, *supra*. A conspiracy is a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.¹ The explanation to this section says that to constitute a conspiracy it is not necessary that any act or illegal omission should take place in pursuance thereof.² The agreement in itself is enough to constitute the offence.³

Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another. An accused not shown to be a member of the conspiracy charged is entitled to demand an acquittal however bad his record may be and however much he may be suspected of this or that offence.⁴ Associations for music, gymnastic exercises and fencing with sticks amongst young men living in the same village or attending the same school are ordinary incidents of village or school life, and could hardly with propriety be proved as forming elements in any alleged scheme or conspiracy to wage war against the King-Emperor, and all the more so when they are shown to have been accompanied by a complete absence of secrecy and rather by a courting of publicity.⁵

If a conspirator has formed the intention to leave a conspiracy and ceases to be a conspirator by his own act and intention when the other conspirators wage war, he cannot be held guilty.⁶

4. 'To deprive the Queen of the sovereignty of British India.'—This expression corresponds to the clause "to deprive or depose him (King) or them (his successors) from the style, honour or the King's name of the Imperial Crown of this realm, or of any other of His Majesty's dominions or countries", existing in the English statute against conspiracies.⁷ Depriving His Majesty of the sovereignty of British India would obviously include the severance of the connection of India with the Imperial Government in England. Any conspiracy to establish the complete independence of India, as distinct from obtaining for it the status of self-governing Dominion within the British Empire, would be tantamount to conspiring to deprive His Majesty of the sovereignty of British India. The result would follow if there was a conspiracy to establish a perfect democratic or republican form of government in India outside the British Empire.

The reference to "The Queen" in this section is not a reference to the personality of the Sovereign for the time being. Section 13 of the Penal Code defines

²³ *Nilkanta*, (1912) 35 Mad. 247.

²⁴ Act XXVII of 1870, s. 13.

²⁵ *Nga Chow*, (1907) 1 B. L. T. 27.

¹ *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

² *Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559, S.B.; *Nilkanta*, (1912) 35 Mad. 247.

³ *Jhabwala*, (1933) 55 All. 1040.

⁴ *Lalit Mohan Chuckerbutty*, *sup.*

⁵ *Ibid.*

⁶ *Goman Saya*, (1913) 14 Cr. L. J. 610.

⁷ 36 Geo. III, c. 7.

"The Queen" as the Sovereign for the time being of the United Kingdom. For this section it is not necessary to establish that there is a conspiracy to deprive His Majesty the present King-Emperor of his sovereignty of British India, i.e., within the lifetime of the present King-Emperor; and the question whether the conspiracy is or is not expected or contemplated to succeed within the lifetime of the present King-Emperor is immaterial.⁸ A person has no right to attempt violently to overthrow by force the constitution as by law established and through which the sovereignty of the King-Emperor is exercised. As with the doctrines of political philosophers, so with the theories sound or unsound of constitutional law; they avail nothing against the plain provisions of the Penal Code.⁹

5. 'Criminal force.'—See s. 350, *infra*.

6. 'Central Government or any Provincial Government.'—This section obviously draws a distinction between the Sovereign for the time being of the United Kingdom and the Central Government or any Provincial Government. Any conspiracy to change the form of the Government, even though it may amount to an offence under another section of the Code, would not be an offence under this section, unless it is a conspiracy to overawe such Government by means of criminal force, or show of criminal force.¹⁰

Amendment.—The words "and shall also be liable to fine" were added by Act XVI of 1921, s. 3.

After the second "British India" the words "of British Burma" were inserted by the Government of India (Adaptation of Indian Laws) Order, 1937. The words "the Central Government or any Provincial Government or the Government of Burma" were substituted for the words "the Government of India or any Local Government" by the same Order. In Burma, the words "the sovereignty of British Burma or British India" were substituted for "the sovereignty of British India" and the words "the Government of Burma or any Government in British India" were substituted for "the Government of India or any Local Government" by the Government of Burma (Adaptation of Laws) Order, 1937.

PRACTICE.

An indictment or information for conspiracy must contain a statement of the facts relied upon as constituting the offence, in ordinary and concise language, with as much certainty as the nature of the case will admit.¹¹

Evidence.—Prove (1) that the accused had entered into a conspiracy. Though to establish a charge of conspiracy there must be an agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence. The agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all should have joined in the scheme from the first; those who come in at a later stage are equally guilty, provided the agreement be proved.¹²

(2) That the conspiracy was to commit an offence punishable under s. 112 or to deprive the King-Emperor of the sovereignty of British India or to overawe by means of criminal force or show of criminal force the Central Government or any Provincial Government.

With reference to evidence admissible as part of the *res gestæ* in prosecutions for conspiracy, or generally of an offence committed by confederates, it is an established rule that any act done by one of the party in pursuance of the original concerted plan and with reference to their common intention is, in the contemplation of the law, the act of the whole party.¹³

If it be intended to give in evidence against the accused the acts of any other person it must be shown that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties and so prove the conspiracy.

⁸ *Jhabwala*, (1933) 55 All. 1040.

⁹ *Manabendra Nath Roy*, (1933) 35 Cr. L. J. 768, [1933] AIR (A) 498.

¹⁰ *Jhabwala*, (1933) 55 All. 1040.

¹¹ *Pulin Behary*, (1912) 15 C. L. J. 517, 16 C. W. N. 1105, 13 Cr. L. J. 609.

¹² *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

¹³ See Indian Evidence Act, 1872, s. 10.

When persons have been taken into custody and are in a condition which makes it impossible for them to act in aid or furtherance of the conspiracy, that is, when, so far as they are concerned, the conspiracy has come to an end, the acts of persons who were members of the conspiracy and who are still free to act in pursuance thereof, are not admissible as against them; these acts can no longer be deemed the acts of conspirators.

There is a distinction between persons who enter into a conspiracy for the sole purpose of detecting and betraying it, and others who concur fully in the criminal designs for a time and join in their accomplishment, till, from alarm, or from some other cause, they turn upon their former associates and give information against them. These latter persons may be truly called accomplices. There is not on the part of such persons as original purpose of discovering the secret designs of the conspirators and of disclosing them for the benefit of the public, which are the vital elements in this class of cases.

The prosecution is not obliged to prove that the persons accused actually met and laid their heads together and after a formal consultation came to an express agreement to do evil. On the contrary, if the facts as proved are such that the jury as reasonable men can say there was a common design and the prisoners were acting in concert to do what is wrong, that is evidence from which the jury may suppose that a conspiracy was actually formed.

It is from this point of view that overt acts may properly be looked to as evidence of the existence of a concerted intention; indeed, the conspiracy is usually loosely bound up with the overt acts, because, in many cases, it is only by means of the overt acts that the existence of the conspiracy can be made out. But the criminality of the conspiracy is independent of the criminality of the overt acts.

If it is not necessary to establish by direct evidence that the accused persons did enter into an agreement to conspire. The criminality of the conspiracy lies in the concerned intention, and once reasonable grounds are made out for belief in the existence of the conspiracy amongst the accused, the acts of each conspirator in furtherance of its object are evidence against each of the others; and this, whether such acts were done before or after his entry into the combination, in his presence, or in his absence.¹⁴

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Joinder of charges.—Where more than two persons are charged with conspiracy, it does not follow that either all the conspirators must be convicted or they must be all acquitted. Where the accused were all alleged to have been members of a secret society, with its headquarters in Maniktolla in the suburbs, and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise, and with others, known and unknown, to have conspired to wage war or to deprive the King of the sovereignty of British India, and to have collected arms and ammunition with such intent and to have actually waged war; it was held that the joint trial of the accused on charges under s. 121, this section, and ss. 122 and 123 was not bad for misjoinder of persons or charges.¹⁵

Sanction.—No Court shall take cognizance of an offence under this section unless the prosecution is instituted under the authority of Government.¹⁶

The requirement of law that complaint under the section should not be made without special authority from Government is no doubt due in part to the fact that a charge framed in terms of that section is calculated to produce an impression that a political situation of the gravest character has arisen.¹⁷

Charge.—Where the accused were charged with having conspired with one another and other persons known and unknown to wage war against His Majesty, it was held that the charge could not be sustained if the known persons were mentioned in it.¹⁸

¹⁴ *Pulin Behary Das*, (1912) 15 C. L. J. 517, 16 C. W. N. 1105, 13 Cr. L. J. 609; *Jitendra Nath Gupta*, (1936) 38 Cr. L. J. 818, [1937] AIR (C) 99.

¹⁵ *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

¹⁶ Criminal Procedure Code, s. 196.

¹⁷ *Noni Gopal Gupta*, (1911) 15 C. W. N. 593, 12 Cr. L. J. 286, (sub. nom.) *Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559, s.B.

¹⁸ *Lalit Mohan Chakravarty*, (1910) 15 C. W. N. 98, 12 Cr. L. J. 2, s.B.

The charge should run thus.—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, or on about the—day of—, at—(*if the place is without British India mention so*) conspired to wage war (*or to abet the waging of war*) against His Majesty the King-Emperor, (*or conspired to deprive the King-Emperor of the sovereignty of British India or of some part thereof, or conspired to overawe by means of criminal force or show of criminal force the Government of India, etc.*) and thereby committed an offence punishable under s. 121A of the Indian Penal Code and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

Sentence.—The severity of sentences should vary with the degree of the seriousness of the acts done by each accused who is convicted.¹⁹

122. Whoever¹ collects men, arms or ammunition or otherwise prepares² to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Collecting arms,
etc., with intention
of waging war
against the Queen.

COMMENT.

This section is intended to put down with a heavy hand any preparation to wage war against the King-Emperor. The acts made punishable by it cannot be considered attempts : they are in truth preparation made for committing the offence of waging war. This section and ss. 126 and 399 make preparation to commit an offence punishable. Preparation is a stage prior to an attempt. See s. 511, *infra*, for a discussion of the terms 'attempt' and 'preparation.'

1. 'Whoever.'—See s. 121, *supra*.

2. 'Or otherwise prepares.'—Any kind of preparation for waging war, e.g., making or strengthening a fort.

3. 'The Queen.'—See s. 13, *supra*.

Amendment.—The words "also be liable to fine" were substituted for the words "forfeit all his property" by Act XVI of 1921, s. 2.

PRACTICE.

Evidence.—Prove (1) that the accused collected men, arms, etc.

(2) That he did collect men, arms, etc., with intent to wage war, or was prepared to wage war.

(3) That such war was against the King.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is required for prosecution under this section.²⁰

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you—on or about the—day of—, at—, collected men (*or arms or ammunition, if any other means were adopted mention those*) with the intention of waging war (*or being prepared to wage war*) against His Majesty the King-Emperor, and thereby committed an offence punishable under s. 122 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

¹⁹ *Joglekar*, (1931) 54 All. 115, F.B.

²⁰ Criminal Procedure Code, s. 196.

123. Whoever¹, by any act², or by any illegal omission³, conceals the existence of a design to wage war⁴ against the Queen⁵, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section merely lays down the principle enunciated in s. 118, the only difference being that the penalty under this section is severer. Section 44 of the Code of Criminal Procedure says : “(1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely) 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

(2) For the purposes of this section the term ‘offence’ includes any act committed at any place out of British India which would constitute an offence if committed in British India.”

1. ‘Whoever.’—See s. 121, *supra*.

4. ‘Wage war’.—See s. 121, *supra*.

2. ‘Act.’—See s. 33, *supra*.

5. ‘The Queen.’—See s. 13, *supra*.

3. ‘Omission.’—See s. 33, *supra*.

PRACTICE.

Evidence.—Prove (1) the existence of a design to wage war against the King.

(2) That the accused knew of such design.

(3) That he concealed the same.

(4) That he intended thereby to facilitate the waging of such war; or that he knew that it was likely that such concealment would facilitate the same.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section.²¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you—knowing that on or about the—day of—, at—, certain persons had design to wage war against the King-Emperor, concealed the existence of such design by (*mention the act or omission*) intending by such concealment to facilitate (*or knowing it to be likely that such concealment would facilitate*) the waging of such war, and thereby committed an offence punishable under s. 123 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

124. Whoever, with the intention of inducing or compelling the Governor General of India, or the Governor of any Province, or a Member of the Council of the Governor General of India, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor General, Governor, or Member of Council,

Assaulting Governor General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.

²¹ Criminal Procedure Code, s. 196.

assaults¹ or wrongfully restrains², or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor General, Governor, or Member of Council,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section is an amplification of the third clause of s. 121A. It punishes severely assaults, etc., made on high officers of Government.

1. 'Assaults.'—See s. 351, *infra*. 2. 'Wrongfully restrains.'—See s. 339, *infra*.

Amendment.—In Burma the following section has been substituted for this section by the Government of Burma (Adaptation of Laws) Order, 1937.

124. Whoever, with the intention of inducing or compelling the Governor to exercise or refrain from exercising in any manner any of the lawful powers of the Governor, assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes by means of criminal force or the show of criminal force, or attempts so to overawe, the Governor shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was one of the persons described in this section.

(2) That the accused assaulted such person, or attempted to do so; or that the accused wrongfully restrained him or attempted to do so; or that the accused used criminal force or show thereof.

(3) That the accused did as mentioned in (2) in order to overawe that person, or in the attempt to do so [see Assault, Criminal Force, Wrongful Restraint].

(4) That the accused did as above with the intention of inducing or compelling that person to exercise, or to refrain from exercising, any of his lawful powers.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section.²²

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, with the intention of inducing the Hon'ble A. B., Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge. (*Vide Criminal Procedure Code, Sch. V, No. xxviii, 2.*)

124A. Whoever¹ by words, either spoken or written², or by signs, or by visible representation³, or otherwise, brings or attempts⁴ to bring into hatred or contempt⁵, or excites or attempts to excite disaffection⁶ towards, Her Majesty⁷ or the Crown Representative or the Government established by law in British India,⁸ or British Burma, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Sedition.

²² Criminal Procedure Code, s. 196.

Explanation 1.—The expression “disaffection” includes disloyalty and all feelings of enmity.⁹

*Explanation 2*¹⁰.—Comments expressing disapprobation¹¹ of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

COMMENT.

Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the Empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. “Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder.”²³

By Act IV of 1898 the present section was substituted for the former section which stood thus :—

“Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.”

The above section, together with s. 121A, was avowedly inserted in this Chapter relating to offences against the State, with a view to fill up an inadvertent omission of a special provision for the punishment of the offence of abetment or rebellion. In the words of Sir Fitz James Stephen, it was felt that as the causes which produce rebellion are wide, and spread over a longer period, a wider definition of abetment in the case of rebellion was necessary than sufficed in the case of theft or murder. In giving effect to this view, the principles of the English statute and common law were followed, and the section, as originally drafted by the Indian Law Commissioners in 1837, was finally incorporated in the Code in 1870,²⁴ as substantially representing the law of England of the present day “though much more compressed, and more distinctly expressed.”²⁵

The present section differs from the repealed section in four ways :

(1) In the repealed section, the offence consisted in exciting or attempting to excite feelings of “disaffection”, in the present section, in addition to this the feeling of “hatred” or “contempt” is made punishable.

²³ *Alexander Martin Sullivan*, (1888) 11 Cox 44, 45; *Niharendu Dutt Majumdar*, [1942] AIR (FC) 22; *Harkishan Singh*, (1944) 47 P. L. R. 3, F.B. [1946] AIR (L) 22, (1944) 47 Cr. L. J. 345.

²⁴ Act XXVII of 1870, s. 5.

²⁵ Per Ranade, J., in *Ramchandra Narayan*, (1897) 22 Bom. 152, 160, F.B.

(2) In the old section the object of the feeling was "the Government established by law in British India", in the new section, in addition to this "Her Majesty" is also made the object of such feeling.

(3) The offence under the old section was designated "Exciting disaffection", under the new it is called "Sedition."

(4) The old section had one Explanation, the new has three, and they differ from the former.

Principle.—The offence of sedition consists in exciting or attempting to excite in others certain bad feelings towards (a) the King-Emperor, or (b) towards the Government. Defamatory statements concerning the Sovereign will be punished under this section. The provisions of this section are very wide and in strict law they would cover every thing that amounts to defamation of the Government if one excludes from the meaning of that term any criticism in good faith of any particular measures or any acts of administration.¹

The offence does not consist in "exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within s. 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section."² A direct incitement to stir up disorder or rebellion is not necessary.³

The Privy Council has laid down, in an appeal from the Gold Coast Colony in which it was contended that the prosecution in a case of sedition could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, that under the law of sedition of the Gold Coast Colony, which is clearly expressed in its own Criminal Code and is to be found there and not in English and Scottish cases or any glosses derived therefrom, incitement to violence is not one of the necessary ingredients of the crime of sedition.⁴ The Federal Court of India held in a case that public disorder, or the reasonable anticipation or likelihood of public disorder, was the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that was their intention or tendency.⁵ The decision of the Federal Court of India was reluctantly followed by the Allahabad⁶ and the Bombay⁷ High Courts as it was a Court of superior authority, although they did not agree with the principle laid down by it. On appeal by the Crown from the decision of the Bombay High Court the Privy Council has overruled the view of the Federal Court and held that there is nothing in the language of this section to suggest that the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency. Explanation I, which defines "disaffection" as including disloyalty and all feelings of enmity, is quite inconsistent with the suggestion that "excites or attempts to excite disaffection" involves not only excitation of feelings of disaffection but also exciting disorder. Incitement to violence is not, therefore, a necessary ingredient of the crime of sedition.⁸

Scope.—This section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them.

The offence consists in the making use of any means for the purpose of bringing the Government into hatred or contempt.

There must be, first of all, words which are capable of a meaning that can be

¹ *Parmanand*, [1941] A. L. J. R. 26, (1940) 42 Cr. L. J. 463, [1941] AIR (A) 156.

² Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 135; *Satya Ranjan Bakshi*, (1929) 56 Cal. 1085; *Satya Pal*, (1929) 31 P. L. R. 11, 31 Cr. L. J. 266, [1930] AIR (L) 309.

³ *Burns*, (1886) 16 Cox 355, 365.

⁴ *Wallace-Johnson*, [1940] A. C. 231, (1939) 44 C. W. N. 403, [1940] M. W. N. 354, (1939) 41

Cr. L. J. 411.

⁵ *Niharendu*, [1942] F. C. R. 38, 43 Cr. L. J. 504, [1942] AIR (FC) 22.

⁶ *Fakhr-ul-Islam*, [1943] All. 429.

⁷ *Sadashiv Narayan*, (1944) 46 Bom. L. R. 459.

⁸ *Sadashiv Narayan Bhalerao*, (1947) 49 Bom. L. R. 526, F.C.

labelled seditious, and, further, the accused should have the intention of actually exciting or causing the feelings that are mentioned in the section.⁹

Intention essential.—The essence of the crime of sedition consists in the intention with which the language is used. But this intention must be judged primarily by the language itself. Intention of this purpose is really no more than meaning. When a man is charged in respect of anything he has written or said, the meaning of what he said or wrote must be taken to be his meaning, and that meaning is what his language would be understood to mean by the people to whom it is addressed. In judging articles which are charged as seditious, due allowance should be made for oriental modes of thought and expression, and for high-flown or classical language.¹⁰

"The intention of a speaker, writer or publisher may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. Where it is ascertained that the intention of the speaker, writer or publisher was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published, could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection."¹¹

It is not necessary for the prosecution to prove the intention directly by evidence which in most cases would be impracticable. The law will presume the intention—whether good or bad—from the language and conduct of the accused, and it will be then for him to show that his words were harmless and his motive innocent.¹² Requisite intention cannot be attributed to a person if he was not aware of the contents of the seditious publication.¹³

Strachey, J., has elaborately discussed the circumstances which should be taken into account in judging the intention of the accused. In his charge to the jury in *Bal Gangadhar Tilak's* case¹⁴ he said: "You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of their readers feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain Government measures? Or did they intend to excite no feeling adverse either to the Government or its measures, but only to excite interest in a poem about Shivaji and a historical discussion about his alleged killing of a Mahomedan general? These are the questions which you have to consider. But you may ask, how are we to ascertain whether the intention of the accused was this, that, or the other? How can we tell whether his intention was simply to publish a historical discussion about Shivaji and Atzul Khan, or whether it was to stir up, under that guise, hatred against the Government? There are various ways in which you must approach the question of intention. You must gather the intention as best you can from the language of the articles; and you may also take into consideration, under certain conditions, the other articles that have been put in evidence, such as the articles about the plague and the Diamond Jubilee and so forth. But the first and most important index of the intention of the writer or publisher of a newspaper article is the language of the article itself. What is the intention which the articles themselves convey to your minds? In considering this, you must first ask yourselves what would be the natural and probable effect of reading such articles in the minds of the readers of the *Kesari*, to whom they were addressed? Read these articles, and ask yourselves

⁹ Per Fawcett, J., in *Phillip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927, (Unrep. Bom.).

¹⁰ *Bal Gangadhar Tilak*, (1908) 10 Bom. L. R. 848, 8 Cr. L. J. 281; *Shankar Shrikrishna Dev*, (1910) 12 Bom. L. R. 675, 35 Bom. 55. Intention is essential: Per Woodroffe, J., in *Amrita Bazar Patrika Press, Ltd.*, (1919) 47 Cal. 190, s.b.; *Satyendra Nath Majumdar*, (1930) 34 C. W. N. 1095, 53 C. L. J. 256, 32 Cr. L. J. 758, [1931] AIR (C) 337.

¹¹ *Amba Prasad*, (1897) 20 All. 55, 69, F.B.

¹² *Jivan Singh*, (1924) 25 Cr. L. J. 1342, [1925] AIR (L) 16, *Iram Nath*, (1904) P. R. No. 1 of 1905, 2 Cr. L. J. 31, not followed. See *Wallace-Johnson*, [1940] A. C. 231, (1939) 44 C. W. N. 403, [1940] M. W. N. 354, (1939) 41 Cr. L. J. 411.

¹³ *Chuni Lal*, (1931) 12 Lah. 483.

¹⁴ (1897) 22 Bom. 112, 139, 142. See *Nageswar Prasad Sharma*, (1924) 9 P. L. T. 766, 26 Cr. L. J. 78, [1925] AIR (P) 99; *Jagat Narain Lal*, (1928) 9 P. L. T. 784, 30 Cr. L. J. 213, [1929] AIR (P) 10.

how the ordinary readers of the *Kesari* would probably feel when reading them. Would the feeling produced be one of hatred to the Government, or would it be simply one of interest in a poem and a historical discussion about Shivaji and Afzul Khan and so forth? If you think that the only feelings which such readers would be excited to are feelings of interest in a poem or a historical or ethical discussion, then you may presume that that is all the accused intended to excite. If you think that such readers would naturally and probably be excited to entertain feelings of enmity to the Government, then you will be justified in presuming that the accused intended to excite feelings of enmity or disaffection. As a matter of common sense a man is presumed to intend the natural and ordinary consequences of his acts: he cannot, speaking generally, say: Although this language would have the natural and ordinary effect of exciting feelings of disaffection, I did not when publishing it intend that it should do so. But in considering what sort of effect these articles would be likely to produce, you must have regard to the particular class of persons among whom they were circulated, and to the time and other circumstances in which they were circulated. In judging what would be the natural and ordinary consequences of a publication like this, and what, therefore, was the probable intention of the writer or publisher, I must impress on you, as perhaps the most important point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication. An article which, if published in England, or among highly educated people, would produce no effect at all—such as an article on cow-killing—might, if published among Hindus in India, produce the utmost possible excitement. An article which, if published at a time of profound peace, prosperity and contentment would excite no bad feeling, might, at a time of agitation and unrest, excite intense hatred to the Government. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. In my opinion, it would be idle and absurd to ask yourselves what would be the effect of these articles upon the minds of persons reading them in a London drawing-room or in the Yatch Club in Bombay; but what you have to consider is their effect, not upon Englishmen or Parsis or even many cultivated and philosophic Hindus, but upon the readers of the *Kesari* among whom they are circulated and read—Hindus, Marathas, inhabitants of the Deccan and the Konkan. And you have to consider not only how such articles would ordinarily affect the class of persons who subscribed to the *Kesari*, but the state of things existing at the time, not in the year 1890 or 1891, or 1892 or 1893, or even 1896, but in June 1897, when these articles were disseminated among them. Then you have to look at the standing and the position of the prisoner Tilak. He is a man of influence and importance among the people; he would be in a position to know what effect such articles would probably produce in their minds. Would then the readers of the *Kesari* at that time, and in the then existing state of the country and of public feeling, regard the articles as a poem and a historical discussion applying no moral to the British Government here and now, or would they be excited by them to feelings of enmity to the Government?

“But in the next place, in judging of the intention of the accused, you must be guided not only by your estimate of the effect of the articles upon the minds of their readers, but also by your common sense, your knowledge of the world, your understanding of the meaning of words, and your experience of the way in which a man writes when he is animated by a particular feeling. Read the articles, and ask yourselves, as men of the world, whether they impress you on the whole as a mere poem and a historical discussion without disloyal purpose, or as attacks on the British Government under the disguise of a poem and historical discussion. It may not be easy to express the difference in words; but the difference in tone and spirit and general drift between a writer who is trying to stir up ill-will and one who is not, is generally unmistakable, whether the writing is a private letter, or a leading article, or a poem, or the report of a discussion. You can form a pretty accurate notion of what a man is driving at, or what he wants to convey, from a perusal of the writing, and can generally tell whether the writing is inspired by good-will or is meant to create ill-will. It is not very difficult to distinguish between the language of hostility and the language of loyalty and good-will or of criticism and comment. You must ask yourselves, having read the articles, whether the writer or publisher is trying to stir up the feelings of his readers against the Government, or is trying to do something altogether

different. If the object of a publication is really seditious, it does not matter what form it takes. Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. You have to look through the form and look to the real object : you have to consider whether the form of a poem or discussion is genuine, or whether it has been adopted merely to disguise the real seditious intention of the writer. Again, in judging of the intention of the writer or publisher, you must look at the articles as a whole, giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions without reference to the context. You must consider each passage in connection with the others and with the general drift of the whole. A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science ; he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles. It is this general character and tendency that you must judge the intention by, looking at every passage so far as it throws light upon this."¹⁵

"You must judge the intention having regard to the time at which it was written, the place where it was written, and the whole of the circumstances in which it was written. . . In judging the question of intention of course the language of the article itself is of the utmost importance in enabling you to decide what was the intention of the writer, reading the article as a whole. But you are by no means confined to the language of the article itself. The subsequent articles are also admissible for the purpose of ascertaining the intention of the accused. It has been laid down that, provided the words used and the article sought to be introduced were used and published within a time reasonably near to the time of publication of the words which you are seeking to construe, then it is open to the prosecution to put even the subsequent words in evidence for the purpose of enabling the jury, taking the matter as a whole, to come to a conclusion as to what was the intention of the writer. And of course the reason is this. If a man has written something which is expressive of disloyalty or disaffection towards Government upon one occasion, he may very likely make use of similar language on a similar occasion either just before or just after the occasion with which you are concerned ; and therefore if you find that a man who writes an article about which there is a controversy as to whether it is expressive of disloyalty or disaffection or not, has subsequently written something else, which it is contended is expressive of disloyalty or disaffection, that subsequent writing may help you,—taking the wording of the article itself and everything into consideration,—to enable you to come to a conclusion as to what the real intention of the writer was."¹⁶

Jenkins, C. J., in another case, tersely said that to determine whether the intention of the accused was to call into being hostile feelings, the rule that a man must be taken to intend the natural and reasonable consequences of his act must be applied : so that if on reading through the articles the reasonable and natural and probable effect of the articles on the minds of those to whom they are addressed appears to be that feelings of hatred, contempt, or disaffection would be excited towards the Government, then it is justifiable to say that the articles are written with that intent and that they are an attempt to create the feelings against which the law seeks to provide.¹⁷

The Judicial Committee of the Privy Council have laid down that in judging the question of intent, the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to the character and description of that part of the public who are to be expected to read the words.¹⁸ If the natural and probable effect of a speech on the minds of those to whom it is addressed appears to excite hatred and contempt against the Government, it is justifiable to say that the speech was delivered with that intent.¹⁹ "The intentions of men are inferences

¹⁵ *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 139, 142; *Thakin Ba Sein*, (1937) 38 Cr. L. J. 801, [1937] AIR (R) 161.

¹⁶ Per Blackwell, J., in *Krishnaji Khadilkar*, (1929) Second Criminal Sessions, Case No. 1, decided on March 27, 1929 (Unrep. Bom.).

¹⁷ *Lueman*, (1899) 2 Bom. L. R. 286, 297;

Satya Ranjan Bakshi, (1929) 56 Cal. 1085.

¹⁸ *Besant v. Advocate General of Madras*, (1919) 43 Mad. 146, 40 I. A. 176, 21 Bom. L. R. 867; *U Damadaya*, (1913) 1 Ran. 211.

¹⁹ *Sachin Das*, (1935) 63 Cal. 588; *Arjun Arora*, (1937) 38 Cr. L. J. 662, [1937] A. L. J. R. 261, [1937] AIR (A) 295.

of reason from their actions where the action can flow but from one motive, and be the reasonable result of but one intention."²⁰

In construing a newspaper article its meaning must be taken from the article as a whole and not from isolated passages.²¹

A single expression that the people of Bengal are trodden under the feet of outsiders used incidentally in a newspaper article, otherwise innocuous, does not constitute the whole seditious.²² In a case of sedition, the accused ought not to be convicted merely upon a few isolated passages or a few hasty or strong expressions in the writing charged as seditious. The main question is the general tendency and effect of the pamphlet.²³

"The speeches must be read as a whole 'in a fair, free and liberal spirit.' In dealing with them, one 'should not pause upon an objectionable sentence here or a strong word there.' They should be dealt with 'in a spirit of freedom' and 'not viewed with an eye of narrow criticism.' The case should be viewed 'in a free, bold, manly, and generous spirit' towards the petitioner."²⁴

If a person chooses to speak in the same publication with two different voices and one of those voices brings him within the reach of the criminal law, it is no excuse for him to say that the other voice expresses his real view.²⁵

The test of seditious libel is this: Was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State.¹ To advise a person to persuade others to adopt violence as a means of attaining a political goal is no less objectionable than advising that person to commit violence himself for that purpose. In either case the advice is to pursue a course of action which is calculated to disturb the tranquillity of the State. A speech which exhorts the audience to attempt to convert the Congress policy of non-violence to one of anarchy is within the mischief contemplated by this section.² Where the accused made a speech at a meeting of the Railway Union and it was clear from the speech that every calamity or evil or misfortune that fell to the country was imputed to the Government, which was also accused of hostility and indifference to the welfare of the people, it was held that the intention of the accused was to bring the Government into hatred, or contempt and excite disaffection towards His Majesty or the Government established by law in British India.³ The question of intention is one of fact.⁴

In a Privy Council appeal from the Gold Coast Colony, it was contended that positive extrinsic evidence of seditious intention was necessary, but the Privy Council held that it is not necessary that there must be some extrinsic evidence of intention outside the words themselves; if the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence.⁵

Innuendo.—If a particular article is charged as being seditious, on the ground that it says more than appears on the face of it, it is the duty of the prosecution to show that it has, in fact, the guilty meaning or intent attributed to it.⁶

1. 'Whoever.'—Not only the writer of seditious articles but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection

²⁰ Per Fitzgerald, J., in *Alexander Martin Sullivan*, (1868) 11 Cox 44, 50.

²¹ *Mammohan Ghose*, (1910) 38 Cal. 253; *Nageswar Prasad Sharma*, (1924) 26 Cr. L. J. 78, 9 P. L. T. 766, [1925] AIR (P) 99; *Satyaj Ranjan Bakshi*, (1929) 56 Cal. 1085 *Gopal Lal Sanyal*, (1927) 46 C. L. J. 156, 28 Cr. L. J. 900, [1927] AIR (C) 751; *Ram Chandra*, (1927) 29 Cr. L. J. 381; *Vishambhar Dayal Tripathi*, [1940] O. W. N. 965, (1940) 42 Cr. L. J. 40, [1941] AIR (O) 33.

²² *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

²³ Per Fawcett, J., in *Phillip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927 (Unrep. Bom.).

²⁴ Per Shah, J., in *Bal G. Tilak*, (1916) 19 Bom. L. R. 211, 272, 18 Cr. L. J. 567, [1916] AIR (B) 9; *Satyendra Nath Majumdar*, (1930) 34 C. W. N. 1095, 53 C. L. J. 256, 32 Cr. L. J. 758, [1931] AIR (C) 337; *Secretary, High*

Court Bar Association, Lahore, (1932) 33 P. L. R. 911, 33 Cr. L. J. 831, [1932] AIR (L) 559; *Maniben Kara*, (1932) 34 Bom. L. R. 1642, 57 Bom. 253; *Lay Maung*, [1939] Ran. 239.

²⁵ Per Beaumont, C. J., in *Chimanlal Rewashankar Joshi*, (1932) Crim. Appeal No. 23 of 1932, decided by Beaumont, C. J., and Broomfield, J., on January 18, 1932, (Bom. Unrep.).

¹ *Aldred*, (1909) 22 Cox 1.

² *Anand Kishore*, (1929) 31 Cr. L. J. 201, [1930] AIR (L) 306.

³ *Munshi Singh*, (1935) 10 Luck. 712.

⁴ *Ganesh*, (1909) 12 Bom. L. R. 21, 34 Bom.

378.

⁵ *Wallace-Johnson*, [1940] A. C. 23, (1939)

44 C. W. N. 406, [1940] M. W. N. 354, (1939)

41 Cr. L. J. 411.

⁶ *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

to the Government is liable under the section, whether he is the actual author or not.⁷

"It is...not sufficient for a person who has published matter calculated to excite hatred, contempt, or disaffection, to say : 'This is not my own work,' because the adoption of the means, the publishing thereof was in itself his work, and therefore it is, that the printer or publisher of an article, which is open to these objections is always to be held liable...for everything that appears in his paper, the editor, printer, or publisher is as responsible as if he had written the article himself. No doubt the question of his liability to punishment is a matter which has to be seriously considered, and circumstances may considerably mitigate the penalty which has to be imposed. But his liability to conviction under the section is not affected by the circumstance that the publisher who used the words did not originate them. The result of his using the words in his publication is the same whether he had written the article himself, or made use of it in other ways. 'Whoever the composer might be, whosoever wrote or caused it to be written, the person who used it for purposes of exciting disaffection is guilty of an offence under s. 124A'".⁸ The registered printer of a paper is liable to be convicted for a seditious article which appears in it, and cannot escape responsibility on a plea of temporary absence, want of actual knowledge, consent or intention, even if proved.⁹ Section 7 of Act XXV of 1867 makes the printer responsible, whoever may be the writer of the articles in the paper, unless he can prove absence from the office of the paper in good faith and without knowledge that during his absence seditious matter would be published. It is not absence in good faith for the printer to go away, but with full knowledge of what is going to happen in his absence and for the purpose of shirking his liability.¹⁰ But he is not liable for seditious articles published in the newspaper without his knowledge during his bona fide absence.¹¹ Where the editor of a newspaper was convicted and sentenced under this section and the accused made his declaration as printer and publisher thereafter, and continued so to act after the editor had resumed work on release from jail, and further allowed his name to appear as such, though he was absent from the town of publication of the paper when certain seditious articles appeared therein, and engaged during the period in his own private business without taking any interest in the paper, it was held that he had not made out the bona fides of his absence, and was, therefore, legally responsible for the articles.¹² The fact that a seditious article was not written by the editor would not affect the question of his guilt, whatever effect it may have on the question of sentence.¹³

A person, making a statutory declaration under Act XXV of 1867, that he is the printer and publisher of a newspaper, is presumably liable as such printer or publisher but may rebut such presumption. The liability of a proprietor is not governed by the Act and depends upon different considerations. The ground of liability in his case is that he authorized the publication of the incriminating article. The authority may be established by direct proof or as a reasonable inference from all the facts of the case. Under s. 14 of the Evidence Act, it is open to the Court to presume that the proprietor, having the control of the paper, authorizes the publication of the matter which appears in it. Such a presumption may be improper in the case of a large paper, with a separate editor responsible for the selection and publication of the literary matter, but in the case of a petty paper, with no responsible editor and published under the eye of the proprietor, the presumption might be reasonable though it would be open to him to rebut such presumption, by showing that the publication was in fact not authorized by him. Though no authority to publish libellous matter may have been originally given, such authority may be inferred from the conduct of the parties, such as the publication of other libellous matter without any remonstrance or interference from the proprietor when it has come to his knowledge. Other issues of the same paper containing libellous matter are relevant as evidence to prove such authority. Mere absence of the proprietor at the time of the publication of the libel will not rebut such presumption if during such absence he exercises complete control over the paper.¹⁴

⁷ *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 129; *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 41.

⁸ Per Battu, J., in *Bhasker Balwant Bhopalkar*, (1906) 8 Bom. L. R. 421, 435, 30 Bom. 421.

⁹ *Ram Nath*, (1904) P.R. No. 1 of 1905, 2 Cr. L. J. 31.

¹⁰ *Phanendra Nath Miller*, (1908) 35 Cal. 945.

¹¹ *Har Swarup Muhammad Siraj*, (1928) 50 All. 806.

¹² *Surendra Prosad Lahiri*, (1910) 38 Cal. 227.

¹³ *Khushal Chand Khursani*, (1930) 31 Cr. L. J. 1170, [1930] AIR (L) 875.

¹⁴ *Harisarvothama Rao*, (1909) 32 Mad. 338.

In a Bombay case Chandavarkar, J., said : "A declaration, made under s. 4 [of the Press Act, 1867], is intended by the legislature to have a certain effect, namely that of fastening responsibility for the conduct of the press on the person declaring in respect of matters where public interests are involved. Therefore, when a book complained of as seditious or libellous is printed in a press, the Court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances. The presumption...is not conclusive; it is not one of law but of fact and it is open to the accused to rebut it...The object is to create a sense of responsibility, so that if any public mischief occurs owing to any action or conduct of the press, the law can at once know who must *prima facie* be held responsible for it...the Courts should be careful to draw no inference of guilt against the declarant from the mere fact of declaration but must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him within the operation of s. 124A...where the charge is under that section."¹⁵ Knowledge by a printer of the nature of the matter printed is a question to be determined on the particular facts of each case.¹⁶

It is not sufficient for an accused person to say that what was put into his paper of a seditious character was put in during his absence and without his authority. If he did not authorize it, it is for him to prove that as a fact, because it must be within his knowledge whether any such authority was given.¹⁷ Where the accused, who was the proprietor, keeper and printer of a press, was absent from the place when the pamphlet was sent to the press for publication, and there was no evidence to show that he was aware of the contents of the pamphlet, beyond the fact that he was the declared proprietor and keeper of the press, it was held that the requisite intention not having been established he could not be convicted under this section.¹⁸

Every man must be taken to intend the natural consequences of his own deliberate act, and therefore the law will not excuse a journalist or newspaper writer on the ground that he writes for hire merely, or that the commercial interest of his paper required the publication of the writings in question.¹⁹ If the registered owner and proprietor of a publishing house chooses to print and publish a seditious book, the intent to excite disaffection is to be presumed. The position of printers of seditious documents is probably worse than that of the authors, because the seditious acts of the authors would be far less extensive in their operation if it were not for the existence of persons able and willing to print and publish them.²⁰

In the prosecution in England against the printer of the *Indian Sociologist* the Court, in convicting the printer, said : "If the accused published the libel, there is no distinction in law between what he wrote in it and what any other person wrote in it."²¹

In the case of a manager of a press in which seditious matter is printed, the prosecution must establish by evidence that he had knowledge of such printing.²²

2. 'By words, either spoken or written.'—Recitation of a seditious poem at a meeting amounts to this offence.²³ Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. Seditious writing, while it remains in the hands of the author unpublished, will not make him liable. Publication of some kind is necessary.²⁴ The publishing of the life-sketch of a person who was admittedly a member of a society

¹⁵ *Shankar Shrikrishna Dev*, (1910) 12 Bom. L. R. 675, 678, 679, 35 Bom. 55, 59.

¹⁶ *Ram Saran Das*, (1924) 26 Cr. L. J. 302, [1925] AIR (L) 298.

¹⁷ *Bhaskar Balwant Bhopalkar*, (1906) 8 Bom. L. R. 421, 30 Bom. 421; *Luxman Narayan Joshi*, (1899) 2 Bom. L. R. 286.

¹⁸ *Chuni Lal*, (1931) 12 Lah. 483. See *Pitre*, (1922) 25 Bom. L. R. 97, 47 Bom. 438.

¹⁹ *Alexander Martin Sullivan*, (1868) 11 Cox 44.

²⁰ *Braja Behari Burman*, (1930) 53 C. L. J. 182, 32 Cr. L. J. 742, [1931] AIR (C) 349.

²¹ *Aldred*, (1900) 22 Cox 1.

²² *Chellam Pillai*, (1928) 30 Cr. L. J. 707, [1928] AIR (R) 276.

²³ *Lachman Das*, (1930) 32 Cr. L. J. 588, 31 P. L. R. 918, [1931] AIR (L) 52.

²⁴ *Bal Gangadhar Tilak*, (1897) 22 Bom. 122, 139; *Foster*, 198. See *Saigal*, (1930) 52 All. 775, where a historical compilation depicting the dark side of the British rule was considered seditious. Historical review which distorts or suppresses facts is seditious: *Satyendra Nath Majumdar*, (1930) 84 C. W. N. 1095, 53 C. L. J. 250, 32 Cr. L. J. 758, [1931] AIR (C) 337.

whose avowed object was to overthrow the Government established by law in British India was held to be an offence under this section on the ground that the subject-matter of the publication was likely to bring Government into hatred or contempt or excite disaffection towards it.²⁵

Sending a seditious matter by post addressed to a private individual not by name but by designation as the representative of a large body of students amounts to publication if it is opened by anybody.¹ The sending through the post office of a packet containing a manuscript copy of a seditious publication with a covering letter requesting the addressee to circulate it to others, when the same was intercepted by another person and never reached the addressee, was held to amount to an attempt to commit sedition.²

3. 'Visible representation.'—"A seditious libel does not necessarily consist of written matter, and it may be evidenced by a woodcut or engraving of any kind,"³ or by exhibition of flags.⁴

The accused published a photographic print called "The Nation Personified". The photo portrayed a muscular person styled India Personified (*rashtra purusha*) standing on the lotus of self-reliance (*svavalambana*) wearing bracelets labelled self-rule (*svarajya*) and hail motherland (*vande mataram*) and holding in his right hand a sword called boycott (*bahiskar*), and in his left a map of India covered with portraits of Dadabhai Naoroji, Tilak, Paranjpe, Bijapurkar and Khare, who were designated as friends of India (*Yar-i-hind*) and national luminaries (*rashtra dipaka*). In the left-hand bottom corner of the photo there were two dogs barking at the *rashtra purusha* labelled as "Dependants on others" (*paravalambee*) and near them stood two persons called "Effeminate" (*janani*). In the left-hand top corner there were portraits of Shivaji, Ramdas, Goddess of India's Independence (*Shri Bharat Svatantrata*) and Swami Vivekanand. Beneath these portraits were two texts: (1) "He who depended upon others, lost his cause," and (2) "Will the force of injustice (immorality) or physical force prevail"? In the top right-hand corner there were portraits of Chaphekar brothers, Ranade, Chiplunkar, Phadke, Khudiram Bose, Prophulla Chaki, Tatya Topi, Rani of Jhansi and Nana Saheb, some of whom had rebelled against the British Government or had been executed for murder or convicted of sedition. These persons were styled "Reliable Hindu Patriots". The Sessions Judge in convicting the accused of sedition observed: "From the above description of the picture and its meaning it is clear that it is of a seditious nature and would be likely to excite hatred and disaffection to Government in the minds of persons who look at it." The High Court in confirming the conviction said: "The main evidence is really the evidence of the photograph itself, and although some of the photographs therein contained are photographs of gentlemen against whom there is nothing whatever to be said, yet, we think, we must take the photograph as a whole. And so considering it we are clear that its symbolism plainly exhorts to hatred of the established Government. That is made plain throughout the picture, and particularly by the selection as models for imitation of persons who have rebelled against the existing Government or have been executed for murder or convicted of sedition."⁵

The writer of an article may be guilty of sedition, no matter how guardedly he attempts to conceal his real object, but the registered printer and publisher cannot be punished if the concealed object is not established by the evidence on the record.⁶

4. 'Attempts, etc.'—An attempt is an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment.⁷ When a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstances independent of

²⁵ *Arjan Singh*, (1929) 31 Cr. L. J. 720, [1930] AIR (L) 153; *Kirpal Singh*, (1930) 32 Cr. L. J. 649, [1931] AIR (L) 106.

¹ *Suresh Chandra Sanyal*, (1912) 39 Cal. 606.

² *Surendra Narayan Adhichary*, (1911) 39 Cal. 522.

³ Per Fitzgerald, J., in *Alexander Martin Sullivan*, (1868) 11 Cox 44, 51.

⁴ 2nd Rep., s. 24.

⁵ *Devising Mohansingh*, Criminal Appeal No. 334 of 1910, decided on 3rd November 1910,

by Batchelor and Rao, JJ., (Unrep. Bom.). See, to the same effect, *Shridhar Waman Nagarkar*, Criminal Appeal No. 395 of 1910, decided on 1st December, 1910, by Batchelor and Rao, JJ., (Unrep. Bom.).

⁶ *Mancmohan Ghose*, (1910) 38 Cal. 253.

⁷ *Luxman Narayan Joshi*, (1899) 2 Bom. L. R. 286. See discussion of 'attempt' in *Amrita Bazar Patrika Press, Ltd.*, (1919) 47 Cal. 190, s.B.

his own will, then that man has attempted to effect the object at which he aimed.⁸ To constitute an attempt all that is necessary is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.⁹ It is not necessary in order to bring the case within this section that it should be shown that the attempt was successful. Attempt does not imply success. It is merely trying. Whoever tries to excite, attempts to excite, etc., is held to come within this section. Whether the intention has achieved the result is immaterial. If the accused tried to excite hatred and contempt, the fact that he failed to do so will be no justification for him. That will be a matter to be decided in determining the sentence.¹⁰ If the attempt is made, the accused cannot shelter himself behind the fact that those to whom he may have addressed himself have either been too discreet or too temperate to act upon the obvious meaning of his teaching,¹¹ or that the peaceful circumstances and conditions of the Empire render his act innocuous.¹² Where the accused attempts to rouse the feelings penalised by this section, he is guilty although such feelings may not have been aroused in a single person, for an "attempt" is made an equal basis for conviction as is the real rousing or exciting of these particular feelings.¹³ What is rendered punishable is the intentional attempt, successful or otherwise, to rouse against Government the feelings enumerated in the section and a mere tendency in an article to promote such feeling is not sufficient to justify a conviction.¹⁴

To determine whether an attempt to commit the offence of sedition is committed by the publication of certain articles, it is necessary to determine what is their true meaning, what is the *innuendo* they convey, and what is the covert meaning, if any, they have. The probable, or natural effect of the words used must then be decided, that is whether they are calculated to bring into hatred or contempt the Government, or excite against it feelings of disloyalty or enmity. If they are so, then it should be considered whether that was not the intention with which the words were used or published. For the purpose of determining whether or not that was the intention, the principle, that a man must be taken *prima facie* to intend that which is the natural result of his acts under the circumstances and in the particular case in which that act has taken place or occurs, should be applied. In determining whether the intention with which any document is published is or is not seditious, the writer must be deemed to intend the consequence which would naturally follow from his work taking into consideration the time and circumstances of the case.¹⁵

In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt, or disaffection, it should be viewed from the standpoint of the types of persons to whom it was primarily addressed. On the one hand, their limitations, if any, have to be taken into account; on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which should be considered.¹⁶

Existence of a grievance, real or supposed, is no excuse or answer to an attempt to arouse towards Government feelings of hatred, contempt or disaffection.¹⁷

An attempt to publish sedition is complete as soon as a copy of the newspaper containing it is sold. It is none the less an attempt because something external to the accused happened which prevented a perusal of the article by the buyers or any other member of the public.¹⁸

In cases decided under the old section the expression "attempts to excite, etc." is explained as follows :—

⁸ *Vinayek Narayan Bhatye*, (1899) 2 Bom. L. R. 304.

⁹ *Ganesh Balvant Modak*, (1909) 12 Bom. L. R. 21, 34 Bom. 378.

¹⁰ *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 439, 30 Bom. 421; *Bal Gangadhar Tilak*, (1908) 10 Bom. L. R. 848, 8 Cr. L. J. 281.

¹¹ *Luzman Narayan Joshi*, (1899) 2 Bom. L. R. 286; *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 439, 30 Bom. 421; *Burns*, (1886) 16 Cox 335, 365.

¹² *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom.

L. R. 421, 440, 30 Bom. 421.

¹³ Per Fawcett, J., in *Phillip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927 (Unrep. Bom.).

¹⁴ *Satyranjan Bakshi*, (1927) 45 C. L. J. 638, 28 Cr. L. J. 723, [1927] AIR (C) 698.

¹⁵ *Vinayek Narayan Bhatye*, (1899) 2 Bom. L. R. 304, 311.

¹⁶ *U. Damadaya*, (1923) 1 Ran. 211.

¹⁷ *Vinayek Narayan Bhatye*, (1899) 2 Bom. L. R. 304, 311.

¹⁸ *Ganesh Balvant Modak*, (1909) 12 Bom. L. R. 21, 34 Bom. 378.

"If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling".¹⁹

An attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce political hatred of Government as established by law, to excite political discontent, and alienate the people from their allegiance.²⁰

5. 'Hatred or contempt'.—"With the *feeling* of hatred the law can do nothing because it cannot see into the heart and cannot reform it, but law does step in when any attempt is made to excite that feeling in others".²¹ If the predominant idea of a speech is to bring the Government and their supporters into hatred and contempt and raise hostile feelings against them the section will apply.²²

'Hatred' and 'contempt' towards Government may be created by writings imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties or by writings unjustly accusing the Government of hostility or indifference to the welfare of the people.²³

An attack on imperialism as a system or a school of opinion without reference to persons does not involve any incitement to hatred or contempt of those who are in the system or hold the opinion. There must be direct and immediate object of inciting violence and the mere talk of armed revolution in Russia or even in India in theoretical terms and the verbal demand for a national Government and a national army to resist the Japanese aggression is anything but an incitement to violence.²⁴

A speech which brings the Government into hatred and contempt cannot be considered to be innocuous because such hatred and contempt cannot be increased from the standard that exists in the mind of the people to whom it is addressed.²⁵ It is quite possible by the abuse of Government officials to make an endeavour to bring into hatred or contempt the Government established by law in British India.¹

The accused in the course of his speech delivered to the tenants of a certain taluka made an attack on its landlords, moneylenders and the Government, saying that the landlords and moneylenders of that taluka were oppressing the peasants, that Government was behind the landlords and moneylenders, and that they could not get rid of the moneylenders and landlords unless they got rid of the Government. It was held that the accused was guilty of sedition as the effect of his speech was to suggest that Government was not looking after the interests of the peasants, but was supporting those who oppressed the peasants, and this brought the Government established by law in British India into hatred or contempt and excited disaffection towards that Government.² An assertion that the British Government was deliberately setting community against community in this country was held to be a statement calculated to incite feelings of hatred and contempt against Government and therefore seditious.³ An attack in a speech upon policeman of a place which does not convey a reflection upon governing authority is not seditious.^{3a}

6. 'Disaffection'.—Explanation 1 says that the word 'disaffection' "includes disloyalty and all feelings of enmity". The expression 'disaffection' is best defined as primarily meaning 'the contrary to affection', and it goes very much towards expressing the same as 'hatred or dislike'. It may cover some thing, perhaps a little different from the expression 'hatred' because it includes 'disloyalty'. To urge

¹⁹ *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 44.

²⁰ *Ramchandra Narayan*, (1897) 22 Bom. 152, 156, F.B.

²¹ *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 437, 30 Bom. 421.

²² *Sachin Das*, (1935) 63 Cal. 588.

²³ *Mrs. Besant*, (1916) 39 Mad. 1085.

²⁴ *B. N. Mukerji*, [1945] Nag. 176.

²⁵ *Dandekar*, (1929) 31 Cr. L. J. 429, [1930]

AIR (A) 324.

¹ *Satya Ranjan Bakshi*, (1929) 50 Cal. 1085; "*Janasakti*" of *Sylhet*, (1932) 36 C. W. N. 962, [1932] AIR (C) 649.

² *Narayan Vasudev Phadke*, (1940) 42 Bom. L. R. 861, 42 Cr. L. J. 121, [1940] AIR (B) 379.

³ *Om Parkash*, (1940) 42 P. L. R. 382.

^{3a} *Om Prakash Mehta*, [1947] Nag. 788.

people to rise against the Government is tantamount to trying to excite feelings of disloyalty in their minds.⁴ “‘Feelings of enmity’ include ill-will, hostility, feelings of dislike amounting to enmity, and anything of a similar class or character which can be summarised under the expression ‘disloyalty’ and ‘feelings of enmity’”⁵

The following judicial interpretations given to this word should be noted :

1. ‘Disaffection’ means a feeling contrary to affection, in other words, dislike or hatred.⁶

2. It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. ‘Disloyalty’ is perhaps the best general term, comprehending every possible form of bad feeling to the Government.⁷

3. [It means] political alienation or discontent, a spirit of disloyalty to the Government or existing authority.⁸

4. It signifies political alienation or discontent, that is to say, a feeling of disloyalty to the Government or existing power, which tends to a disposition not to obey but to resist and attempt to subvert that Government or power. It cannot be construed to mean an absence of or the contrary of affection, or love, that is to say, dislike or hatred.⁹

5. It is a positive political distemper, and not a mere absence or negation of love or good-will. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossess the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder.¹⁰

6. It means ‘disloyalty’. Anyone who excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, feelings of ‘disaffection’.¹¹

7. Disaffection is a feeling, and not the want of a feeling. It is not the absence of affection. It is not indifference, but a positive emotion not necessarily prompting to action, but with a tendency to influence conduct just as all our feelings do. It is not necessarily limited to “feelings of enmity”. It is intended to express a feeling which can only exist between the ruler and the ruled. Feelings of personal affection in such a connection are not demanded, but only such feelings as the relation of the subject to the Government necessarily implies. This relation implies the recognition, on the part of the ruled, of the Government as a Government. The ruler must be accepted as a ruler, and disaffection which is the opposite of that feeling, is the repudiation of that spirit of acceptance of a particular Government as ruler.¹²

When the Bill for amending this section was introduced it was proposed to add the words “or ill-will” at the conclusion of Explanation 1. But the Select Committee thought that the expression “all feelings of ill-will” was too wide and vague. They said : “It is only when feelings of ill-will amount to disloyalty or enmity that they constitute such disaffection as is contemplated by the clause. A certain amount of ill-will may be compatible with genuine loyalty”.¹³ In view of this opinion some of the interpretations given above, notably those of Strachey, J., and Edge, C. J., are not of any authority.

The amount or intensity of disaffection is absolutely immaterial except perhaps in dealing with the question of punishment.¹⁴

7. ‘Her Majesty’.—‘Her Majesty’ means the sovereign for the time being of the United Kingdom of Great Britain and Ireland (s. 13).

⁴ Per Fawcett, J., in *Phillip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927 (Unrep. Bom.).

⁵ Per Blackwell, J., in *Krishnaji Khadilkar*, (1929) Second Criminal Sessions, Case No. 1, decided on March 27, 1929 (Unrep. Bom.).

⁶ Per Petheram, C. J., in *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 44.

⁷ Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 134.

⁸ Per Farran, C. J., in *Ramchandra Narayan*,

(1897) 22 Bom. 152, 156, F.B.

⁹ Per Parsons, J., in *ibid.*, p. 159.

¹⁰ Per Ranade, J., in *ibid.*, p. 162.

¹¹ Per Edge, C. J., in *Amha Prasad*, (1897) 20 All. 55, 68, F.B.

¹² Per Batty, J., in *Bhaskar Balwant Bhopatkar*, (1906) 8 Bom. L. R. 421, 437, 438, 4 Cr. L. J. 1.

¹³ *Gazette of India*, 1898, Part V, p. 14.

¹⁴ *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 134.

8. 'Government established by law in British India'.—This expression means British rule and its representatives as such,—the existing political system as distinguished from any particular set of administrators.¹⁵ The established authority which governs the country and administers its public affairs includes the representatives to whom the task of government is entrusted.¹⁶ It denotes "the person or persons authorized by law to administer Executive Government in any part of British India.... the feelings, which it is the object of s. 124A to prohibit, may be excited towards the Government in a variety of ways;...it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India, must depend upon the nature of the criticism, the position of the service in the administration and all the other circumstances of that case. It would be a question of fact to be determined in each case with reference to its circumstances".¹⁷ "The expression means, to put it very briefly, British rule in India, as established by the Government of India Act".¹⁸ In this sense the 'Government' includes not only the Government of India but also Local Government.¹⁹ 'Government' does not mean the person or persons for the time being. It means the person or persons collectively, in succession, who are authorized to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals, and are not representatives of that abstract conception which is called Government.²⁰ There is a clear distinction between the Government and the individual officers employed under the Government. Words bringing the former into hatred or contempt constitute sedition, but similar words directed against the latter can only infringe the law of libel.²¹ There may be instances of criticism of subordinate officials that would not offend the rule "to bring into hatred or contempt or excite disaffection towards" Government and it is also easy to imagine instances that would. No general rule can be laid down.²² No substantial distinction can be drawn between the "Government established by law in British India" and the "Executive Government".²³

"The Government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace. Therefore where...you criticise the Civil Service *en bloc*, the question whether you excite disaffection against the Government or not seems to me a pure question of fact. You do so if the natural effect of your words, infusing hatred of the Civil Service, is also to infuse hatred or contempt of the established Government whose accredited agent the Civil Service is. You avoid doing so if, preferring appropriate language of moderation, you use words which do not naturally excite such hatred of Government. It is....a mere question of fact".²⁴

It is permissible to a writer to dwell upon the foreign origin in the Government of India and confine himself to advocating a larger employment of Indians, so as to make the Government a little less foreign, or eventually get rid of its foreign nature.²⁵

The Calcutta High Court has held that under the Government of India Act, 1935, the Ministers of a Province are not vested with any right to exercise executive authority nor are the officers subordinate to the Governor within the meaning of s. 49(1)

¹⁵ Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 135; "*Amrita Bazar Patrika*," (1932) 37 C. W. N. 166, 56 C. L. J. 157, 33 Cr. L. J. 949, [1932] AIR (C) 738, F.B.

¹⁶ *Sundar Lal*, (1919) 42 All. 288, F.B.; *Kshiteeshchandra Ray Chaudhuri*, (1932) 59 Cal. 1197.

¹⁷ *Bal G. Tilak*, (1916) 19 Bom. L. R. 211, 271, 18 Cr. L. J. 567, 605, [1916] AIR (B) 9; *Dhirendra Nath Sen*, [1938] 2 Cal. 672.

¹⁸ Per Fawcett, J., in *Phillip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927. (Unrep. Bom.).

¹⁹ *Mrs. Besant*, (1916) 39 Mad. 1085, S.B.; *Kshiteeshchandra Ray Chaudhuri*, (1932) 59 Cal. 1197.

²⁰ Per Batty, J., in *Bhaskar Balvant Bhopalkar*, (1900) 8 Bom. L. R. 421, 438, 4 Cr. L. J. 1.

²¹ *Raj Pal*, (1922) 3 Lah. 405.

²² *Sat. Parkash*, (1940) 43 P. L. R. 53, 42 Cr. L. J. 682, [1941] AIR (L) 165, explaining *Om Parkash*, (1940) 42 P. L. R. 382.

²³ *Anandabazar Patrika*, (1932) 60 Cal. 408; *Kshiteeshchandra Ray Chaudhuri*, sup.

²⁴ Per Batchelor, J., in *Bal G. Tilak*, (1916) 19 Bom. L. R. 211, 264, 18 Cr. L. J. 567, 601, [1916] AIR (B) 9; "*India in Bondage*", (1930) 57 Cal. 1217, S.B.

²⁵ Per Fawcett, J. in *Phillip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927 (Unrep. Bom.).

of the Act. They are merely the Governor's advisers. The Ministers, therefore, are not "the Government" within the meaning of this section.¹

As to the definition of 'Government', see s. 17, *supra*. The expression 'established by law in British India' restricts the meaning which this word otherwise has.

Incitement to secure 'Swaraj'.—'Swaraj' does not necessarily mean government of the country to the exclusion of the present Government, but its ordinary acceptance is 'home-rule' under the Government. The incitement of the members of a public meeting to exert themselves to secure 'Swaraj' does not amount to sedition.² This case draws a sharp line between change of Government and a change of form of Government. Advocating 'home-rule' for India is not *per se* objectionable. But such advocacy must not offend against existing laws.³

Exhortation not to pay taxes.—Exhortation to the people not to pay land revenue and taxes or discouraging recruiting do not amount to sedition.⁴

9. Explanation 1.—Where the Court came to the conclusion that the whole effect of the speech in question was to suggest to the hearers that Government was taking sides against labour and was taking the part of capitalists, it held that to make a charge of gross partiality of that sort against Government was calculated to inspire feelings of enmity and disaffection towards Government.⁵ Where an article in a newspaper expressed that the law was being employed as a weapon of tyranny and that the maker of the law and those responsible for its administration viewed with pleasure executions carried out in pursuance of the law, it was held that the language of the articles came within the purview of this section.⁶

10. Explanations 2 and 3.—Both these Explanations have a strictly defined and limited scope. They have no application whatever unless the article in question criticises "the measures of Government" or "administrative or other action of the Government" and that too "without exciting or attempting to excite hatred, contempt or disaffection". The object of the Explanations is to protect bona fide criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers.

The Select Committee to whom the Bill to amend this section was referred in their Report say: "We have added explanation 3 to make it clear that criticism on the action of Government is not confined to cases in which it is sought to bring about an alteration of what has been done. For example, suppose the Government make an appointment which is considered objectionable. That appointment may be criticised, although the criticism may not have in view the cancellation of the appointment. We have made consequential amendments in explanation 2 to make the language of the two explanations uniform".

Explanations 2 and 3 give perfect freedom to journalists, to publicists, to orators and public speakers to discuss the measures and administrative acts of Government, to disapprove of them, to attack them, and to use forcible and strong language if necessary, and to do everything legitimate and honest in bringing before the public or the Government the fact that their measures or their actions are disapproved by a section of the public or by that particular speaker or journalist. But a publicist, a journalist, or a speaker, has no right to attribute dishonest or immoral motives to Government. Criticism, though harsh and uncompromising, must be free from the taint of language which is likely to arouse or calculated to engender feelings of enmity, hatred, or disloyalty against Government.⁷

The limits to which a public speaker or writer can go in criticising the acts of Government are well summarized by Strachey, J.—"A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures,

¹ *Hemendra Prasad Ghose*, [1939] 2 Cal. 411;
Om Parkash, (1940) 42 P. L. R. 382.

² *Beni Bhushan Roy*, (1907) 34 Cal. 991.

³ *Mrs. Besant*, (1915) 39 Mad. 1085, S.B.

⁴ *Om Parkash*, (1940) 42 P. L. R. 382.

⁵ *Maniben Kara*, (1932) 34 Bom. L. R.

1642, 57 Bom. 253.

⁶ *Kshiteeshchandra Ray Chaudhuri*, (1932) 59 Cal. 1197.

⁷ *B. G. Tilak*, (1908) 10 Bom. L. R. 848.

8 Cr. L. J. 281; *Phanendra Nath Mitter*, (1908) 35 Cal. 945.

and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section.”⁸

“Full liberty of the press is preserved to writers and publishers of newspapers to make whatever comments they like and in however strong language expressing disapprobation or disapproval of any measures of the Government, if the object of the disapproval expressed in however strong language is to obtain their alteration by lawful means, that is to say, by arguments or by persuading the general public that those measures are bad ought to be altered. It is one thing to use strong language about measures with a view to secure their alteration. It is quite another thing to use language which does not do that, but does something far different, namely, excites or attempts to excite hatred, contempt or disaffection against the Government. That is the distinction which is drawn. Liberty of the press by all means; say what you like, in whatever language you like, however strong. Condemn measures of Government by all lawful means and argument. But while making use of the liberty of the press, do not transgress the reasonable limit which is imposed for the safety of the Government, that is to say, do not excite or attempt to excite hatred, or contempt or disaffection towards the Government established by law in British India.

“It has been the policy of the Legislature to preserve as far as possible and within all reasonable limits the cherished freedom of the press which has been for generations one of the joys and privileges of the British people in whatever part of the world they have found themselves. Under explanation 3 it is open to any newspaper editor or proprietor to express this disapprobation in whatever language he likes and however strong of any administrative or other action of the Government. It does not matter what is the language used to condemn the administrative or other action of the Government provided he does not overstep the limit on what the safety of the Government depends, the proviso being that he must not excite or attempt to excite hatred or contempt or disaffection.”⁹

Liberty of the press means complete freedom to write and publish without censorship and without restriction, save such as is absolutely necessary for the preservation of society. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. It would also be its duty to complain of a grievance which the public good required to be removed, though the very assertion of a grievance creates discontent to a certain extent. Such writings, though trenching closely upon sedition, should receive the protection of a jury.

Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretence of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions. Political writing, when confined within proper and lawful limits, is not only justifiable, but is protected for the public good, and such writings are to be regarded in a free and liberal spirit. A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives; with the same motives a writer may freely criticise the proceedings of Courts of Justice and of individual Judges—nay, he is invited to do so, and to do so in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expres-

⁸ *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 137, approved of in *Manmohan Ghose*, (1910) 38 Cal. 253. See *Satyranjan Bakshi*, (1927) 45 C. L. J. 638, 28 Cr. L. J. 723, [1927] AIR (C) 698.

⁹ Per Blackwell, J., in *Krishnaji Khadil-*

kar, (1929) Second Criminal Sessions, Case No. 1, decided on March 27, 1929 (Unrep. Bom.); *Secretary, High Court Bar Association Lahore*, (1932) 33 P. L. R. 911, 33 Cr. L. J. 831, [1932] AIR (L) 559.

sions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion.¹⁰

"Changes in policy and changes in measures are liable to criticism, and to criticise and urge objections to them is a special right of a free press in a free country . . . every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State."¹¹ Where the object of the speaker was to obtain for Indians an increased and gradually increasing share of political authority and to subject the administration of the country to the control of the people (*svarajya*) and there was a distinct pleading that the political changes thus advocated should be obtained by lawful and constitutional means, it was held that there was no infringement of the provisions of this section.¹² A criticism of the Simon Commission and reference to the economic drain from India caused by the export of food-stuffs and other raw materials in exchange for which motor-cars, etc., were imported were held not to constitute an offence under this section.¹³

The conditions at present in India are quite different from those which existed in 1897 and far greater freedom is given to the press now than was given in those days and things which may now be said and written with impunity would have been treated as seditious at the end of the last century. The Court is to consider the existing state of the minds of the people and the existing conditions and to decide whether the article is likely to engender feelings of hatred, enmity or disloyalty in the minds of the readers.¹⁴

An article in a newspaper, which is an attack upon the Government and also upon the personnel which constitute the Government, attributing to them a deliberate policy of fomenting communal strifes comes under the purview of this section, as anybody reading the article and believing in the existence of such a policy would naturally both hate the Government and hold it in contempt and be disaffected towards it.¹⁵

A criticism of the acts of the police which represents one of the chief agencies of the Government will fall within the purview of this section if the natural effect of the words used is to infuse hatred or contempt of the Government.¹⁶ But an attack, in a speech upon policemen of a particular place does not convey any reflection on the governing authority.¹⁷ A speech which attributes evil motives to the Government and indulges in a wholesale denunciation is not a mere criticism of the policy of the Government. Where a speaker told the audience that the Government wanted to ruin those people who were trying to set them on the right path, that the Englishmen had come to India to make the people addicted to drink opium and *bhang*, that the executive and judiciary were partial to white men and exhorted the audience to resolve not to live under Englishmen, it was held that the speech was calculated to excite disaffection against the Government and to bring it into hatred and contempt.¹⁸ It is sedition to say in a public speech that the Government holds the lives of the people of this country as of no value and is prepared to shoot them down under the pretext of acting in the interest of law and order. Where a speaker said that the Government had wounded the feelings of the Sikhs in the matter of Sis Ganja Gurdwara at Delhi and any one could see the grief-provoking picture showing thousands of bullet-marks on the wall of the Gurdwara and that in the name of law and order bullets were showered on the people, it was held that the reference to the Sis Ganja Gurdwara and to the motive of the authorities to rain bullets under the cover of maintaining law and order was undoubtedly such as to bring the Government established by law in British India into hatred and the speaker was guilty of sedition.¹⁹ S made a speech stating that though

¹⁰ *Alexander Martin Sullivan*, (1868) 11 Cox 44, 49, 50; *Collins*, (1839) 9 C. & P. 456; *Dhirendra Nath Sen*, [1938] 2 Cal. 672. See also *Lambert*, (1810) 2 Camp. 398.

¹¹ *Per Batty, J.*, in *Bhaskar Balwant Bhopalkar*, (1906) 8 Bom. L. R. 421, 441, 4 Cr. L. J. 1. See the observations of Sadasiva Aiyar, J., in *Varadarajulu Naidu*, (1919) 42 Mad. 885, 893, S.B.

¹² *Bal G. Tilak*, (1916) 19 Bom. L. R. 211, 18 Cr. L. J. 567, [1916] AIR (B) 9.

¹³ *Ram Saran Das*, (1930) 31 P. L. R. 688, 32 Cr. L. J. 444, [1930] AIR (L) 892.

¹⁴ See *Nageswar Prasad Sharma*, (1924) 9

P. L. T. 766, 26 Cr. L. J. 78, [1925] AIR (P) 99.

¹⁵ *Jagat Narain Lall*, (1928) 9 P. L. T. 784, 29 Cr. L. J. 773, [1928] AIR (P) 649.

¹⁶ *Satya Ranjan Balshi*, (1929) 56 Cal. 1085.

¹⁷ *Om Parkash*, [1947] N. L. J. 563.

¹⁸ *Kidar Nath*, (1929) 31 Cr. L. J. 603, [1929] AIR (L) 817; *Jnananjan Niyogi*, (1930) 31 Cr. L. J. 1114, [1930] AIR (C) 363; *Satya Pal*, (1929) 31 P. L. R. 11, 31 Cr. L. J. 266, [1930] AIR (L) 153; *Arjan Singh*, (1929) 31 Cr. L. J. 720, [1930] AIR (L) 309.

¹⁹ *Narain Das*, (1930) 32 Cr. L. J. 588, [1931] AIR (L) 31; *Lachhman Singh*, (1929) 31 Cr. L. J. 734, [1930] AIR (L) 156.

matters were had under other Kings, who ruled before the British, we were never in a worse plight than now. They have sucked our blood and we do not realize this. Again, whereas in previous days the education was general the present Government has only given education to fit people for clerks and also the handicrafts and trade have been ruined. S also referred to incidents of martial law days. It was held that the speech exceeded the limits of fair comment and brought the speaker within the purview of this section.²⁰ The opinion of a historian may be partial and such partiality is obviously not in itself criminal or even culpable, but there is manifestly a vast difference between this and the deliberate setting out of only one side of the case. A compilation in which authorities are often misquoted, always in the direction of exaggeration or embroidery of the evidence or conclusion stated by the author, and increasing the gravity of the charges made, and depicting nothing but black of any Englishman or any British measure and nothing but white of anybody else, is not a mere 'history' but is deliberately calculated to create disaffection towards British rule.²¹ An attempt to remove from power the ministers in office or any agitation for the repeal of an Act of Parliament is not seditious if no unlawful means are employed. An article which is not an attack on the ministry, but on a proposed bill and the policy of the ministry as revealed therein, is not seditious.²² But a speech which is otherwise seditious does not cease to be seditious merely because the opinions expressed in the speech are in accordance with the principles of a political party (in this case the Congress party) whose members govern in the majority of the provinces in India. A Court cannot take account of the principles of a political party and declare that an offence which is punishable under the Pcnai Code is not an offence because it does not contravene the principles of that party. Moreover it is not the advocacy of certain principles—however extreme they may be—that the law punishes, but the adoption of the methods and modes of address intended to cause disaffection towards Government established by law or to bring Government into hatred or contempt.²³ Shouting objectionable slogans in a public meeting, namely, "destroy the dishonest Government" and "long live bloody revolution" is sedition and comes within the meaning of this section. The speech which amounts to an exhortation to the hearers to join the Communist or Bolshevik party in itself is not objectionable within the meaning of this section.²⁴

To suggest some other form of Government is not necessarily to bring the present Government into hatred or contempt. Hence, a speech alleging the present Government of the country to belong to the capitalist class, drawing attention to the action of Government in banning certain militant class organisations and not banning others which are alleged to be capitalist organisations, describing the effect of such action to be that the capitalist organisations found it easier to put down the workers' movement, alleging the motive of such action to be the common motive of all Governments which is to encourage a reformist movement as a method of checking the revolutionary movement, and, in the sum, recommending the Bolshevik form of Government as preferable to the present capitalist form, does not amount to sedition.²⁵

It is not sedition merely to criticise Government however bitterly or forcibly that may be done. It is not sedition to seek its overthrow by constitutional means in order that another Government, equally constitutional, may be substituted in its place in a constitutional way. It becomes sedition only when the intention or the attempt is to induce people to cease to obey the law and to cease to uphold lawful authority.¹

A speech delivered for the purpose of getting labourers to unite in making a demand for their real or fancied rights and privileges from their employers, and also to have some law promulgated for the protection of the labourers and for the improvement of the conditions under which they work, as the laws in existence are stated to

²⁰ *Sham Das*, (1930) 31 P. L. R. 841, 31 Cr. L. J. 1169, [1930] AIR (L) 874; *A. M. A. Zaman*, (1932) 34 Cr. L. J. 309, [1933] AIR (C) 140.

²¹ *Saigal*, (1930) 52 All. 775, S.B.

²² *Dhirendra Nath Sen*, [1938] 2 Cal. 672.

²³ *S. S. Bathwala*, (1938) 48 L. W. 171, [1938] M. W. N. 529, [1938] 2 M. L. J. 416, 39 Cr. L. J. 988, [1938] AIR (M) 758.

²⁴ *Sodhi Pindi Das*, (1937) 40 P. L. R. 872,

39 Cr. L. J. 930, [1938] AIR (L) 629.

²⁵ *Kamal Krishna Sircar*, (1935) 39 C. W. N. 1245, 62 C. L. J. 116, 36 Cr. L. J. 1870, [1935] AIR (C) 636; *Arjun Arora*, [1937] A. L. J. R. 261, 38 Cr. L. J. 662, [1937] AIR (A) 297.

¹ *Bhagwati Charan Shukla v. Provincial Government, Central Provinces and Berar*, [1946] Nag. 865, S.B.

operate favourably towards capitalists and detrimentally towards them, is protected by the explanation to this section. But not so, if the object of the speaker is to make the labourers feel discontented and dissatisfied with their lot which is attributed to the unfair operations of the prevailing laws and the alien character of the Government which is said to be favourable to the capitalists and prejudicial to the labourers and under whose rule the position of the Burmans is reduced to that of slaves.²

Though it cannot be said that language current in the political controversy of a country can never be made the subject of a charge of sedition for something may turn upon the occasion on which it is used, the context in which it occurs and on the surrounding circumstances of the case, but ordinarily it should be difficult to found a charge of sedition upon ideas, sentiments and expressions which have become part and parcel of normal political life of the country and which do not excite people to disorder.³

Truth.—An article imputing wholesale bribery to the ministerial officers of the law Courts and to the lower officers of the police force, and expressing grave doubts as to whether the Government ever inquire into such abuses, so much is it occupied with investigations of boycott, dacoity and sedition, published when sedition is rife and the minds of people excited, may have the effect of creating a feeling that the Government is not doing its duty, and exceeds the limits of fair comment and is seditious, irrespective of the question of the truth of the allegations.⁴ If certain alleged facts are used as a peg on which to hang seditious comments the truth of the facts does not excuse the seditious commentary.⁵

11. 'Disapprobation.'—This means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him.⁶ It is quite possible to like or be loyal to any one, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly.⁷

It is not sedition for a writer to describe the Reform scheme as being monstrous and misbegotten, because it is not founded on democratic principles and not a genuine reform or a genuine initiation of constitutional progress, or to assert that some of the police officials and the judiciary are corrupt, unscrupulous and partial, or to state that if an organization which he believes to be lawful is suppressed by proclamation it is arbitrary, and that in such case the responsibility will not rest on him for the madness which crushes down open and legal political activity in order to give a desperate and sulen nation into the hands of fiercely enthusiastic and unscrupulous forces, or to inculcate the doctrine of passive resistance or refusal of co-operation with the Government within legal limits, or to describe the British Courts in India as ruinously expensive.⁸ Where disapprobation of measures of Government is motivated throughout by a desire to excite hatred, contempt and disaffection towards it, it is immaterial to consider whether absolute independence is advised or any form of constitution advocated. Any advocacy regarding change in the form of Government as bringing into hatred or contempt or exciting disaffection towards the present Government comes within the mischief of this section.⁹

It may be pointed out that "what was considered seditious under s. 124A, Indian Penal Code, in 1897 may not necessarily be held to be so in 1932; one cannot shut one's eyes to changes in political conceptions due to the march of events and to the declared objective of the Government of the day."¹⁰

Dramatic performances.—Under the Dramatic Performances Act the Provincial Government may prohibit any dramatic performance of a nature likely to excite feelings of disaffection to the Government¹¹ and authorize seizure of all its parapher-

² *Lay Maung*, [1939] *Ran.* 239.

³ *Fakhr-ul-Islam*, [1943] *Ali.* 429.

⁴ *Joy Chandra Sarkar*, (1910) 38 *Cal.* 214.

⁵ *Ram Chandra*, (1929) 31 *Cr. L. J.* 168, [1930] *AIR (L)* 371.

⁶ *Per Petheram, C. J.*, in *Jogendra Chunder Bose*, (1891) 19 *Cal.* 35, 44.

⁷ *Per Strachey, J.*, in *Bal Gangadhar Tilak*,

(1897) 22 *Bom.* 112, 137.

⁸ *Manomohan Ghose*, (1910) 38 *Cal.* 253.

⁹ "*India in Bondage*", (1930) 57 *Cal.* 1217, *S.B.*

¹⁰ *The "Amrita Bazar Patrika"*, (1932) 37 *C. W. N.* 166, 176, 56 *C. L. J.* 157, 33 *Cr. L. J.* 949, (1932) *AIR (C)* 738, *F.B.*

¹¹ *Act XIX of 1876, s. 3.*

nalía.¹² Persons taking part in any such prohibited performance may be prosecuted and convicted.¹³ A conviction under this Act is no bar to a prosecution under this section.¹⁴

Liability for letters of correspondents.—The editor of a paper is liable for unsigned seditious letters appearing in the paper.¹⁵

Dissemination of seditious matter.—Section 108 of the Criminal Procedure Code can be brought into operation when any person is found to be disseminating seditious matter. It runs as follows :—

“Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Provincial Government in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing, or in any other manner intentionally disseminates or attempts to disseminate, or in anywise abets the dissemination of,—

(a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, or

(b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code, such Magistrate, if in his opinion there is sufficient ground for proceeding, may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867, with reference to any matter contained in such publication except by the order or under the authority of...the Provincial Government or some officer empowered by the Provincial Government in this behalf.”

Liability for publishing seditious extracts.—The law does not excuse the publication in newspapers of writings which are in themselves seditious libels, merely because they are copied from foreign newspapers as items of news. This will be a matter for the jury in considering the criminal intent; but they must also consider the circumstances under which the writings were copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, the nature of the editorial comments accompanying them, if any, or their absence, if none, the general tone of the other writings in the newspaper, as the intent of the publisher is to be inferred from the natural consequences of his act.¹⁶

Where the accused reproduced in his own paper a seditious article which had already been published in other papers without any prosecutions having been launched with regard to those publications, and it was found that his primary intention in publishing the article was to win over those who were within the Council to readiness to leave it, it was held that the accused was guilty of publishing a seditious article under this section.¹⁷

Republication of seditious articles from another newspaper, one of which only was filed as an exhibit by the prosecution and used in the case against the editor of that paper on his trial for sedition, is not a report of the proceedings of a Court of Justice, and is not justifiable.¹⁸

Where the compiler of certain Hindi Readers, meant for the use of children, collected together seditious utterances and sentiments which had already been published and the cumulative effect of which was to bring into hatred and contempt the Government, it was held that the books could be proscribed even though the originals were

¹² Act XIX of 1876, s. 8.

¹³ *Ibid.*, s. 6.

¹⁴ *Ibid.*, s. 9.

¹⁵ *Apurba Krishna Bose*, (1907) 35 Cal. 141, 153.

¹⁶ *Alexander Martin Sullivan*, (1868) 11 Cox 44.

¹⁷ *Krishna Gopal Sharma*, [1930] A. L. J. R. 1215, 32 Cr. L. J. 161, [1930] AIR (A) 836.

¹⁸ *Apurba Krishna Bose*, (1907) 35 Cal. 141.

not proscribed. A compilation consisting of extracts from various sources may be seditious and a fit subject for an order of proscription, though the extracts considered in relation to their own proper contexts may not be in themselves of a seditious nature.¹⁹

Seditious meeting.—Stephen says : “If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy, of which the seditious words spoken are an overt act, and their meeting is an unlawful assembly. If at a meeting lawfully convened seditious words are spoken of such a nature as to be likely to produce a breach of the peace, the meeting may become unlawful in all those who speak the words or do anything to help those who speak to produce upon the hearers their natural effect. The speaking of the seditious words is in itself an offence in the speaker, but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is such as to produce reasonable fear of a breach of the peace, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence, though it may expose him to serious consequences if the meeting becomes disorderly and has to be dispersed, for in such a case force may be used against all persons who are present, whether they take part in the unlawful object of the meeting or not.”²⁰

“If one man uses seditious words at a meeting those who stand by and do nothing, although they do not reprobate them, are not guilty of uttering the seditious words. Those even who make a speech themselves are not guilty of uttering seditious words unless you can gather from the language they use that they are endeavouring to assist the other man in carrying out that portion of his speech, and by that course endeavouring to assist him in causing his words which excite to disorder to produce their natural effect upon the people.”²¹

To prevent meetings of a seditious character the Prevention of Seditious Meetings Act is passed. It is set out in full in the Appendix.

Amendment.—The words “or The Crown Representative” were inserted after “Her Majesty” and the words “or British Burma” after “British India” by the Government of India (Adaptation of Indian Laws) Order, 1937.

In Burma, for “British India” the words “Burma or British India” were substituted by the Government of Burma (Adaptation of Laws) Order, 1937.

The Crown Representative having exclusive jurisdiction over railway lands specified in the Notification No. 26—I B, Political Department, the following modification has been made by a Notification²² issued under the Indian (Foreign Jurisdiction) Order in Council, 1937 :—For “British India or British Burma” read “British India or the Railway lands or British Burma or towards the Ruler of or the Administration established by law in the State in which the said lands are situate.”

PRACTICE

Evidence.—Prove (1) that the accused spoke or wrote the words, or made the signs or representations, or did some other acts, in question.

(2) That he thereby brought or attempted to bring into hatred or contempt; or excited or attempted to excite disaffection.

(3) That such disaffection was towards His Majesty, or the Government of British India.

Evidence of publication.—If the manuscript of a seditious writing be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the accused, although there be no evidence given to show that the printing and publication were by the direction of the accused.²³ In order to establish the fact of publication of seditious matter transmitted through the post office it is not necessary to prove the actual posting, nor that it was printed and published under the directions of the accused. If

¹⁹ *Baijnath Kedia*, (1924) 47 All. 298, F.B.

²⁰ *History of Criminal Law of England*, Vol. II, p. 386.

²¹ *Per Cave, J.*, in *Burns*, (1886) 16 Cox

355, 366.

²² No. 34-IB, G.I., dated 10-2-1939, *Bom. G. G.*, Part I, p. 570, dated 28-2-1939.

²³ *Lovett*, (1839) 9 C. & P. 462.

the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him.²⁴

Portions of a speech charged as seditious taken down by a reporter are admissible in evidence.²⁵ Short abstracts taken down from a speech are sufficient if they are seditious in character.¹

Upon an indictment against A B and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held (A B having presided at this meeting) that resolutions passed at a former meeting assembled a short time before, in a distant place, and at which A B also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to show the intention of A B in assembling and attending the meeting in question.²

Intention as gathered from other articles.—Seditious articles published in the same newspaper, not forming the subject of the charges, on which the accused is being tried at the time, are admissible to show the intention of the person, who printed or published the latter.³ Articles not forming the subject of the charge and appearing in other issues of the same paper, are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity.⁴

Where the prosecution tendered in evidence a copy of a letter purporting to have been written by the accused to the editor of a newspaper sending for publication a portion of a pamphlet charged as seditious, and the letter mentioned the writer's motive in writing the portion sent, it was held that the copy of the letter was relevant under ss. 9 and 14 of the Indian Evidence Act, as evidence of the accused's intention, and was admissible; and that it was not necessary for the prosecution to prove that the letter was sent, before its copy could be admitted.⁵ A writing made subsequently by the accused and found in his possession, though not published, is admissible at his trial for an offence punishable under this section, as a piece of evidence which can be shown to the jury and used in argument.⁶

Intention as gathered from speeches not charged as seditious.—Where certain speeches form the subject-matter of a charge for sedition and when such speeches form part of a series of speeches or lectures on one topic, delivered within a short period of time, any of such speeches or lectures will be admissible, under s. 14 of the Indian Evidence Act, as evidence to prove the intention of the speaker in respect of the speeches which form the subject-matter of the charge.⁷ It is not open to the Court to admit evidence of other speeches alleged to have been made by the accused on other occasions for the purpose of determining the guilt or otherwise of the accused or even for the purpose of determining the sentence to be awarded.⁸

Intention as gathered from written statement of accused.—The written statement filed by the accused in a sedition case does not affect the intention of the accused, which is to be derived from a construction of the speech itself. Nevertheless it is a matter to be taken into consideration, and shows how the accused is minded.⁹

Intention as gathered from preface of book.—In considering whether a book is seditious the preface, though written by a third person, which throws light upon the intention of the writer, cannot be ignored.¹⁰

²⁴ *Surendra Narayan Adhicary*, (1911) 39 Cal. 522.

²⁵ *Sant Ram*, (1929) 31 Cr. L. J. 562, [1930] AIR (L) 86.

¹ *Krishna Chandra Pangoria*, (1937) 38 Cr. L. J. 972, [1937] A. L. J. R. 365, [1937] AIR (A) 466; *Crowe*, (1848) 3 Cox 123; *Vishamshar Dayal Tripathi*, [1940] O. W. N. 965, (1940) 42 Cr. L. J. 40, [1941] AIR (O) 35.

² *Hunt*, (1820) 3 B. & A. 566.

³ *Phanendra Nath Mitter*, (1908) 35 Cal. 945; *Harisarvothama Rao*, (1909) 32 Mad. 338; *Satyendra Nath Majumdar*, (1930) 34 C. W. N. 1095, 53 C. L. J. 256, 32 Cr. L. J. 758, [1931] AIR (C) 337.

⁴ *Manomohan Ghose*, (1910) 38 Cal. 253.

⁵ *Spratt* (No. 2), (1927) 30 Bom. L. R. 314, 29 Cr. L. J. 322, [1928] AIR (B) 77.

⁶ *Spratt* (No. 3), (1927) 30 Bom. L. R. 315, 29 Cr. L. J. 320, [1928] AIR (B) 78.

⁷ *Chidambaram Pillai*, (1908) 32 Mad. 3; *Om Parkash*, (1930) 31 Cr. L. J. 1182, [1930] AIR (L) 867; *Jagannath Prasad*, [1942] Nag. 62.

⁸ *Indra*, (1930) 31 P. L. R. 625, 31 Cr. L. J. 1187, [1930] AIR (L) 870.

⁹ *Jnananjan Niyogi*, (1930) 31 Cr. L. J. 1114, [1930] AIR (C) 363.

¹⁰ *Kirpal Singh*, (1930) 32 Cr. L. J. 640, [1931] AIR (L) 106.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session, Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered.

Trial by Magistrate or Court of Session.—An offence under this section is triable by alternative Courts including a Magistrate of the First Class specially empowered by the local Government, and under the Code the Magistrate has discretion to decide whether the case shall be tried by himself or by the Court of Session. If the discretion is exercised in a judicial manner the High Court will not lightly interfere.¹¹

Where an article alleged to be seditious was written in Tamil and published in a newspaper which had a wide circulation and the question was whether the Presidency Magistrate should himself try the case or should commit it to the High Court to be tried with the aid of a jury, it was held that, in the circumstances of the case, the Magistrate should record the evidence as if it were a preliminary enquiry for ultimately committing the case to the Sessions, if a *prima facie* case was made out. The Legislature has not directed that the offence of sedition, punishable under this section, should be tried solely by a Court of Session. But there are several circumstances which have to be taken into consideration before deciding the question whether the case is to be tried by the High Court or by the Presidency Magistrate himself. The main considerations in the case are : (i) the advantages of a trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implication and its effect on the general public and the reaction of the readers to it; (ii) the adequacy of the sentence that may be passed by the Court for the offence in question; and (iii) the capacity of the Judge to appreciate the impression that is likely to be formed in the minds of the reading public.¹²

Chapters IV and V of the Code apply to offences punishable under this section.¹³

Special jury.—A trial for sedition before the High Court should ordinarily be before a special jury.¹⁴

Sanction.—Sanction of the Provincial Government or some officer empowered by the Provincial Government is necessary for prosecution under this section.¹⁵ A commitment of the accused upon the evidence recorded before such sanction has been given is illegal.¹⁶ Orders under s. 196 of the Criminal Procedure Code should be expressed with sufficient particularity and with strict adherence to the language of the section. An order purported to accord sanction to prosecute the editor, manager and the printer of a newspaper without specifying their names, and containing a misdescription of the seditious article. On the day of the trial an amended order correcting the errors in the previous order was filed. It was held that the prosecution was rightly instituted.¹⁷ "Section 196 only requires that the complaint should be made upon authority from the Provincial Government and not that the actual complaint must be expressly authorized by the Provincial Government. A complaint is not defective because it does not set out the speeches or alleged seditious words which form the subject-matter of the charge.¹⁸ If the accused is charged under this section and also under s. 153A the charge does not become defective merely because it does not set out what portions of the speech of the accused are within the provisions of this section and what are within those of s. 153A.

It is not necessary that the order of Government sanctioning the prosecution should specify the sections under which the accused is to be tried.¹⁹

Joint trial of printer and publisher.—The printer and the publisher of a seditious writing can be tried jointly.²⁰

¹¹ *Hari Moreswar*, (1931) 33 Bom. L. R. 1515, 56 Bom. 61, commenting on *Krishnaji Khadilkar*, (1929) 31 Bom. L. R. 602, 53 Bom. 611, where the High Court directed the Chief Presidency Magistrate to commit to the High Court Sessions a case under this section against the accused who was the editor of a widely circulated daily newspaper in Bombay.

¹² *Ramaratnam*, [1946] Mad. 892.

¹³ Act XXVII of 1870, s. 13.

¹⁴ *Spratt*, (No. 1), (1927) 30 Bom. L. R. 313, 29 Cr. L. J. 411, [1928] AIR (B) 74.

¹⁵ Criminal Procedure Code, s. 196.

¹⁶ *Mulla Abdul Rahim*, (1882) P. R. No. 28 of 1882. See *Basdeo Agarwalla*, [1945] F. C. R. 93, 47 Bom. L. R. 392; *Suraj Parkash*, [1945] F. C. R. 90, 47 Bom. L. R. 395.

¹⁷ *Apurba Krishna Bose*, (1907) 35 Cal. 141; *Bal Gangadhar Tilak*, (1897) 22 Bom. 112.

¹⁸ *Chidambaram Pillai*, (1908) 32 Mad. 3.

¹⁹ *Virumal*, (1910) 4 S. L. R. 55, 11 Cr. L. J. 583.

²⁰ *Shantaram Mirajkar*, (1927) 30 Bom. L. R. 320, 29 Cr. L. J. 683, [1928] AIR (B) 189.

Jurisdiction.—The offence is complete either in the district where the author hands over the document for the purpose of being communicated to the public or in the district where it is sent by post for publication and is published.²¹ Sending newspapers by post from the office where they are published to other places constitutes in law publication at the places where they are sent.²²

Confiscation.—A Magistrate can order forfeiture of a newspaper or book containing seditious matter under s. 99A of the Criminal Procedure Code.

Appeal to Privy Council.—Once it appears that the principles of the law of sedition have been rightly understood by the local tribunal, the question whether those principles have been properly applied is so much in the nature of a question of fact and depends so largely upon local conditions that it is difficult for the Board to interfere on this ground with the conclusions arrived at by the Courts in India.²³

Charge.—In a Madras case it has been ruled that a charge of an offence under this section is defective if it does not set out the speeches or passages in speeches alleged to be seditious, but such defect does not vitiate the proceedings in virtue of ss. 225 and 537 of the Code of Criminal Procedure.²⁴ But in a subsequent case two other Judges of the same High Court have held that if an offence under this section is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, i.e., if the charge states the words used with substantial, though not absolute, accuracy; and it is enough if the substance of the words proved to have been used is the same as that of the words set out in the charge. Even if the words or the substance of the words used are not entered at all in the charge, this will be only an irregularity which, under s. 225 of the Code of Criminal Procedure, will not vitiate a conviction unless such omission has misled the accused and occasioned a failure of justice.²⁵ The Lahore High Court has held that the charge should contain the speech or at least the substance of the speech alleged to be seditious, but omission to do so will not vitiate a conviction if it has not prejudiced the accused in the trial of his case.¹

Charges under this section and s. 153A could be joined together.²

The charge should run as follows :—

I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, by writing (*or speaking*) the words (*mention them*) (*or by signs or by visible representation, or otherwise*) brought (*or attempted to bring*) into hatred or contempt (*or excited or attempted to excite disaffection towards*) His Majesty the King-Emperor, (*or the Government established by law in British India*), and thereby committed an offence punishable under s. 124A and within my cognizance (*or the cognizance of the Court of Session or High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—The framers of the Code wished to draw a marked distinction between minor offences and those of a very serious character where transportation would be the only appropriate punishment. The sentence of transportation is not an alternative for imprisonment as in ss. 121 and 122.³

The test as regards sentence should be whether the speech or article was a violent one and whether the intention of the accused was to excite people to commit violence.⁴ Where the accused has made an overt attempt by his speech to persuade the people to rise in active and open rebellion against Government, a severe and deterrent sentence should be imposed.⁵

²¹ *Burdett*, (1820) 4 B. & Ald. 95.

²² *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 129.

²³ *Kali Nath Roy*, (1920) 48 I. A. 96, 98, 99, 2 Lah. 84, 23 Bom. L. R. 709.

²⁴ *Chidambaram Pillai*, (1908) 32 Mad. 3.

²⁵ *Mylapore Krishnasami*, (1909) 32 Mad. 384, per Benson, and Wallis, JJ., Sankaran Nair, J., *dissentiente*. The Judicial Commissioners' Court, Sind, has held that it is not

necessary to specify the passages in the charge : *Virumal*, (1910) 4 S. L. R. 55, 11 Cr. L. J. 583.

¹ *Chint Ram*, (1930) 32 P. L. R. 13, 32 Cr. L. J. 1202, [1931] AIR (L) 186.

² *Tribhuvandas*, (1908) 10 Bom. L. R. 801, 33 Bom. 77; *Virumal*, (1910) 4 S. L. R. 55, 11 Cr. L. J. 583.

³ See G. I., 1898, Part V, p. 13.

⁴ *Munshi Singh*, (1935) 10 Luck. 712.

⁵ *U. Datthana*, [1940] R. L. R. 681.

On the question of sentence the position of printers of seditious documents is probably worse than that of the authors because the seditious acts of the authors would be far less extensive in their operation if it were not for the existence of persons able and willing to print and publish them.⁶

The sentence will depend upon the nature and circumstances of each case, the language used, and the age and position in life of the accused.⁷ A sentence of fine is regarded to be sufficient where the offence is technical.⁸

The theory of punishment is based upon (a) the protection of the public, (b) the prevention of crime and (c) the reformation of the offender. In the case of political offences, arising out of the beliefs of the accused, severe sentences defeat their object. In practice such sentences confirm the offenders in their beliefs and create other offenders, thus increasing the evil and the danger to the public.⁹ Where a paper had not any wide circulation and there were only 750 copies printed of the issue in which the seditious article was published and the editor was a young man of about twenty-two only with not very great education, the sentence of one year was reduced on appeal to one already undergone.¹⁰

125. Whoever wages war against the Government of any Asiatic

Waging war
against any Asiatic
Power in alliance
with the Queen.

Power in alliance or at peace with the Queen or attempts to wage such war, or abets¹ the waging of such war, shall be punished with transportation for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

COMMENT.

Object.—This section restrains a person from making British India the focus of intrigues and enterprise for the restoration of deposed rulers or other like purposes. And the fulfilment of the obligations of the State to allies and friendly Powers requires that the abetment of such schemes by its subjects whether by furnishing supplies or otherwise should be forbidden.¹¹ The principle of this section is based upon international comity and a desire of the State to remain friendly with its neighbours.¹²

Where a person dwelling in British territory waged war with the Raja of Manipore, a country lying beyond British India, he was punished under this section.¹³

The offences defined in this section and ss. 126 and 127 are similar to those made punishable under the Foreign Enlistment Act, 1870,¹⁴ which applies to India. Sections 11 and 12 of that Act are as follows :—

“11. If any person within the limits of Her Majesty’s dominions, and without the licence of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue :

(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.

⁶ *Braja Behari Burman*, (1930) 32 Cr. L. J. 742, 53 C. L. J. 182, [1931] AIR (C) 349.

⁷ *Lachhman Das*, (1930) 31 P. L. R. 918, 32 Cr. L. J. 588, [1931] AIR (L) 52; *Amir Al'am*, (1930) 32 Cr. L. J. 199, [1930] AIR (L) 885; *Sham Das*, [1930] 31 P. L. R. 841, 31 Cr. L. J. 1169, [1930] AIR (L) 874; *Anand Kishore*, (1929) 31 Cr. L. J. 201, [1930] AIR (L) 306; *Ram Saran Das*, (1930) 31 P. L. R. 688, 32 Cr. L. J. 444, [1930] AIR (L) 892; *Krishna Gopal Sharma*, [1930] A. L. J. R. 1215, 32

Cr. L. J. 161, [1930] AIR (A) 836.

⁸ *Satyendra Nath Mazumdar*, (1938) 40 Cr. L. J. 630, [1939] AIR (C) 270.

⁹ *Jhabrcala*, (1933) 58 All. 1040.

¹⁰ *A. M. A. Zaman*, (1932) 34 Cr. L. J. 309, [1933] AIR (C) 140.

¹¹ *M. & M. 105.*

¹² *Jameson*, [1896] 2 Q. B. 425.

¹³ *Keifa Singh*, (1865) 3 W. R. (Cr.) 16.

¹⁴ 33 & 34 Vic., c. 90.

(2.) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender¹⁵.

1. 'Abets'.—See s. 107, *supra*.

PRACTICE.

Evidence.—Prove (1) that the Power in question is Asiatic, and in alliance, or at peace, with the King.

(2) That the accused waged war against the Government of such Power; or that the accused abetted or attempted the same.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Sessions.

Sanction.—Sanction of Government is necessary for prosecution under this section.¹⁶

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, waged (*or attempted to wage or abetted the waging of*) war against the Government of——an Asiatic Power in alliance (*or at peace*) with the King-Emperor and thereby committed an offence punishable under s. 125 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

126. Whoever commits depredation¹, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

COMMENT.

The preceding section made punishable the waging of war against any Asiatic Power in alliance with the King-Emperor: this section prevents the commission of depredation or plunder on territories of States at peace with the King-Emperor. It is much wider than the preceding section, for it applies to a Power which may or may not be Asiatic.

The Foreign Enlistment Act¹⁶ punishes any British subject for similar acts. See the notorious case of *The Queen v. Jameson*.¹⁷

1. 'Commits depredation'.—Something more than a mere outrage against the property of an individual seems to have been contemplated.¹⁸

PRACTICE.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of the Provincial Government or some officer empowered by the Provincial Government is necessary for prosecution under this section.¹⁹

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed (*or made preparations to commit*) depredation on the territories of——, a Power in alliance

¹⁵ Criminal Procedure Code, s. 196.

¹⁶ 33 & 34 Vic., c. 90.

¹⁷ [1896] 2 Q. B. 425.

¹⁸ M. & M. 105.

¹⁹ Criminal Procedure Code, s. 196.

(or at peace) with the King-Emperor, and thereby committed an offence punishable under s. 126 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

And I hereby direct that you be tried by the said Court on the said charge.

127. Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

Receiving property taken by war or depredation mentioned in sections 125 and 126.

COMMENT.

The actual depredators taking refuge with their plunder within British territory will not come within this provision. The section applies to those persons who knowingly receive the property obtained by waging war with a Power at peace with the King-Emperor or by committing depredation on its territories. Such persons are punished under this section apart from the fact whether the principal offender has been prosecuted or not, otherwise persons waging war or committing depredation may find a market in British India to sell their spoils.

PRACTICE.

Evidence.—Prove (1) that the property in question was obtained by waging war against any Asiatic Power or by commission of depredation.

(2) That such war or depredation was punishable under s. 125 or s. 126.

(3) That the accused received such property.

(4) That when he so received such property, he knew that it had been obtained as mentioned in (1).

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

No sanction is necessary for a prosecution under this section.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, received (*specify the property*) knowing the same to have been taken in waging war against——an Asiatic Power in alliance (or at peace) with the King-Emperor [or knowing the same to have been taken in the commission of depredation on the territories of——, a Power in alliance (or at peace) with the King-Emperor], and thereby committed an offence punishable under s. 127 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

And I hereby direct that you be tried by the said Court on the said charge.

128. Whoever, being a public servant¹ and having the custody of any State prisoner² or prisoner of war³, voluntarily⁴ allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Public servant voluntarily allowing prisoner of State or war to escape.

COMMENT.

This section and s. 225A are based on the same principle. In both the sections the public servant who has the custody of the prisoner is punished if he voluntarily allows such prisoner to escape. The only difference between the two sections is that in the former the prisoner is a State prisoner and therefore the punishment is severer, whereas in the latter the prisoner is an ordinary criminal. Thus the offence under this section is an aggravated form of an offence under s. 225.

1. 'Public servant'.—See s. 21, *supra*.

2. 'State prisoner'.—A State prisoner is one whose confinement is necessary in order to preserve tranquillity in the territory of any Native State entitled to protection, or the security of the British dominions from foreign hostility or from internal commotion, and who has been confined by the order of the Governor-General in Council.²⁰

3. 'Prisoner of war'.—A prisoner of war is one who in war is taken in arms. Those who are not in arms, or who being in arms submit and surrender themselves, are not to be slain but to be made prisoners. But it seems those only are prisoners of war who are taken in arms.²¹

4. 'Voluntarily'.—See s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he had the person in question in his custody.

(3) That such a person was a State prisoner or prisoner of war.

(4) That the prisoner escaped.

(5) That the accused allowed the prisoner to escape from the place where he was confined.

(6) That the accused did so voluntarily.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of the Provincial Government or some officer empowered by the Provincial Government is necessary for prosecution under this section.²²

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant (*mention the office*), and as such having the custody of—, a State prisoner (*or prisoner of war*), on or about the—day of —, at—, voluntarily allowed such prisoner to escape from—, the place in which such prisoner was confined, and thereby committed an offence punishable under s. 128 of the Indian Penal Code and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

129. Whoever, being a public servant¹ and having the custody of any State prisoner or prisoner of war², negligently

Public servant negligently suffering such prisoner to escape.

suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall

be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this section is like the one under s. 128, with the mitigating circumstance that the escape of the prisoner was not allowed voluntarily but suffered negligently. This section is similar to s. 223 which punishes the escape of an ordinary prisoner under similar circumstances.

1. 'Public servant'.—See s. 21, *supra*.

2. 'State prisoner or prisoner of war'.—See s. 128, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he had the person in question in his custody.

²⁰ Beng. Reg. III of 1818; Bom. Reg. VIII of 1818; Mad. Reg. II of 1819. See Acts XXXIV of 1850 and III of 1858.

²¹ M. & M. 107.

²² Criminal Procedure Code, s. 196.

(3) That such person was a State prisoner or prisoner of war.

(4) That the accused suffered such prisoner to escape from the place of confinement.

(5) That the accused did so negligently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Sanction.—Sanction of the Provincial Government or some officer empowered by the Provincial Government is required for prosecution under this section.²³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant (*mention his office*), and as such having the custody of—, a State prisoner (*or prisoner of war*), on or about the—day of—, at—, negligently suffered such prisoner to escape from any place of confinement in which such prisoner was confined, and thereby committed an offence punishable under s. 129 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

130. Whoever knowingly aids or assists¹ any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

COMMENT.

This section uses words more extensive than those in the two preceding ones which contemplate an escape only from some prison or actual place of custody. Again, under the last two sections the offender is a public servant; under this section, he may be any person.

Scope.—This section is somewhat narrower in scope than s. 129. It requires that the rescue or assistance should be given “knowingly”.

1. ‘Knowingly aids or assists’.—It is essential to show that the accused had a knowledge of the character in which the prisoner is confined, i.e., that he is a prisoner of State or of war.

PRACTICE.

Evidence.—Prove (1) that the person in question was a prisoner of State or of war.

(2) That such prisoner was at the time in lawful custody; or

That such prisoner had escaped from lawful custody.

(3) That the accused knew that such person was in lawful custody as a prisoner of State or of war; or

That he knew that such prisoner had escaped therefrom.

(4) That he aided or assisted such prisoner in escaping; or that he rescued such prisoner or attempted to do so; or

²³ Criminal Procedure Code, s. 196.

That he harboured or concealed such prisoner ; or

That such prisoner was about to be recaptured but the accused offered or attempted to offer resistance to such recapture.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, knowingly aided (*or assisted, or offered to rescue, or attempted to rescue*)——, a State prisoner (*or prisoner of war*), in escaping from lawful custody (*or knowingly harboured or concealed*)——, a State prisoner (*or prisoner of war*) who had escaped from lawful custody [*or knowingly offered or attempted to offer resistance to the recapture of*——, a State prisoner (*or prisoner of war*) who had escaped from lawful custody], and thereby committed an offence punishable unders. 130 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY, NAVY AND AIR FORCE.

THE authors of the Code say : "A few words will explain the necessity of having some provisions of the nature of those which are contained in this chapter.

"It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person ; nor, framed as it is, would it be desirable that it should reach him. It would not reach him, because the military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person not military, who had abetted a breach of military discipline, should be fixed according to the principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of the abettor of an offence shall be equal or proportional to the punishment of the person who commits that offence ; and this seems to us a sound principle when applied only to the punishments provided by this Code. But the military penal law is, and must necessarily be, far more severe than that under which the body of the people live. The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person, not military, who abets a breach of military discipline, should be made liable to a punishment regulated, according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who should induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, ravisher or a kidnapper. We have attempted in this chapter to provide, in a manner more consistent with the general character of the Code, for the punishment of persons who, not being military, abet military crimes".¹

Calcutta Rule.—Sessions Judges and Magistrates will forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that Department are convicted in a Criminal Court.²

It has been brought to the notice of the High Court that Magistrates, in awarding penalties for offences committed by native military pensioners, not infrequently recite their belief that such pensioners will (on conviction) be subjected to an additional penalty, in the shape of loss of pension, and that they take this circumstance into account in deciding on the severity of the sentence passed by them on the offenders. This procedure on the part of Magistrates is incorrect, in so far as it proceeds on the assumption that the pensioners thus convicted must necessarily forfeit their pensions. The attention of all Magistrates is invited to the terms of Article 496, Army Regulations, India, Volume I, Part II, Native Troops, which governs the subject. Under that Article, the Government of India are the sole arbiters on the point whether, in each case, the pension shall or shall not be reduced, or wholly withdrawn, and in considering this point, due weight is given by Government to the sentence actually awarded by the Court in each case. Magistrates should, therefore, not assume that in such cases forfeiture of pension is an invariable consequence of a conviction.³

The attention of all Sessions Judges and Magistrates of the first and second classes in Bengal and Eastern Bengal and Assam is invited to the following order of the Government of India :—

"In the case of a reservist of the Native Army who may be sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months, a report should be made to the Adjutant-General in India".⁴

¹ Note D, p. 120.

² C. H. C. R. & O., Vol. I, Ch. I., s. 102, p. 36.

³ *Ibid.*, s. 103, p. 36.

⁴ C. H. C. R. & O., Vol. I, Ch. I, s. 104, p. 37.

Lahore Rule.—Criminal cases against Military officers and soldiers. should only be taken up by District Magistrates or Magistrates of the first class, and this direction should be strictly observed.

2. Cases falling under ss. 154 and 156 of the Army Act, 1881,* should be dealt with by District Magistrates or Magistrates of the first class who are European British subjects and Justices of the Peace, and by no other class or description of Magistrate.

3. In every case in which a military officer or a soldier is sentenced by a Criminal Court to a fine of Rs. 200 or upwards, or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200, the Court shall send a copy of its final order *proprio motu* to the immediate superior of the person convicted.

4. Whenever a soldier is committed to jail, whether for trial or under sentence, his military rank shall always be stated in the warrant of commitment, in order that due notice may be given to the military authorities of the day on which, and hour at which, the imprisonment of such person will expire.

5. When a person amenable to Military Law is convicted of any offence by a Cantonment Magistrate, information in the form given below shall be furnished by such Cantonment Magistrate to the superior officer of the person so convicted :—

Form of information.

Name and Military rank of person convicted.	Offence of which convicted.	Sentence.	Date.
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6. On all occasions on which a British soldier may have to be conveyed in custody from one place to another, whether before or after sentence, application should be made to the local Military authorities for a military escort to accompany such prisoners to the jail. The employment of Indian policemen on such duties is strictly prohibited.

7. The annexed extract from a letter from the Secretary to Government, Punjab, pointing out the consequences resulting from a sentence of rigorous imprisonment being passed upon a soldier in His Majesty's service, is published for information and guidance :

Extract (paragraph 2) from a letter No. 3565, dated 30th October 1876, from the Secretary to Government, Punjab, to Registrar, Chief Court, Punjab.—

“(2) The Lieutenant-Governor would be obliged if the Judges of the Chief Court would point out to Magistrates that a sentence of rigorous imprisonment or hard labour, when passed upon a soldier in Her Majesty's service, involves his discharge under Military Regulations, and, consequently, though unintentionally, they may, in passing such a sentence, give a far higher punishment than they in any way intended. This point, the Lieutenant-Governor thinks, should be borne in mind by Magistrates when trying soldiers for petty offences”.

8. Whenever a military pensioner is convicted and sentenced to imprisonment by a Criminal Court, a report, containing information regarding the nature and circumstances of the offence and the amount of imprisonment to which the offender has been sentenced, shall be made at once direct to the Controller of Military Accounts of the division within which the conviction takes place. A similar report should also be made to the Post-Master-General Punjab and North-West Frontier Province, as military pensioners in the Punjab are paid through the agency of the Post Office.

Criminal Courts subordinate to the District Magistrate will report every such case to the District Magistrate, who will forward all such reports of convictions, in his own or subordinate Courts, to the Controller, and to the Postmaster-General, Punjab, and North-West Frontier Province.

9. Whenever a reservist of the Indian Army is sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months, the facts are to be reported, in the manner described in the last preceding paragraph, without delay to the Adjutant-General in India.

10. The following are the rules for the defence of British and Indian soldiers charged with criminal offences, and prosecuted by Government in Civil Courts :—

1. When soldiers are to be tried by a Civil Court upon any criminal charge, the Brigade Commander should consult the District Magistrate, and arrange with him

for the selection and remuneration of a Pleader, Advocate or Barrister, as the importance and necessities of the case may require.

2. The maximum amount that may be paid to the Pleader, Advocate or Barrister is (a) Rs. 100 for each day that he appears in the case before a High Court, or (b) Rs. 50 for each day that he appears in the case before any other Court. These amounts include expenses of *every description* which counsel may incur.

3. That Brigade Commander is only to appoint a Pleader, Advocate or Barrister in cases where he thinks it desirable. The amount to be paid to counsel must be definitely settled beforehand, subject to the maxima above; an agreement will be made *in writing* and signed by the Brigade Commander and the Pleader, Advocate or Barrister. If suitable counsel cannot be obtained for the remuneration admissible under these rules, the case should be reported to superior authority with a view to the orders of Government being obtained thereon.

4. When counsel is rightly provided for the defence of a soldier at the first trial in a Civil Court, counsel can also be provided when considered necessary on appeal, subject to the limitations laid down in rules (2) and (3).

5. The term "soldiers" in (1) includes regimental warrant and non-commissioned officers and privates, both British and Indian (except native soldiers on leave and reservists not under training), but it does not include officers nor departmental nor regimental followers.⁵

Amendment.—The words "and Air Force" were added to the title by Act X of 1927.

131. Whoever¹ abets the committing of mutiny² by an officer, soldier, sailor or airman, in the Army,³ Navy⁴ or Air Force⁵ of the Queen,⁶ or attempts to seduce any such officer, soldier, sailor or airman from his allegiance or his duty, shall be punished with transportation for life, or with transportation of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—In this section the words "officer", "soldier", "sailor" and "airman" include any person subject to the Army Act, the Indian Army Act, 1911, the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934, the Air Force Act or the Indian Air Force Act, 1932, as the case may be.

COMMENT.

The first part of this section relates to the offence of abetting mutiny. The offence contemplated is an abetment which is not followed by actual mutiny, or which, supposing actual mutiny follows, is not the cause of that mutiny.

1. 'Whoever'.—See s. 139, *infra*. The offender must be a person not subject to the Indian Army Act, 1911.

2. 'Mutiny'.—The offence of mutiny consists in extreme insubordination, as if a soldier resists by force, or if a number of soldiers rise against or oppose their military superiors, such acts proceeding from alleged or pretended grievances of a military nature. Acts of a riotous nature directed against the Governor or civil authorities rather than against military superiors seem also to constitute mutiny.⁶ Mutiny implies collective insubordination or a combination of two or more persons to resist, or to induce others to resist, lawful military authority.⁷ Where P published an article in his newspaper purporting to be a letter from a sympathiser of native soldiers to their address and calculated to seduce soldiers of the Indian Army from their allegiance and their duty to the King-Emperor, and D abetted the same by printing the articles in his press, it was held that P and D were guilty of an offence under this section, and that

⁵ L. H. C. R. & O., (1928 edn.) Vol. II, Ch. XX, p. 108.

⁶ M. & M. 112.

⁷ Manual of Indian Military Law, 1918 Edn., p. 114.

publishing broadcast some 3,000 copies of the letter was an act amounting to an attempt.⁸

3. 'Army'.—The Indian Army Act of 1911 is a consolidated statute relating to the Government of His Majesty's Indian Forces.

4. 'Navy'.—This includes Indian Marine Service (s. 138A). See the Indian Marine Act (XIV of 1887).

5. 'Air Force'.—The Indian Air Force Act (XIV of 1932) provides for the administration and discipline of the Air Force.

6. 'The Queen'.—See s. 13, *supra*.

Explanation.—The explanation was added by Act XXVII of 1870, s. 6, and was amended by Act X of 1927. The section is thus extended to non-combatants attached to and serving with the Army, Navy or Air Force. The Army Act,⁹ 1891, applies to the English Army. Act V of 1869 is repealed by the Indian Army Act (VIII of 1911). The substantive offences the abetment of which is punishable under the Code are punishable under the Indian Army Act. For 'sailor' see the Naval Discipline Act;¹⁰ and for 'airman' see the Air Force Act.¹¹

Amendment.—The words "or the Indian Air Force Act, 1932" in the Explanation were added by Act XIV of 1932, and the words "sailor" and "the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934," by s. 2 and Sch. of Act XXXV of 1934.

In Burma, after the words "Army Act, 1911" the words "the Burma Army Act" were inserted by the Government of Burma (Adaption of Laws) Order, 1937.

PRACTICE.

Evidence.—Prove (1) that the person abetted is an officer, etc., of the King's Army, Navy or Air Force.

(2) That the accused abetted him to commit mutiny; or attempted to seduce him from his allegiance.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, abetted the commission of mutiny by—, an officer (*or soldier, or sailor, or airman*) in the Army (*or Navy or Air Force*) of the King-Emperor [*or attempted to seduce—an officer (or soldier, or sailor, or airman in the Army, or Navy, or Air Force) of the King-Emperor from his allegiance or duty*], and thereby committed an offence punishable under s. 131 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

132. Whichever¹ abets² the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen, shall, if mutiny be committed in consequence of that abetment,³ be punished with death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment of mutiny, if mutiny is committed in consequence thereof.

COMMENT.

This section punishes the abetment of mutiny when mutiny is committed in consequence of that abetment. It therefore prescribes enhanced penalty.

1. 'Whoever'.—See s. 130, *infra*.

2. 'Abets'.—See s. 107, *supra*.

⁸ *Pindi Das*, (1907) P. W. R. (Cr.) No. 37 of 1907, 6 Cr. L. J. 411.

⁹ 44 & 45 Vic., c. 58.

¹⁰ 29 & 30 Vic., c. 109. This Act is made

applicable to British India with some modifications by the Indian Navy (Discipline) Act, XXXIV of 1934.

¹¹ 7 & 8 Geo. V, c. 51.

3. 'Committed in consequence of that abetment'.—An act or offence is committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.¹²

PRACTICE.

Evidence.—Prove (1) the abetment of mutiny as in s. 131.

(2) That mutiny was committed in consequence of such abetment.

Procedure.—Cognizable—Warrant—Not bailable—Not—compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, abetted the commission of mutiny by——, an officer (*or soldier, or sailor, or airman*) in the Army (*or Navy, or Air Force*) of the King-Emperor and mutiny was committed in consequence of that abetment, and thereby committed an offence punishable under s. 132 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

133. Whoever¹ abets² an assault³ by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen,⁴ on any superior officer⁵ being in the execution of his office,⁶ shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.

COMMENT.

This section is intended to punish persons, who, not being military, abet an assault by an officer, soldier, sailor, or airman on any of his superior officers.

This section punishes abetment of assault which is not committed. The next section punishes similar abetment where the offence is committed.

1. 'Whoever'.—See s. 139, *infra*. 2. 'Abets'.—See s. 107, *supra*.

3. 'Assault'.—The assault here meant may probably be that which the Mutiny Acts and Articles of War provide against, namely, the striking a superior officer, or using or offering any violence against him when he is on duty.¹³ As to the definition of 'assault', see s. 351, *infra*.

4. 'The Queen'.—See s. 13, *supra*.

5. 'Superior officer'.—These words of course exclude from this provision such assaults as one private soldier may commit on another. But they clearly comprehend all officers whether commissioned or non-commissioned—for a non-commissioned officer is a superior officer in relation to a private soldier, as a Captain is to Subaltern, and the Commanding Officer of a Regiment to all the officers and men under his Command.¹⁴

'Superior officer' in the Indian Army Act includes a warrant officer and a non-commissioned officer; and as regards persons placed under his orders, a warrant officer or non-commissioned officer subject to the Army Act (s. 7 (7)).

6. 'In the execution of his office'.—It is an inseparable part of this offence that the officer should be assaulted while in the execution of his office. An officer is in the execution of his office not only when he is performing a prescribed duty, but also when he is discharging a duty arising out of the exigency of the moment. Thus an officer seeing a soldier out of quarters after hours, or improperly dressed or drunk in the streets of a town, or transgressing any order or usage of the service, would at all times be in the execution of his duty and therefore of his office, in ordering the soldier to his barracks or directing such other measures as might be necessary. It must, however, be remembered that an important ingredient in the soldier's offence is, that he offers violence knowingly to his officer. If he strikes a person whom he or his abettor really does not know to be an officer, the offence of abetment which is here made punishable so

¹² See Expln. to s. 109, *supra*.

¹³ See the Manual of Indian Military Law,

1918 Edn., p. 114.

¹⁴ M. & M. 113.

severely, has not been committed by the person who abets the blow.¹⁵

PRACTICE.

Evidence.—Prove (1) that the accused was guilty of acts of abetment.

(2) That the person abetted was an officer, etc., in the King's Army, Navy or Air Force.

(3) That the assault was to be on the superior officer of the person abetted.

(4) That such officer was at the time in the execution of his duty.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, abetted an assault by—an officer (*or soldier, or sailor, or airman*) in the Army (*or Navy, or Air Force*) of the King-Emperor on—a superior officer being in the execution of his office, and thereby committed an offence punishable under s. 133 of the Indian Penal Code and within my cognizance (*or within the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

134. Whoever¹ abets² an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen,³ on any superior officer being in the execution of his office, shall, if such assault⁴ be committed in consequence of that abetment,⁵ be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Abetment of such assault, if the assault is committed.

COMMENT.

This section punishes the abetment of an assault when such assault is committed in consequence of that abetment. It is but an aggravated form of the offence made punishable by the last section. It stands in the same relation to s. 133 just as s. 132 does to s. 131.

1. 'Whoever'.—See s. 139, *infra*.
2. 'Abets'.—See s. 107, *supra*.
3. 'Queen'.—See s. 13, *supra*.
4. 'Assault'.—See s. 351, *infra*.
5. 'In consequence of that abetment'.—See Explanation to s. 109.

PRACTICE.

Evidence.—Prove (1) that the accused was guilty of acts of abetment.

(2) That the assault was committed.

(3) That it was committed in consequence of the abetment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, abetted an assault which was committed by—, an officer (*or soldier, or sailor, or airman*) in the Army (*or Navy or Air Force*) of the King-Emperor on—a superior officer being in the execution of his office, and thereby committed an offence punishable under s. 134 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

135. Whoever¹ abets² the desertion³ of any officer, soldier,⁴ sailor or airman, in the Army, Navy or Air Force of the Queen,⁵ shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Abetment of desertion of soldier, sailor or airman.

COMMENT.

Offences referred to in this and the next section are also punishable under the Army Act. The section is somewhat ambiguous. It does not say whether the deserter abetted under it must take place or not.

1. 'Whoever'.—See s. 139, *infra*. 2. 'Abets'.—See s. 107, *supra*.

3. 'Desertion'.—The offence of desertion from the Army, or Navy or Air Force consists in this, that the officer, soldier, sailor, or airman is unlawfully absent from his duty, and has no intention of returning to it. Whether he departs without leave from his regiment, or, whether, having leave of absence, he overstays his leave, if his intention is not to return to his duty and his regiment, he is a deserter. This intention not to return is essential to desertion, and, without it, the offence becomes one which is known in Military law as "absence without leave", an offence of a much lighter kind.¹⁶

4. 'Soldier'.—The word 'soldier' must be interpreted as in the Explanation to s. 131, *supra*. The definition of the word 'soldier' given in the Indian Articles of War is expressly confined to those Articles and is a very limited one.¹⁷

5. 'The Queen'.—See s. 13, *supra*.

PRACTICE.

Evidence.—Prove (1) that the person instigated was an officer, etc., in the King's Army, Navy or Air Force.

(2) That the accused instigated such person to desert.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first class or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, abetted the desertion of—, an officer (*or soldier, or sailor, or airman*) in the Army (*or Navy, or Air Force*) of the King-Emperor, and thereby committed an offence punishable under s. 135 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

136. Whoever¹, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen,² has deserted, harbours³ such officer, soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

COMMENT.

A person harbouring a deserter is an 'accessory after the fact'. The gist of the offence is concealment of a deserter to prevent his apprehension. Exception is made only in the case of a wife. The word 'harbour' is defined in s. 52A.

The offence under this section is also punished by the Indian Army Act, 1911, s. 30.

1. 'Whoever'.—See s. 139, *infra*. 2. 'The Queen'.—See s. 13, *supra*.

3. 'Harbours'.—That is, conceals such deserter; or aids or assists him in concealing himself, or aids or assists in his rescue.¹⁸

¹⁶ See the Army Act (VIII of 1911), s. 29; the Indian Marine Act (XIV of 1887), s. 19; the Indian Air Force Act (XIV of 1932), s. 39.

¹⁷ *Sri Navas*, (1920) 21 P. L. R. 247, 21

Cr. L. J. 511.

¹⁸ See the Army Act (1881), 44 & 45 Vic., c. 58, s. 153 (8).

PRACTICE.

Evidence.—Prove (1) that the person in question was an officer, etc., in the King's Army, Navy, or Air Force.

(2) That such person had deserted.

(3) That the accused harboured such person.

(4) That the accused when he so harboured knew or had reason to believe that such person was a deserter.

(5) That the accused was not the wife of such person.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, knowing, or having reason to believe that—, an officer (*or soldier, or sailor, or airman*) in the Army (*or Navy, or Air Force*) of the King-Emperor had deserted, harboured such officer (*or soldier, or sailor, or airman*), and thereby committed an offence punishable under s. 136 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

137. The master or person in charge of a merchant vessel, on board of which any deserter from the Army, Navy or Air Force of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

Deserter concealed on board merchant vessel through negligence of master.

COMMENT.

Under this section the captain of a merchant vessel in which a deserter has concealed himself is punished for his criminal negligence in allowing the deserter to be on board.

The master is liable even though he is ignorant of such concealment.

PRACTICE.

Evidence.—Prove (1) that the person in question is a deserter from the King's Army, Navy, or Air Force.

(2) That such deserter was concealed in a merchant vessel.

(3) That the accused was, at the time of such concealment, the master or person in charge of such vessel.

(4) That the accused was guilty of neglect of duty, as such master or person in charge; or was guilty of want of discipline on board.

(5) That such neglect of duty, or want of discipline, was the cause of such concealment.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That—, a deserter from the Army (*or Navy, or Air Force*) of the King-Emperor had concealed himself on or about the—day of—, at—, on board— a merchant vessel of which you are the master (*or person in charge*) through your neglect of duty as such master (*or person in charge*) [*or through your want of discipline on board the said vessel*] and that you have thereby committed an offence punishable under s. 137 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

138. Whoever¹ abets² what he knows to be an act of insubordination by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen,³ shall, if such act of insubordination⁴ be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Abetment of act of insubordination by soldier, sailor or airman.

COMMENT.

This section punishes abetment of an act of insubordination by a soldier, sailor, or airman.

In this section it is expressed as part of the definition of the offence that the abettor knows the quality of the act abetted, that is, he knows it to be an act of insubordination.

1. 'Whoever'.—See s. 139, *infra*. 2. 'Abets'.—See s. 107, *supra*.

3. 'The Queen'.—See s. 13, *supra*.

4. 'Act of insubordination'.—Any wilful breach of discipline on the part of a soldier, sailor, or airman will constitute an act of insubordination. The Army Act of 1881,¹⁹ s. 103, defines what 'insubordination' is. It says:—

"Every person subject to military law who commits any of the following offences; that is to say,

(1.) Being concerned in any quarrel, fray, or disorder, refuses to obey any officer (though of inferior rank) who orders him into arrest, or strikes or uses or offers violence to any such officer; or

(2.) Strikes or uses or offers violence to any person, whether subject to military law or not, in whose custody he is placed, and whether he is or is not his superior officer; or

(3.) Resists an escort whose duty it is to apprehend him or to have him in charge; or

(4.) Being a soldier breaks out of barracks, camp, or quarters, shall on conviction by court-martial be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned".

The Indian Army Act, 1911, s. 28, the Indian Marine Act (XIV of 1887), s. 19, and the Indian Air Force Act (XIV of 1932), ss. 36-38, also specify the cases of insubordination.

PRACTICE.

Evidence.—Prove (1) that the act was one of insubordination.

(2) That the person guilty of such act was an officer, etc., in the King's Army, Navy, or Air Force.

(3) That the accused abetted such officer in doing such act.

(4) That the accused at the time knew the same to be an act of insubordination.

(5) That such act of insubordination was committed in consequence of such abetment.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, abetted what you knew to be an act of insubordination by—, an officer (*or soldier, or sailor, or airman*) in the

Army (or Navy, or Air Force) of the King-Emperor and such act of insubordination was committed in consequence of the said abetment, and thereby committed an offence punishable under s. 138 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

138A. (*Application of foregoing sections to the Indian Marine service. Repealed by s. 2 and Sch. of Act XXXV of 1934*).

139. No person subject to the Army Act, the Indian Army Act, 1911, the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934, the Air Force Act or the Indian Air Force Act, 1932, is subject to punishment under this Code for any of the offences defined in this Chapter.

Persons subject
to certain Acts.

COMMENT.

The object of this section is to specify definitely that persons subject to military law will not be dealt with under the Code for offences defined in this Chapter.

Amendment.—The words “certain Acts” in the marginal note were substituted for the words “Articles of War” by s. 2 and Sch. I of Act X of 1927.

The words “the Army Act, the Indian Army Act, 1911, the Naval Discipline Act or the Air Force Act” were substituted for the words “any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy” by s. 2 and Sch. I of Act X of 1927.

The words “or the Indian Air Force Act, 1932”, were added by Act XIV of 1932. The words “or that Act as modified by the Indian Navy (Discipline) Act, 1934”, were added by s. 2 and Sch. of Act XXXV of 1934.

In Burma, after the words “Army Act, 1911”, the words “the Burma Army Act” were inserted by the Government of Burma (Adaption of Laws) Order, 1937.

140. Whoever, not being a soldier, sailor or airman in the Military, Naval or Air service of the Queen,¹ wears any garb or carries any token resembling any garb or token used by such a soldier, sailor or airman,² with the intention that it may be believed that he is such a soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Wearing garb or
carrying token used
by soldier, sailor
or airman.

COMMENT.

The gist of the offence herein made penal is the intention of the accused wearing the dress of a soldier, etc., for the purpose of inducing others to believe that he is in service at the present time. Merely wearing a soldier's garb without the specific intention is no offence. Otherwise actors putting on every kind and shade of uniform will be hauled up under this section. Similarly, persons using cast-off uniforms of soldiers will not be liable.

No fraudulent intention is made a part of the definition.

1. ‘The Queen’.—See s. 13, *supra*.

2. ‘Soldier, etc.’—This section provides punishment for those who personate soldiers, sailors or airmen in the service of the King.

PRACTICE.

Evidence.—Prove (1) that the accused wore the garb or carried the token in question.

(2) That such garb or token resembled that used by soldiers or sailors or air-men.

(3) That the accused was not a soldier or sailor or airman.

(4) That the accused wore the garb or carried the token with the intention that it might be believed that he was a soldier, etc.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, not being a soldier *or* sailor *or* airman in the Military (*or* Naval *or* Air) service of the King-Emperor, on or about the——day of——, at——, wore (*specify the garb*) [*or* carried——, a token resembling (*specify it*) (*or* used by such soldier *or* sailor *or* airman)] with the intention that it might be believed that you were such a soldier (*or* sailor *or* airman), and thereby committed an offence punishable under s. 140 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

THESE offences hold a middle place between State offences on the one hand, and crimes against person and property on the other. Many of the offences made punishable by other Chapters of the Code involve in their commission a disturbance of the public peace. But the present Chapter punishes especially unlawful assemblies of persons who, whether they assemble tumultuously or otherwise, have a common unlawful purpose in their minds, the execution of which will disturb public order and excite alarm.¹

This Chapter deals with assemblies as a menace to the public peace, in a simple or in an aggravated form (ss. 141, 142, 143, 144), with persistence in such menace (ss. 145, 151), and with actual disturbance of the peace by rioting in a simple form (ss. 146, 147), or an aggravated form (s. 148). It also deals (s. 149) with the responsibility of each member of an unlawful assembly for any offence committed by the members comprising it. The remaining sections deal with connected offences and with offences connected with affrays.²

As to the duty to give information of offences punishable under s. 143, 144, 145, 147, or 148, see the Code of Criminal Procedure, ss. 44 and 45.

As to dispersion of unlawful assemblies, see the Code of Criminal Procedure, Chapter IX.

141. An assembly of five or more¹ persons is designated an
Unlawful assem- “unlawful assembly”, if the common object² of the
bly. persons composing that assembly is—

*First*³.—To overawe by criminal force, or show of criminal force, the Central or any Provincial Government or Legislature, or any public servant in the exercise of the lawful power of such public servant; or

*Second*⁴.—To resist the execution of any law, or of any legal process; or

*Third*⁵.—To commit any mischief or criminal trespass, or other offence; or

*Fourth*⁶.—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

*Fifth*⁷.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

*Explanation*⁸.—An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly.

¹ M. & M. 118.

² *Rasul*, (1888) P. R. No. 4 of 1889.

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues⁹ in it, is said to be a member of an unlawful assembly.

Being member
of unlawful assem-
bly.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Punishment.

COMMENT.

The essence of an offence under s. 143 is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit.³ Thus in the case of a house-trespass by members of an unlawful assembly the conviction of the accused under s. 143 is not illegal even though the offence under s. 447 had been compounded.⁴

The intention indicated by the heading of this Chapter is to constitute certain acts, which endanger the public peace, offences against public tranquillity.

Scope of s. 141.—"In construing section 141, regard must be had not only to the general intention deducible from the heading of the chapter, but also to the specific mode in which the Legislature intended to carry out that intention".⁵ The common object of the assembly must be one of the five objects mentioned in the section. Thus, as assembly for the purpose of gambling does not constitute an unlawful assembly.⁶

1. 'Five or more'.—The assembly must consist of five or more persons, having one of the five specified objects as their 'common object'.⁷ Where, of five persons convicted, it was found as regards two of them that there had been no common object, it was held that the conviction of the others could not be maintained, as there must have been five persons who had a common object before there could be an unlawful assembly.⁸ Where more than five persons were charged with being members of an unlawful assembly but only four of them were found to have taken part in the assembly, it was held that none of the accused could be convicted under s. 143.⁹ Where seven persons were put on trial, but five were given the benefit of the doubt, and only two were convicted, it was held that the two could not be convicted under ss. 147 and 323 read with s. 149.¹⁰ Where it is found by the Court that the number of persons who committed an offence under s. 147 was five or more, the acquittal of some of the accused cannot dispel the application of s. 147 to the others. The essential question in such a case is whether the number of persons who took part in the crime was five or more than five. The identity of the persons who were members thereof relates to the determination of the guilt of the individual accused.¹¹

An unlawful assembly according to common law in England is an assembly of three or more persons for purposes forbidden by law.

2. 'Common object'.—The essence of the offence is the common object of the persons forming the assembly. Whether the object is in their minds when they come together, or whether it occurs to them afterwards, is not material. But it is

³ *Matti Venkanna*, (1922) 46 Mad. 257.

⁴ *Ibid.*

⁵ Per Muttusami Aiyar, J., in *Tirakadu*, (1890) 14 Mad. 126, 130.

⁶ (1880) 1 Weir 53.

⁷ *Koura Khan*, (1868) P. R. No. 34 of 1868; *Koylash Chunder Dass*, (1873) 20 W. R. (Cr.) 78; *Gholam Mahomed*, (1874) 22 W. R. (Cr.) 17; *Sumeshar Rai*, (1893) 13 A. W. N. 169; *Gajraj Singh*, (1946) 21 Luck. 527; *Yusuf*, (1945)

48 Cr. L. J. 165, [1945] P. W. N. 438, [1946] AIR (P) 127.

⁸ *Vyapuri Chetti*, (1909) 5 M. L. T. 285, 11 Cr. L. J. 197.

⁹ *Abdul Qadir Kasuri*, (1930) 32 Cr. L. J. 249, [1930] AIR (L) 1044.

¹⁰ *Ram Rup*, [1945] All. 39.

¹¹ *Feroze Din*, (1928) 29 Cr. L. J. 859, [1929] AIR (L) 59.

necessary that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. It seems also that there must be some present and immediate purpose of carrying into effect the common object; and that a meeting for deliberation only, and to arrange plans for future action is not an unlawful assembly.¹² Where the members of an assembly merely agree as to what they should individually do, when, in the case of each person separately, a demand is made for the payment of a certain tax, the assembly does not come within the definition of an unlawful assembly.¹³ There is a difference between object and intention, for, though the object of an assembly is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful.¹⁴ Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object.¹⁵

In order to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot, and to infer that all these were originally part of its common object, but most normally be based on more evidence than the mere acts themselves.¹⁶

No one is a member of an unlawful assembly unless he is aware of the facts that render that assembly an unlawful one and intentionally joins or continues in it.¹⁷

After people have formed themselves into an unlawful assembly and decided upon their common object, preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence then they are equally liable.¹⁸

3. First clause.—The third clause of s. 121A provides for a conspiracy to overawe the Central Government.

'To overawe'.—A person kept by superior influence in awe, so that he fears to do that which he has a mind and will to do, and which the law empowers him to do, is overawed. But the common object which makes an assembly 'unlawful' is an intent to overawe by criminal force, or by show of criminal force. To carry a conviction under this head the common object of the persons composing the assembly must have been to overawe a public servant; the mere fact that their action did overawe such public servant is not in itself sufficient. A crowd of persons, assembling to see what the police-officers were doing in arresting a person who had escaped from lawful arrests, who do not use force or show of force, does not form an unlawful assembly.¹⁹

As to the definition of 'criminal force', see s. 350; of 'public servant', s. 21.

4. Second clause.—Resistance to some law or legal process connotes some overt act, and mere words, when there is no intention of carrying them into effect, are not sufficient to prove an intention to resist. The conduct of the assembly and the refusal of the members of it to disperse after being ordered to do so constitutes an overt act and establishes a common object to resist the order within the meaning of this clause.²⁰

'Law'.—A notification issued by an executive authority in exercise of a power conferred by statute is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment.²¹ When an order is lawfully made under the provisions of a statute, that order is law, and resistance to the execution of that law is an offence under s. 141 (2) of the Code.²²

Under this clause any resistance to the carrying out of the provisions of any law or to the execution of legal process is deemed to be illegal.²³

¹² M. & M. 119; *Koura Khan*, (1868) P. R. No. 84 of 1868.

¹³ *Nga Tun Maung*, (1925) 4 B. L. J. 169,

27 Cr. L. J. 337, [1925] AIR (R) 362.

¹⁴ *Barendra Kumar Ghosh*, (1924) 52 I. A.

40, 27 Bom. L. R. 148, 159, 52 Cal. 197.

¹⁵ *Jahiruddin*, (1894) 22 Cal. 306.

¹⁶ *Ganapati Sarma*, [1923] M. W. N. 104,

17 L. W. 197, 24 Cr. L. J. 531, [1923] AIR (M) 369.

¹⁷ *Ibid.*

¹⁸ *Ramaraja Tevan*, (1930) 53 Mad. 937, 942.

¹⁹ *Lalji*, (1924) 23 A. L. J. R. 32, 26 Cr. L. J. 766, [1925] AIR (A) 308.

²⁰ *Abdul Hamid*, (1922) 2 Pat. 134, 135, 144, S.B.; *Rambabu*, (1945) 25 Pat. 125.

²¹ *Ibid.*

²² *Ramendrachandra Ray*, (1931) 58 Cal. 1303.

²³ *Sheo Ahir*, (1938) 17 Pat. 680.

This clause has not the effect of making an assemblage of persons an unlawful assemblage, if the object with which they assembled was a perfectly legal one.²⁴

Cases.—Resistance to unlawful search.—Where a number of persons resisted an attempt to search a house which was being made by officers, who had not the written order investing them with the power to do so, it was held that the persons resisting the attempted search could not be lawfully convicted under s. 143.²⁵ It was held similarly where the accused, in defence of their property and of their rights, real or supposed, resisted the execution of an order which was made without authority by a Collector, and in so resisting did not use more force than was necessary for the purpose.¹

Resistance to illegal arrest.—Where a party of policemen, on receiving information that certain persons were waiting near a railway line with the intention of robbing a train, arrived at the scene and finding the accused and certain other persons sitting or roaming about near the railway line, attempted to arrest those present and a fight ensued but the accused were eventually secured and taken to the police-station and they were subsequently charged with and convicted of an offence under s. 147, it was held that the police had no justification for attempting to arrest the accused and that consequently in resisting the arrest the accused were not guilty of rioting. The Court said: "The detention and arrest of members of the public are not matters of caprice but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is perhaps one of the most serious encroachments upon the liberty of the subject which can well be contemplated."²

Resistance to order under Police Act.—Where the Superintendent of Police issued a notice under s. 30 of the Police Act, prohibiting any processions, associations, or assemblies started or formed by any person or any class of persons within a certain area, otherwise than under a licence, for a period of three months, it was held that if five persons joined or remained in any unlicensed procession, association, or assembly within such area, after it was ordered to disperse, and if such persons were acting together with the common object that the person who had convened the assembly or association or directed or prompted the procession should resist the execution of the Superintendent's order, then each of such five persons would be a member of an unlawful assembly unless he was unaware of the fact that no license had been obtained.³ Where a license had been taken out for a procession but the processionists violated the conditions of the license which prescribed the route and limit up to which the procession was permitted to proceed, and on being directed by the police and the magistrate not to do so, a group of the processionists made a determined effort to break through the police cordon, it was held that the latter clearly constituted an unlawful assembly.⁴

5. Third clause.—This clause specifies only two offences, viz., mischief and criminal trespass, but the words "or other offence" seem to denote that all offences are included though only two are enumerated in a haphazard way. This construction is borne out by the fact that the word "offence" has been given a wider significance in this clause. 'Offence' under this clause means a thing punishable under the Code, or under any special or local law if punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine (s. 40).⁵

As to the definition of 'mischief', see s. 425; of 'criminal trespass', s. 441. Persons driving cattle to the pound are not guilty of the offence of mischief as getting the cattle put into pound is not causing such a change in the situation of property as diminishes its utility or value. An assembly of five or more persons illegally seizing cattle and taking them to the pound cannot constitute an unlawful assembly within the meaning of this section.⁶

²⁴ *Uma Charan Singh*, (1901) 29 Cal. 244.

²⁵ *Narain*, (1875) 7 N. W. P. 209.

¹ *Nikka Jogi*, (1888) 1 Weir 64. See *Uma Charan Singh*, (1901) 29 Cal. 244.

² *Rampriit Ahir*, (1925) 7 P. L. T. 218, 220, 26 Cr. L. J. 1608, 1609.

³ *Held by Mullick and Coutts, JJ.*, (Das, J., dissentiente), in *Abdul Hamid*, (1922) 2 Pat. 134, s.b.; *Bhalchandra Ranadive*, (1929) 31 Bom.

L. R. 1151, 54 Bom. 35; *Public Prosecutor v. Satyanarayana*, (1930) 54 Mad. 1025.

⁴ *Rambabu*, (1945) 25 Pat. 128.

⁵ *Ramendrachandra Ray*, (1931) 58 Cal. 1303; *Ramchandra Shastri*, (1931) 33 Bom. L. R. 1169, 55 Bom. 725.

⁶ *Dayal*, [1943] O. W. N. 202, (1943) 44 Cr. L. J. 640, [1943] AIR (O) 280.

An assembly of five or more persons becomes an unlawful assembly if the common object is not to arrest persons who commit an offence but to subject to humiliation persons who intervene on behalf of the offenders.⁷

6. Fourth clause.—The act falling within the purview of this clause is made punishable owing to the injurious consequences which it is likely to cause to the public peace. But this clause does not take away the right of private defence of property which belongs naturally to every man and which has been legalized and justified by the Code. It ought not to affect cl. (2) of s. 105, which allows a person to recover the property carried away by theft. It has no application to a case where a person in lawful possession of any property proposes to use force in order to maintain his possession. The clause speaks of "to take or obtain possession of any property". It does not speak of maintaining possession or resisting an attempt by another to take possession. It has no application to a party who uses force to defend property in his possession. Such a person is not enforcing a right, but preventing a wrong.⁸

This clause is meant to prevent the resort to force in vindication of supposed rights. It makes a distinction between an admitted claim or an ascertained right and a disputed claim.⁹ Though a person may abate a nuisance when his rights have been infringed, a person who has not acquired any right of way or light and whose rights have not been in any way infringed cannot take the law into his own hands and pull down a wall constructed by his neighbour merely to maintain the *status quo*.¹⁰

'To enforce any right or supposed right'.—This phrase would seem to make a division into (1) rights in actual enjoyment when interfered with; (2) rights claimed though not in actual enjoyment when interfered with.¹¹ The phrase 'to enforce a right' can only apply when the party claiming the right has not possession over the subject of the right, and therein lies the distinction between enforcing a right and maintaining a right.¹² The true import of the phrase relates to an initial act when it is done in furtherance of any right and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right.¹³ A person entitled to the land, but not in possession of it, may take peaceable possession; but if he enters by force in such a manner as to provoke a breach of the peace, then he takes the consequences, because he has no right to take the law in his own hands.¹⁴ Even the assertion of a supposed right, if it is to be asserted by a show of force, is sufficient in itself for constituting an unlawful assembly.¹⁵ Persons who are not animated with the intention to enforce a right, or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which is being at the time exercised, do not, in preventing an encroachment, commit an offence under this section.¹⁶ Where five or more persons assembled for maintaining by force or show of force a right which they bona fide believe they possess, and not for enforcing by such force or show of force a right or supposed right of theirs, they do not constitute an unlawful assembly.¹⁷ Thus, a tenant is justified in resisting an illegal distraint.¹⁸ If persons are rightfully in possession of land, and find it necessary to protect themselves from aggression, they are justified in taking precautions and using such force as is necessary to prevent the aggression.¹⁹ There is nothing unlawful on the part of five or more persons in congregating together for exercising a lawful right and resist opposition, if necessary, provided they do not exceed

⁷ *Ram Sahay Ram*, (1920) 48 Cal. 78.

⁸ *Inderjit*, (1923) 26 Cr. L. J. 43; *Mohammad Idris*, (1933) 10 O. W. N. 788, 34 Cr. L. J. 748, [1933] AIR (O) 279; *Anantha Bhandari*, [1934] M. W. N. 43; *Mandayan*, [1935] M. W. N. 178; *Bangaruraju*, [1942] M. W. N. 42.

⁹ *Gulam Hoosein*, (1909) 11 Bom. L. R. 849, 10 Cr. L. J. 427.

¹⁰ *Kishan Gopal*, (1928) 30 Cr. L. J. 305, [1929] AIR (P) 44.

¹¹ *Ganouri Lal Das*, (1889) 16 Cal. 206, 219; *Mehdi*, [1941] Lah. 267.

¹² *Ramnandan Prosad Singh*, (1913) 17 C. W. N. 1132, 14 Cr. L. J. 463; *Sarabawan Singh*, (1913) 17 O. C. 21, 15 Cr. L. J. 232, [1914] AIR (O) 222.

¹³ *Baij Nath*, (1924) 1 O. W. N. 588, 26 Cr. L. J. 513, [1925] AIR (O) 425.

¹⁴ *Ramchandra Appaji*, Criminal Appeals Nos. 146-149 of 1911, decided on June 21, 1911, by Chandavarkar and Hayward, JJ., (Unrep. Bom.).

¹⁵ *Fatnaya*, [1942] Lah. 470.

¹⁶ *Shunker Singh*, (1875) 23 W. R. (Cr.) 25; *Birjoo Singh v. Khub Lal*, (1873) 19 W. R. 66; *Denonath Ghatack v. Rajcoomar Singh*, (1878) 3 Cal. 573; *Biku Koer v. W. J. Marshman*, (1901) 5 C. W. N. 368; *Parmeshwar Din*, (1923) 25 Cr. L. J. 579, [1923] AIR (O) 167.

¹⁷ *Veerabadra Pillai*, (1927) 51 Mad. 91.

¹⁸ (1875) 1 Weir 56.

¹⁹ *Narsang Pathabhai*, (1890) 14 Bom. 441; *Pachkauri*, (1897) 24 Cal. 686; *Fouzdar Rai*, (1917) 4 P. L. W. 111, 3 P. L. J. 410, 19 Cr. L. J. 241, [1918] AIR (P) 193; *Dibakar Das v. Saktiulhar Kabiraj*, (1927) 54 Cal. 470.

the limits of the right of private defence of their property or person.²⁰ But when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men, who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other.²¹ There is no distinction between forming an assembly to enforce a right or supposed right within the meaning of cl. (4) of s. 141, and forming an assembly forcibly to maintain an existing right, in either case the assembly being an unlawful one.²² The question as to who was in actual occupation just before the occurrence took place is of paramount importance, and a right to possession, or constructive possession, is not generally of much importance.²³ Unless a right of private defence is established, a claim (even bona fide) of title or a claim (even bona fide) of possession will avail nothing.²⁴

"The words... 'to enforce a right or a supposed right' show that it is perfectly immaterial whether the act which one seeks to prevent by use of criminal force or show of criminal force is legal or illegal the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace."²⁵ "The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self help... In the domain of penal law, that right can extend to no cases not expressly defined by the law itself. The fact, therefore, of the illegality of the act of the opponent of the accused is wholly indifferent, unless it brings itself within the category of those in which self-defence is permitted".¹

Even if a party succeeds in taking wrongful possession of premises belonging to another, the latter acts lawfully if he re-takes possession in a peaceable and easy manner such as when he re-enters the premises and puts out articles found there in the trespasser's absence in which case no question of force or show of force or resistance arises as there is no one on the premises; or even when he ejects in a peaceable and easy manner trespassers found on the premises. In the first case, if the trespasser's men come in force after possession has been re-taken and attack the rightful owner's men who do not act aggressively, they constitute an unlawful assembly and no plea of private defence is available to them.²

Cases.—Disputes regarding possession of land.—Where there was a dispute of long-standing between the accused and certain other parties regarding the possession of certain land, and there was no one in undisputed possession of the land in question, and the accused went to sow the land with indigo, accompanied by a body of men armed with clubs and who kept off the opposite party by brandishing their weapons while the land was being sowed, it was held that they were guilty of this offence.³ Where two parties were entitled to joint possession of a property but one party having been out of possession their servants with thirty or forty other men went armed with clubs to take forcible possession of the property and succeeded in getting it without having had to use any force, it was held that the servants were guilty of this offence.⁴ Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with clubs, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently, it was held that the common object was not to enforce a right, but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful.⁵

²⁰ *Suba Ahir*, (1927) 27 Cr. L. J. 1078, [1927] AIR (P) 27.

²¹ *Prag Dat*, (1898) 20 All. 459; *Moher Sheikh*, (1898) 21 Cal. 392; *Kabiruddin*, (1908) 35 Cal. 368; *Maniruddin*, (1908) 35 Cal. 384; *Muhammad Ibrahim*, (1928) 30 Cr. L. J. 38, [1929] AIR (N) 43.

²² *Ghyasuddin Ahmad*, (1932) 11 Pat. 523.

²³ *Jairam Mahton*, (1907) 35 Cal. 103.

²⁴ *Ghyasuddin Ahmad*, (1932) 11 Pat. 523; *Subedar Singh*, (1933) 14 P. L. T. 228, 34 Cr.

L. J. 1075, [1933] AIR (P) 434.

²⁵ Per Muttusami Ayyar, J., in *Tirakadu*, (1890) 14 Mad. 126, 130.

¹ Per Holloway, J., in (1873) 7 M. H. C. Appx. 35, 1 Weir 58.

² *Ram Sumer Ahir*, (1933) 38 C. W. N. 77, 35 Cr. L. J. 1313, [1934] AIR (C) 273.

³ *Peary Mohun Sircar*, (1883) 9 Cal. 639.

⁴ *Bepin Behari Guha v. Pranakul Majumdar*, (1906) 11 C. W. N. 176, 5 Cr. L. J. 19.

⁵ *Silajit Mahto*, (1909) 36 Cal. 865.

Procession.—Where the accused assembled and forcibly interrupted a procession upon the ground that it was a nuisance or annoyance to them or their community, it was held that their act clearly fell within clause (4) of s. 141.⁶ A headman and eighteen villagers conducted a funeral procession along a public road with the object of vindicating their right to use the road, and intending to resist obstruction. It was not proved that the party was armed, but some of its members used threatening language. It was held that the use of threats made the funeral party an unlawful assembly.⁷ Where a party goes out armed for the express purpose of having a fight and its object is not so much to conduct a religious procession as to have a fight, the members of the party constitute an unlawful assembly and if they use force or violence, they are guilty of rioting under s. 147 of the Code. But the mere knowledge that a religious procession is going to be opposed by force is not in all cases sufficient to constitute the members of the procession an unlawful assembly.⁸ Where certain Mahomedans assembled together to protest against the action of Hindu processionists in taking a procession through an unlicensed route, it was held that they did not become members of an unlawful assembly at that stage, but when the Hindus were receding back the Mahomedans chased them, then they became members of an unlawful assembly.⁹

Illegal seizure.—Paddy belonging to a society, to which the first accused belonged, was stored in a granary in a street. The treasurer of the society attempted to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. It was held that this offence was committed.¹⁰ Where a large crowd of Hindus appeared in a village and threatened to take away the cows of the Mahomedans which they had collected for sacrifice on the occasion of Bakr-id, it was held that they were guilty of an offence under this section.¹¹

A person purchased a motor bus and paid part of the price immediately and agreed to pay the balance in instalments. He committed default in payment of instalments. Under the agreement the seller company was entitled to recover possession of the bus. While the servants of the purchaser were in peaceful possession of the bus the agents of the company tried to recover possession by use of force. The servants resisted them and when one of the agents picked up the handle of the bus to start it, it provoked the servants and in the course of the altercation that ensued the agents of the company received some injuries. It was held that though the company had a legal right to recover possession through the civil Court, they had no right to recover possession of the bus by the use of force; that the servants of the purchaser did not form an unlawful assembly and that they were legally justified in resisting the attempt of the agents of the company to recover forcible possession of the bus.¹²

Illegal construction of dam.—The complainant's party without the permission of the accused constructed a dam across a pyne exclusively belonging to the accused who had obtained an injunction from the civil Court restraining the complainant's party from interfering with the accused in their use and occupation of the pyne. The accused in attempting to cut the dam were opposed by the complainant's party two of whom were struck by the accused and the accused were convicted of rioting and of causing grievous hurt. It was held that after the civil Court decree and injunction the accused could not be held to be enforcing a right within the meaning of clause (4) of s. 141 and the presence of the complainant's party in opposing the accused was a criminal trespass which entitled the accused to a right of private defence.¹³

Taking water by force.—Where five persons assembled together at a water-head armed with deadly weapons to take water by force and to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose, it was held that they constituted an unlawful assembly and became guilty

⁶ (1869) 5 M. H. C. Appx. 6; 1 Weir 58.

⁷ *Nga Kyaw Yaung*, (1905) U. B. R. (P.C.) (1904-06) 21, 12 Burma L. R. 37, 2 Cr. L. J. 832.

⁸ *Dilli*, (1925) 2 O. W. N. 589, 26 Cr. L. J. 1825, [1925] AIR (O) 656.

⁹ *Mohammad*, (1942) 43 Cr. L. J. 871.

¹⁰ *Ayya Annasamy Aiyar*, (1901) 25 Mad. 624.

¹¹ *Suba Singh*, (1916) 18 Cr. L. J. 110, [1916] AIR (P) 176 (2).

¹² *Nawab Raza*, (1934) 11 O. W. N. 288, 35 Cr. L. J. 740, [1934] AIR (O) 108.

¹³ *Ramnandan Prosad Singh*, (1913) 17 C. W. N. 1132, 14 Cr. L. J. 463.

of rioting when they used their deadly weapons in pursuance of their common object; and that as every one of them knew that the weapons were likely to be used with deadly effect, they were all responsible if any one of them inflicted a fatal injury.¹⁴

Preventing cow sacrifice.—The leaders of the Hindu and Mahomedan communities of a place entered into an agreement by which the Mahomedan community undertook not to sacrifice cows publicly. The Hindus apprehending such sacrifice assembled with deadly weapons and as a result a riot ensued and some Mahomedans died of injuries. It was held that the object of the assembly fell within the purview of this clause and that the members of the assembly could be charged and convicted for being members of an unlawful assembly.¹⁵

7. Fifth clause.—This clause is very comprehensive and applies to all the rights a man can possess, whether they concern the enjoyment of property or not. It differs from the preceding clause in the omission of any reference to a 'right or supposed right'.

The mere use of criminal force or show of criminal force by any person to take possession of any property is not sufficient to bring a case within this clause, unless some criminal intent is proved against the persons so using force or show of force.¹⁶ Where, therefore, a District Board decided to replace a bridge across a *khal* which was out of repair by means of a road with pipes passing underneath for the flow of water, and the owners of the bed of the *khal* objected to the laying of the pipes on the ground that it would obstruct the flow of water and removed the pipes placed there by the District Board, it was held that the owners could not be convicted of this offence.¹⁷

8. Explanation.—An assembly which is lawful in its inception may become unlawful by the subsequent acts of its members.¹⁸ It may turn unlawful all of a sudden and without previous concert among its members.¹⁹ But an illegal act of one or two members, not acquiesced in by the others, does not change the character of the assembly.²⁰

An assembly which is lawful in itself does not become unlawful merely because the members know that their assembly would be opposed and a breach of the peace would be committed.²¹ The accused assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it. It was held that they could not be convicted of being members of an unlawful assembly.²²

An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them nor by exceeding the lawful use of their right of private defence.²³

An assembly which is not unlawful in its inception does not become an unlawful assembly because of its refusal to obey an order to disperse.²⁴ An assembly does not become unlawful by reason of its lawful acts exciting others to do unlawful acts.²⁵

"No man can foresee at the commencement what course, they, i.e., assemblies will take, or what consequences will ensue. Though cases may occur in which the object of such assemblies is at first defined and moderate they rapidly enlarge their powers of mischief; and from the natural effects of the excitement and ferment inseparable from the collection of multitudes in one mass, the original design is quickly lost sight of, and men hurry on to the commission of crimes, which at their first meeting they had never contemplated. The beginning of tumult is like the letting out of water; if not stopped at first, it becomes difficult to do so afterwards; it rises and increases, until it overwhelms the fairest and the most valuable works of man."²⁶

¹⁴ *Hari Singh*, (1925) 26 P. L. R. 820, 27 Cr. L. J. 233, [1926] AIR (L) 4.

¹⁵ *Lachmi Singh*, (1928) 29 Cr. L. J. 567, [1928] AIR (P) 562; *Bhaggan*, [1935] A. L. J. R. 1169, 37 Cr. L. J. 39, [1935] AIR (A) 931.

¹⁶ *Addithia Bhuia v. Kali Das De*, (1907) 12 C. W. N. 96, 6 Cr. L. J. 393.

¹⁷ *Ibid.*

¹⁸ *Khemee Sing*, (1864) 1 W. R. (Cr.) 19; *Lokenath Kar*, (1872) 18 W. R. (Cr.) 2.

¹⁹ *Ragho Singh*, (1902) 6 C. W. N. 507.

²⁰ *Dinobundo Rai*, (1868) 9 W. R. (Cr.) 19.

²¹ *Beatty v. Gillbanks*, (1882) 9 Q. B. D. 308.

²² *Ibid.*

²³ *Mukka Muthrian*, (1915) 16 Cr. L. J. 743, [1916] AIR (M) 1062 (2).

²⁴ *Girdhara Singh*, (1921) 23 P. L. R. 53, 23 Cr. L. J. 5, [1922] AIR (L) 135.

²⁵ *Muhammad Ibrahim*, (1928) 30 Cr. L. J. 38, [1929] AIR (N) 43.

²⁶ Extract from the charge of Tindal, C. J., to the grand jury of Bristol in 1832.

Section 142.—Section 141 having explained what an unlawful assembly is, this section declares who may be said to be a member of such an assembly. Any one who joins an unlawful assembly or continues in it is a member of such assembly. If he pleads that he was there innocently, or merely as a harmless spectator, he must prove that he was there owing to no fault of his own and that he could not get out of the crowd.² The mere fact that a person applied to be made a member of an association some months before it was declared unlawful cannot by any stretch of imagination be said to be proof of his membership of the association after it had been declared unlawful. Some overt act as a member subsequent to such declaration must be proved.³

R filed a prosecution against K, for enticing away his wife A. K claimed to be the husband of A, and denied the marriage of A with R. On the day of hearing R in company of several others forcibly seized A, put her in the carriage of one H and drove away. It was held that H, the carriage driver, was rightly convicted under s. 147. He must have seen that the object of the unlawful assembly was to carry off A, and when he drove A off against her wish he joined the unlawful assembly and assisted the carrying out of the unlawful object for which it had assembled.⁴

9. 'Continues'.—This word means physical presence as a member of the unlawful assembly, that is to be physically present in the crowd.⁵ Although individuals may in the first instance have associated themselves with a mob from motives perfectly innocent, nevertheless, if the mob is or becomes an unlawful assembly and the individuals in question take part in its proceedings, they will be liable as members of an unlawful assembly.⁶ Where certain persons had assembled to prevent a procession by force from passing over a certain street, and they were ordered by the police to disperse but neglected to do so, it was held that they were guilty of the offence of being members of an unlawful assembly.⁷ Where certain Mahomedans assembled together to protest against the action of Hindu processionists in taking a procession through an unlicensed route, it was held that they did not become members of an unlawful assembly at that stage, but when the Hindus were receding back the Mahomedans chased them, then they became members of an unlawful assembly.⁸

Exercise of lawful rights.—When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right. Persons exercising their lawful rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence. In such a case each is liable only for his individual acts done in excess of such right.⁹

Amendment.—In s. 141, cl. (1), the words "Central or any Provincial Government or Legislature" were substituted for the words "Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor" by the Government of India (Adaption of Indian Laws) Order, 1937. In Burma, for cl. (1) the following clause was substituted by the Government of Burma (Adaptation of Laws) Order, 1937 :—

"First.—To overawe by criminal force, or show of criminal force, the Legislature or the Government or any public servant in the exercise of the lawful power of such public servant; or."

PRACTICE.

Evidence.—Prove (1) that the assembly in question consisted of five or more persons.

² *Gendo Uraon*, (1927) 6 Pat. 828.

³ *Mela Ram*, (1930) 32 P. L. R. 83, 32 Cr. L. J. 1233, [1931] AIR (L) 261.

⁴ *Haji Baka*, (1908) 2 S. L. R. 6, 10 Cr. L. J. 208.

⁵ *Sheo Dayal*, (1933) 55 All. 689; *Iqbal Ahmad*, [1942] A. L. J. R. 637, (1942) 44 Cr. L. J. 280, [1943] AIR (A) 49.

⁶ *Periapien*, (1883) 1 Weir 66.

⁷ *Tirakadu*, (1890) 14 Mad. 126.

⁸ *Mohammad*, (1942) 43 Cr. L. J. 871.

⁹ *Kunja Bhuiya*, (1912) 39 Cal. 896; *Ambika Singh*, (1921) 1 Pat. 212; *Bhagwat Jha*, (1923) 6 P. L. T. 310, 25 Cr. L. J. 557, [1925] AIR (P) 158.

Where, of five persons convicted, it was found as regards two of them that there had been no common object, it was held that the conviction of the others could not be maintained, as there must have been five persons who had a common object before there could be an unlawful assembly and rioting.¹⁰

(2) That the object of the persons so assembled (either at the time it became an assembly, or during the time that it continued to be assembled) was any of the five objects mentioned in s. 141.

(3) That such object was common to the persons assembled.¹¹

It is necessary that the accused should have a reasonably distinct notice of the common object imputed to them and of the manner in which that common object is to be brought within the language of this section.¹²

In order to establish the common intention of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence, but such an intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons it is a perfectly valid and reasonable inference that they all had a common intention and were, therefore, members of an unlawful assembly.¹³

Where a crowd has dispersed without taking any action, the intention and common object of that crowd can only be inferred from the surrounding circumstances, and among these circumstances the attitude and demeanour of the crowd itself is one of the points which must be taken into consideration.

The opinion or the impression of a witness that it appeared to him from the conduct of a mob that they had appeared for an unlawful purpose is not admissible in evidence to prove the object of the assembly although statements as to what he actually saw and heard are admissible.¹⁴

The essence of the offence is the common unlawful purpose and the accused cannot be convicted if the common object proved is different from the common object in the charge or for which he has been tried.¹⁵

If the common object fails and the substantive charge is disbelieved the accused should be acquitted. It is not proper for an appellate Court, while disbelieving the alleged common object of an unlawful assembly, to find out a different common object regarding which the accused were never called upon to plead nor tried and to affirm the conviction.¹⁶

(4) That the accused joined, or continued in, such assembly.

It is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful.¹⁷

(5) That he did so intentionally.

(6) That he did so being aware of the above facts.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Power to disperse unlawful assembly.—Chapter IX of the Code of Criminal Procedure gives power to a Magistrate to disperse unlawful assemblies by using civil or military force.¹⁸

Joint trial.—As a matter of procedure it is irregular to treat both parties to a riot as constituting one unlawful assembly, and to try them together inasmuch as they do not have one common object.¹⁹ Members of each faction may be called as witnesses against their opponents.²⁰ Where members of two assemblies do not mingle together at any time or place, the mere fact that they have a common intention will not make them one assembly. The question whether two groups of men do or do not

¹⁰ *Vyapuri Chetti*, (1909) 11 Cr. L. J. 197.

¹¹ *Bhagiram Dome v. Abar Dome*, (1888) 15 Cal. 388.

¹² *Parakuzhiyil Ayamad*, (1923) 10 L. W. 350, 24 Cr. L. J. 852.

¹³ *Lajja*, (1927) 28 P. L. R. 23, 273, 28 Cr. L. J. 264, [1927] AIR (L) 193.

¹⁴ *Jogi Raut*, (1927) 9 P. L. T. 260, 28 Cr. L. J. 906, [1928] AIR (P) 98.

¹⁵ *Loganathaiyer*, (1909) 6 M. L. T. 17, 11 Cr. L. J. 30.

¹⁶ *Rahimuddin v. Asgarali*, (1900) 5 C.W.N. 31.

¹⁷ *Sheo Dayal*, (1933) 55 All. 689.

¹⁸ Criminal Procedure Code, ss. 126-132.

¹⁹ *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75.

²⁰ *Mahomed Hossein*, (1869) 1 N. W. P. 298; *Nawab*, (1881) P. R. No. 26 of 1881.

form one assembly is a question of fact in each case. Where two mobs start from different localities and operate independently and never come close to each other, they cannot be considered to be members of one assembly, though their object be the same.²¹

Restoration of possession can be ordered.—Where possession of immovable property is taken by means of criminal trespass and threats to use force against the complainant by an unlawful assembly, the Magistrate can make an order directing restoration of possession.²²

Death of complainant.—The death of the complainant does not put an end to the prosecution. The trying Magistrate has a discretion in proper cases to allow the complaint to continue by a proper and fit complainant if the latter is willing.²³

Right of Crown to prosecute.—A complaint for rioting or for being a member of an unlawful assembly discloses a non-compoundable offence or which the Crown alone in the interests of public peace and security has a right to prosecute, and a complainant has no independent right to have the guilty persons punished.²⁴

Charge.—The charge should state the common object of the assembly.²⁵ Omission to state it does not vitiate a conviction if there is evidence on the record to show it.¹ It is sufficient if it is specified in the complaint and found by the Court.² Such an omission is a mere irregularity which will vitiate the trial only if it has caused miscarriage of justice on the merits; and the test of such a miscarriage is whether the accused were prejudiced by the omission and had no notice during the trial of the case of the prosecution as to the common object so as to enable them to meet it in their defence and in cross-examination.³

Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt, whether simple or grievous, it is sufficient to state in the charge that the common object of the members of the unlawful assembly was to assault the persons to whom hurt was caused. It is not necessary to state that the common object was to cause simple or grievous hurt, as the case may be.⁴

The charge should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, were a member of an unlawful assembly, the common object of which was (*specify the object*), and thereby committed an offence punishable under s. 143 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence,¹ is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining unlawful
assembly armed
with deadly weapon.

COMMENT.

The risk to the public tranquillity is aggravated by the intention to use force evinced by carrying arms. This section, therefore, provides for an enhanced punishment where a member of an unlawful assembly is armed with a deadly weapon.

²¹ *Wajid Ali*, (1927) 4 O. W. N. 240, 28 Cr. L. J. 337, [1927] AIR (O) 151.

²² *Rameshwar Singh*, (1925) 4 Pat. 438.

²³ *Mahomed Azam*, (1925) 28 Bom. L. R. 288, 27 Cr. L. J. 491, [1926] AIR (B) 178.

²⁴ *Malayil Kottayil Koyassan Kutty*, (1917) 18 Cr. L. J. 329, [1918] AIR (M) 494.

²⁵ (1865) 4 W. R. (Cr. L.) 9; *ibid.*, 10; *Tafazzul Ahmed Chowdhry*, (1899) 26 Cal. 630.

¹ *Kudrutulla*, (1912) 39 Cal. 781.

² *Yeshwant Salva*, (1926) 28 Bom. L. R. 497, 27 Cr. L. J. 744, [1926] AIR (B) 314.

³ *Shivprasad Manilal*, Criminal Reference No. 92 of 1910, decided on January 20, 1911 by Chandavarkar and Heaton, JJ., (Unrep. Bom.).

⁴ *Chhanka Dhanuk*, (1927) 6 Pat. 832.

Scope.—The enhanced punishment under the section can only be inflicted on that member of an unlawful assembly who uses a weapon of offence. The word 'whoever' justifies this interpretation.

1. **'Weapon of offence'.**—That is, a weapon which under the present circumstances and at the present time (during the existence of the unlawful assembly) is an offensive weapon, notwithstanding that it might be otherwise at a different time and place.⁵ A crowd of about 100 persons, including the accused, had assembled together, armed with bill hooks and sticks, but it dispersed at once on seeing the police. On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and, having regard to the weapons with which they were armed, he convicted them under this section. The High Court held that the prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by s. 141, and that the accused were entitled to be acquitted.⁶

Sections 114 and 144.—When one person instigates another to join an unlawful assembly armed with a deadly weapon and afterwards joins the unlawful assembly himself he is punishable under this section, read with s. 114, even though he was not himself armed with a deadly weapon⁷.

PRACTICE.

Evidence.—Prove points (1) to (6) as in s. 143; and further

(7) That the accused was armed with a deadly weapon, or with anything which, used as a weapon of offence, was likely to cause death.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, being armed with a deadly weapon, to wit, [or armed with something which, used as a weapon of offence, is likely to cause death, to wit—] were a member of an unlawful assembly, and thereby committed an offence punishable under s. 144 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse¹ shall be punished with imprisonment of either description for a term which may extend to two years, or with fine,

Joining or continuing in unlawful assembly, knowing it has been commanded to disperse. or with both.

COMMENT.

This section and s. 151 are connected with each other so far as the principle underlying both of them is concerned. Section 127(I) of the Code of Criminal Procedure says: "Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly."

~~Section~~ Section 188 of the Penal Code provides for the disobedience of any lawful order promulgated by a public servant. This section and s. 151 deal with special cases as the disobedience may cause serious breach of the peace.

1. **'Commanded in the manner prescribed by law to disperse'.**—This expression means, in the city of Bombay, commanded as prescribed in s. 40 (I) of the City of Bombay Police Act, 1902. It cannot be construed in a wider sense so as to include a command by a Magistrate to disperse without any order having been given

⁵ M. & M. 123.

⁶ *Peelimuthu Tevan*, (1900) 24 Mad. 124.

⁷ *Srihari Shome v. Lal Khan*, (1900) 5 C.W. N. 250.

by an officer in charge of a police-station.⁸ In disobedience of an order passed under s. 42 of the Bombay District Police Act, the accused along with others formed themselves into a procession (Prabhat Pheri) and passed through the streets uttering objectionable songs, in spite of the advice of police officers and others that they were violating the order. The assembly was declared unlawful and was ordered to disperse. The crowd refused to disperse and squatted on the public road. On a prosecution of the accused for an offence punishable under this section, it was held that the common object of the unlawful assembly having been to commit an offence under the latter part of s. 188, the assembly became unlawful, and the remaining in it after it was ordered to disperse constituted an offence under this section.⁹

CASE.

The accused formed into a procession which started from a Congress office. When they reached a certain place they were met by a party of police officers who directed them to proceed by a route different from that which they were till then following. They thereupon sat down on the ground in the public road. They were asked to disperse but refused to do so and were arrested and convicted under s. 151 and this section. It was held that the conduct of the processionists in sitting on the ground when ordered to take a different route and refusing to disperse when called upon to do so, coupled with the fact that the conduct of the accused proved that the procession was animated by hostility to the established Government, justified the finding that the processionists were determined to disregard and disobey any lawful orders that the police or the Magistrate might give them and that their object was therefore unlawful. It was also held that, though the sentences were heavy in the circumstances of the case, the High Court would not entertain an application for reduction of sentence at the instance of a third party, the convicted persons not having seen fit to appeal.¹⁰

PRACTICE.

Evidence.—Prove points (1) to (6) as in s. 143; and further

(7) That such unlawful assembly had been commanded to disperse.

(8) That such command to disperse was in the manner prescribed by law.

(9) That the accused joined, or continued in such unlawful assembly after it had been commanded to disperse.

(10) That the accused did so, knowing that it had been commanded to disperse.¹¹

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

The prosecution should give formal evidence to show that the accused had the common object to resist the execution of a lawful order and the accused should have an opportunity to meet the case in the trial Court, particularly when the charge framed against him does not mention that common object.¹²

Charge.—The failure to specify the common object in a charge under this section is not fatal to the trial if it can be shown that there was ample evidence on the record to prove what the common object of the assembly was.¹³

The charge should run thus :—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, joined (*or continued in*) an unlawful assembly, knowing that such assembly had been commanded in the manner prescribed by law to disperse, and thereby committed an offence punishable under s. 145 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

⁸ *Keshav Govind*, (1921) 23 Bom. L. R. 350, 22 Cr. L. J. 320, [1921] AIR (B) 322 (2).

⁹ *Ramchandra Shastri*, (1931) 33 Bom. L. R. 1169, 55 Bom. 725.

¹⁰ *Ambika Charan De*, (1933) 34 Cr. L. J.

814, [1933] AIR (C) 361.

¹¹ *Mohammad*, (1942) 43 Cr. L. J. 871.

¹² *Abdul Hamid*, (1922) 2 Pat. 134, s.B.

¹³ *Ramchandra Shastri*, (1931) 33 Bom. L. R. 1169, 55 Bom. 725.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof,¹ in prosecution of the common object² of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The basis of the law as to rioting is the definition of an unlawful assembly, a riot being simply an unlawful assembly in a particular state of activity,¹⁴ that activity being accompanied by the use of force or violence. It is only the use of force that distinguishes rioting from an unlawful assembly.

Ingredients.—There are two essentials which make every member of an unlawful assembly guilty of rioting—

1. Use of force or violence by an unlawful assembly or by any member thereof.
2. Such force or violence should have been used in prosecution of the common object of such assembly.

1. 'Force or violence...used by an unlawful assembly, or by any member thereof'.—As to the meaning of 'force', see s. 349. It is not necessary that the force or violence should be directed against any particular person or object.¹⁵ The use of any force, even though it be of the slightest possible character, by any one of an assembly once established as unlawful constitutes rioting.¹⁶ A person who is the leader of an unlawful assembly whose common object is to assault passers-by commits the offence of rioting.¹⁷ Thus, if a husband and his friends take possession of his wife by force and violence they are guilty of rioting.¹⁸ Actual use of force and not merely a show of force, is necessary. Where a number of men who are assembled at a certain place run away on being attacked by the opposite party, they are not guilty of rioting.¹⁹

'Violence'.—This word is not restricted to force used against persons only but it extends also to force used against inanimate objects.²⁰ Thus, if an unlawful assembly came together for the purpose of pulling down a man's house, and proceeded to carry out the object, they could be said to have used violence. Similarly, where the accused struck at the door of the complainant who fled away to save himself from being beaten, it was held that they had used violence.²¹ Pulling down a toddy shop and cutting and destroying spatts of toddy trees are enough to show that violence was used.²² Applying lighted match to a hayrick or burning a cattle-shed amounts to using violence.²³ Looting of a cutlery (office) demolishing a privy and erecting fence on the land of other party are acts of violence.²⁴

'Unlawful assembly'.—See s. 141, *supra*.

'Any member thereof'.—Whether only one, or more than one of the persons assembled use force, the penal consequences apply equally to all. It will be otherwise, however, if the force or violence is used for a distinct purpose...as if it consists of a mere affray or assault upon each other, or upon bystanders by some members of the assembly.²⁵ If any person encourages, or promotes, or takes part in, riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself considered a rioter. Active participation in actual violence is not necessary.

¹⁴ *Rasul*, (1888) P. R. No. 4 of 1889.

¹⁵ *Ghani Khan*, (1918) 21 O. C. 134, 19 Cr. L. J. 828, [1918] AIR (O) 171.

¹⁶ *Koura Khan*, (1868) P. R. No. 34 of 1868; *Ramadeen Doobay*, (1876) 26 W. R. (Cr.) 6.

¹⁷ *Sujatali Nyamatalli*, (1921) 24 Bom. L. R. 110, 23 Cr. L. J. 256.

¹⁸ *Askur*, (1864) W. R. (Gap No.) (Cr.) 12.

¹⁹ *Mahomed Ishak Khan*, (1904) 1 A. L. J. R. 602, 1 Cr. L. J. 1057.

²⁰ *Samaruddi*, (1912) 40 Cal. 367; *Rasul*,

(1888) P. R. No. 4 of 1889; *Mir Bayjan Khan*, (1934) 36 Cr. L. J. 933, [1935] AIR (Pesh.) 65.

²¹ *Venkatasubbaier*, (1922) 44 M. L. J. 407, 17 L. W. 535, 24 Cr. L. J. 356, [1923] AIR (M) 603.

²² *Marimuthu Naidu*, (1923) 17 L. W. 577, 25 Cr. L. J. 139, [1923] AIR (M) 606.

²³ *Sankarapandia Thevar*, [1933] M. W. N. 1138.

²⁴ *Kali Das Mukherji*, (1946) 48 Cr. L. J. 351.

²⁵ M. & M. 124.

Some may encourage by words, others by signs, and others again may actually cause hurt and yet all would be equally guilty of rioting.¹

2. 'In prosecution of the common object'.—Section 141 indicates what objects are deemed unlawful. If the common object of an assembly is not illegal, it is not rioting if force is used by any member of that assembly.² If the common object is not unlawful then there can be no unlawful assembly and consequently no rioting. Thus, resistance to the execution of an illegal warrant within reasonable bounds does not amount to rioting because the common object is not unlawful; but when the right of resistance is exceeded and a severe injury, not called for, is inflicted, the person who inflicts such injury may be convicted of grievous hurt.³ Similarly, resistance to a search without a search-warrant does not amount to rioting.⁴ Where a warrant of attachment was signed, not by the Munsiff, but by the Sheristadar, and did not bear the seal of the Court, and the accused were charged with rioting with the common object of illegally rescuing the attached property, it was held that the omission of the seal rendered the attachment illegal, and that, therefore, the common object charged was not an unlawful common object and consequently the charge of rioting was not sustainable.⁵ Although in ascertaining whether the object of the members composing an assembly is such as to constitute an unlawful assembly, all the circumstances must be regarded which tend to show what that object is, and the result of such consideration may be to negative the view that the object is such as to render the assembly unlawful, still when once the offence of rioting or any other offence is brought home to a member of an unlawful assembly, it rests with him to establish that the apparent offence is no offence, by reason of the act which constitutes the offence being justifiable under the provisions relating to the right of private defence.⁶

Acts done by some members of an unlawful assembly outside the common object of the assembly or of such a nature as the members of the assembly could not have known to be likely to be committed in prosecution of that object are only chargeable against the actual perpetrators of those acts.⁷

Sudden quarrel.—If a number of persons assembled for any lawful purpose suddenly quarrel without any previous intention or design, they do not commit a riot in the legal sense of the word.⁸ Similarly, if a fight were to spring up between two of the persons unlawfully assembled, this would only make them individually responsible, and not convert the assembly into a riot.⁹ It is, however, not necessary that there should be a common object prior to the commencement of the fight. It is also immaterial that the accused conceived the idea of injuring suddenly after they went to the scene of offence.¹⁰

Forcible entry.—A plea of right to possession is no answer to a charge of rioting by making a forcible entry on land cultivated by a trespasser, who is in possession and opposes the entry.¹¹ A person does not lose possession of a field by going home to have a meal, or to sleep. If somebody enters on his land during his absence and he does not acquiesce in the trespass, he would still retain possession of the land; and as the possessor of the land he is entitled to defend that possession. If he brings friends with him and with force of arms resists those who are trespassing on the land who are also armed, he and his friends would not be guilty of forming themselves into an unlawful assembly; for those who defend their possession are not members of an unlawful assembly. If a person acquiesces in his dispossession and subsequently under claim of title comes again to dispossess his opponents, then he and his friends would be members of an unlawful assembly and guilty of rioting.¹²

¹ *Ganu*, (1875) Unrep. Cr. C. 99.

² *Jagannath Mandhata*, (1897) 1 C. W. N. 233; *Parthasar Singh*, (1899) 4 C. W. N. 345.

³ *Uma Charan Singh*, (1901) 29 Cal. 244.

⁴ *Bajrang Gope*, (1910) 38 Cal. 304.

⁵ *Khidir Bux*, (1918) 3 P. L. J. 636, 20 Cr. L. J. 139, [1919] AIR (P) 404.

⁶ *Rasul*, (1888) P. R. No. 4 of 1889.

⁷ *Agra*, (1914) P. R. No. 37 of 1914, 16 Cr. L. J. 209, [1914] AIR (L) 579.

⁸ *Khajah Noorul Hossein v. C. Fabre-Tonnerre*, (1875) 24 W. R. (Cr.) 26; *Government v.*

Doolubh, 2 N. A. R. 883.

⁹ *Muzhur Hossein*, (1873) 5 N. W. P. 208.

¹⁰ *Golla Hanumappa*, (1911) 35 Mad. 243.

¹¹ *Appavu Nayak*, (1882) 6 Mad. 245; *Sajawara*, (1903) 5 P. L. R. 47, 1 Cr. L. J. 94. But see *Ram Krishna Singh*, (1922) 3 P. L. T. 335, 23 Cr. L. J. 321, [1922] AIR (P) 197, which justifies such entry by an auction-purchaser.

¹² *Mooka Nadar*, (1943) 1 M. L. J. 352, (1942) 56 L. W. 329, [1943] M. W. N. 275, (1942) 44 Cr. L. J. 783, [1943] AIR (M) 590.

Private defence.—Where a party acts in the exercise of the right of private defence, there is no riot, and if the accused are able to establish that they acted in the right of private defence, the burden of proving that they exceeded it lies upon the prosecution.¹³ An assembly which has the common object of inflicting hurt upon any other person or body of persons is *prima facie* unlawful.

There can be no right of private defence where the riot is premeditated on both sides.¹⁴ Where both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that a particular party was acting within the legal limits of the right of private defence.¹⁵ A free fight is one when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders. The fact that the accused's party were victorious does not lead to any inference that they were the aggressors.¹⁶

The illegality of a certain act or acts opposed by criminal force is no defence to a charge of rioting, unless the circumstances are such that a right of self-defence arises.¹⁷

If the common object of an assembly is to enforce the right or supposed right of private defence of person or property, and force is used in prosecution of the common object to enforce that right by means of criminal force, or show of such force, rioting is committed, within the terms of the law, unless circumstances exist which give occasion for the exercise of the right of private defence and this right is exercised within the limits prescribed by law.¹⁸

The party of the accused accompanied by R went armed with clubs to fish in a tank in which R had a two-annas share. The complainant, who with some other co-sharers, represented an eleven-annas interest in the tank, went there with some of these co-sharers to protest on the ground that the accused had no share or interest in the tank. A fight ensued in the course of which some of the complainant's party received slight injuries. It was held that the accused were guilty of rioting and voluntarily causing hurt.¹⁹ The accused went with three ploughs on land to which the complainant had the right of possession, and of which he was in possession till such entry, and began to plough up the land, to uproot some castor plants, and to throw them away. While they were thus in actual but temporary occupation, the complainant and his party went on the land and tried to unyoke the cattle, whereupon a riot took place. It was held that the accused were guilty of rioting and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation.²⁰ Where more than twenty-five persons went in a body to enforce the right or supposed right of one of them to an animal by removing it from the house of a third person, and after they had removed it and gone some distance they were followed by that person, who was consequently attacked and beaten by some of them and died as a result of a blow on the head, it was held that the assembly was an unlawful assembly.²¹

The accused, on receiving information that the complainant's party were about to take forcible possession of a plot of land, which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed, and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt. It was held that the accused were justified in taking such precautions as they thought were required to prevent the aggression, and that they could not be held to be members

¹³ *Makhdoom Singh*, (1945) 47 Cr. L. J. 102, [1945] O. W. N. 58, [1945] AIR (O) 296.

¹⁴ *Prag Dat*, (1898) 20 All. 459.

¹⁵ *Kalce Beparee*, (1878) 1 C. L. R. 521; *Saadullah*, (1923) 6 L. L. J. 170, 25 Cr. L. J. 983, [1924] AIR (L) 482.

¹⁶ *Ahmad Sher*, (1931) 32 Cr. L. J. 868, [1931] AIR (L) 513; *Piran Ditta*, (1933) 34 P. L. R. 950, 35 Cr. L. J. 69, [1933] AIR (L) 808.

¹⁷ (1878) 7. M. H. C. Appx. 35, 1 Weir 58;

Bechu, [1939] P. W. N. 215, 40 Cr. L. J. 337, [1939] AIR (P) 314.

¹⁸ *Rasul*, (1888) P. R. No. 4 of 1889.

¹⁹ *Anant Pandit v. Madhusudan Mandal*, (1899) 26 Cal. 574; *Ganouri Lal Das*, (1889) 16 Cal. 206, dissented from in *Veerabadra Pillai*, (1927) 51 Mad. 91; *Alladad*, (1869) P. R. No. 1 of 1870.

²⁰ *Jairam Mahton*, (1907) 35 Cal. 108.

²¹ *Agra*, (1914) P. R. No. 87 of 1914, 16 Cr. L. J. 209, [1914] AIR (L) 579.

of an unlawful assembly.²² Where the accused were maintained in possession of certain lands, including a homestead, under s. 145 of the Criminal Procedure Code, and the opposite party unlawfully attempted to take possession of some huts standing thereon, whereupon the accused came with an armed body and demolished the huts, and on being resisted by the opposite party wounded some of them, it was held by the majority of the Court that they were justified in taking precautions and using such force as was necessary to prevent aggression by the opposite party.²³

Where one K being assaulted by B, a number of persons rushed to the scene and a fracas occurred in which B was killed, and K and the other persons forming the assembly were convicted of rioting, it was held that they were not guilty of rioting as the common object of the crowd was to rescue K and not to assault B.²⁴ In so far as excessive force is used by some members of the assembly the users of such force alone are liable to be punished for the assaults committed by them and not the other members of the assembly and in the absence of proof as to who actually dealt the fatal blow to the original assailant, no member of the assembly is punishable in respect of the blow.²⁵

Delivery of possession by the Court passes possession to the party and must be treated as doing so even though the other side may allege the delivery of possession to be of doubtful legality.¹ But in a Nagpur case only symbolical possession of fields was given to the auction-purchasers and they were resisted by the previous owners' lessee whose crops were standing, when they tried to take actual possession, and it was held that no offence was committed by the lessee and his men, and their conviction for rioting was bad.²

See Comment and Cases on ss. 99 and 141, *supra*.

CASES.

Resistance to distraint.—Where a landlord, who had not tendered to his tenant such a lease as the latter was bound to accept under the Madras Rent Recovery Act (Mad. Act VIII of 1865), distrained his cattle for arrears of rent, the assistance of the police having been procured for the purpose, and the tenant with others forcibly obstructed the removal of the cattle, it was held that they were guilty of rioting.³ But obstruction offered to distraint by a landlord when no rent was in arrear was held to be no offence.⁴

Resistance to public officer.—N, S and G were appointed special constables under s. 17 of the Police Act, 1861. A Police Inspector accompanied by some police went to their village and informed them that they had been so appointed, and requested them to accompany him to a police-station which they declined to do. The Inspector then had N arrested, whereupon N shook himself free, and N, S and G with other persons, who had assembled, abused and threatened the police and compelled them to withdraw from the village. It was held that the refusal of N to accompany the Inspector was not an offence for which N could be arrested, and, as the police when obstructed were not acting in lawful discharge of their duty, none of the persons concerned could be convicted of an offence under s. 353, but they were guilty of rioting under this section.⁵

Where a Sub-Inspector of Police, on receiving information of the commission of a dacoity, searched the house of one of the alleged offenders, accompanied by the complainant and the village officers, but without a search warrant, whereupon they were beaten by the accused who were charged with, and convicted of, rioting, with the common object of resisting the search, assault and causing hurt, under ss. 147, 323 and

²² *Pachkauri*, (1897) 24 Cal. 686; *Fateh Singh*, (1913) 41 Cal. 43; *Samba Pillai*, (1916) 2 M. W. N. 213, 4 L. W. 125, 17 Cr. L. J. 391, [1917] AIR (M) 662 (2); *Fouzdar Rai*, (1917) 4 P. L. W. 111, 3 P. L. J. 419, 19 Cr. L. J. 241, [1918] AIR (P) 193; *Sunder Buksh Singh*, (1918) 3 P. L. J. 652, 19 Cr. L. J. 983, [1918] AIR (P) 398.

²³ *Poresh Nath Sircar*, (1905) 33 Cal. 295; *Mohammad Idris*, (1933) 10 O. W. N. 788, 34 Cr. L. J. 748, [1933] AIR (O) 279; *Subedar Singh*, (1933) 14 P. L. T. 228, 34 Cr. L. J.

1075 [1933] AIR (P) 434.

²⁴ *Ambika Singh*, (1921) 1 Pat. 212.

²⁵ *Nawab*, (1928) 29 P. L. R. 727, 29 Cr. L. J. 593, [1928] AIR (L) 277.

¹ *Karu Mahto*, (1932) 13 P. L. T. 395, 33 Cr. L. J. 862, [1932] AIR (P) 244.

² *Laxmanrao Narainrao*, (1933) 35 Cr. L. J. 1213, [1934] AIR (N) 172.

³ *Ramayya*, (1889) 13 Mad. 148.

⁴ (1875) 8 M. H. C. Appx. 11, 1 Weir 56.

⁵ *Raman Singh*, (1900) 28 Cal. 411.

353; it was held that the search was illegal, and that, the common object having failed, the conviction under this section was bad.⁶ But where certain police-officers acting bona fide under a defective search warrant were resisted by more than five persons and hurt was caused, the former Chief Court of the Punjab held that they were guilty of an offence under this section read with s. 99 if the common object was to cause hurt and hurt was caused.⁷ A complaint having been lodged against two persons under s. 498 for abduction of K, the complainant's daughter-in-law, the Magistrate ordered the issue of a warrant for the arrest of K, apparently intending to act under s. 90 of the Code of Criminal Procedure, but the warrant erroneously charged K herself with an offence under s. 498. Under this warrant the head constable arrested K and had taken her to a distance of about 200 *kadams* (steps) when a large concourse of people assembled, amongst whom were the accused, who took away the woman from the custody of the head constable and the constables with him, and inflicted certain injuries upon them. It was held that the accused were rightly convicted of an offence of rioting.⁸ Where the accused by using criminal force attempted to rescue certain persons who were arrested by the police, it was held that they were guilty of rioting.⁹ Where the accused, a section of villagers, broke into the village temple and removed idols for celebrating a festival, it was held that they were guilty of rioting as their object was to enforce a right by means of criminal force and they used violence in prosecution of the common object.¹⁰

Preventing cow-killing.—Where several Hindus, acting in concert, forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing 'wrongful gain' to themselves or 'wrongful loss' to the owner of the cattle, but for the purpose of preventing the killing of the cows, it was held that they were guilty not of dacoity but of rioting.¹¹ But the authority of this case has been shaken by a subsequent decision of the same High Court. In the later case a large body of Hindus, acting in concert, and apparently under the influence of a religious feeling, attacked certain Mahomedans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such cattle to their lawful owners. It was held that the offence of which the Hindus were guilty was dacoity and not merely rioting.¹²

Recovering possession of cattle.—Persons whose common object was by means of criminal force to recover possession of their cattle seized for trespass, and who made use of such force and took away their cattle, were held guilty of rioting.¹³

PRACTICE.

Evidence.—Prove (1) that five or more persons were assembled.

In the absence of a definite finding that five or more people took part in the occurrence, a conviction for rioting cannot be sustained.¹⁴ Where the finding is that more than five persons took part in the riot, the conviction of less than five persons is not illegal.¹⁵

(2) That such assembly was unlawful when it was convened or subsequently became unlawful, having any one of the five objects specified in s. 141.

There must be a finding as to the existence of an unlawful assembly.¹⁶

⁶ *Bajrangi Gope*, (1910) 38 Cal. 304.

⁷ *Gaman*, (1913) P. R. No. 16 of 1931, 14 Cr. L. J. 142.

⁸ *Attar Singh*, (1917) P. R. No. 9 of 1918, 19 Cr. L. J. 390, [1918] AIR (L) 332.

⁹ *Public Prosecutor v. Amirtham Servai*, [1939] 2 M. L. J. 776, (1938) 50 L. W. 763, [1939] M. W. N. 1004, (1938) 41 Cr. L. J. 250, [1940] AIR (M) 18.

¹⁰ *Perumal Konan*, [1940] M. W. N. 873, (1940) 52 L. W. 347, (1940) 42 Cr. L. J. 263 (2), [1941] AIR (M) 71 (2).

¹¹ *Raghunath Rai*, (1892) 15 All. 22. This case has not been followed in *Parichat*, (1908) 5 N. L. R. 17, 9 Cr. L. J. 389, where it was held that a man who from a conscientious objection to the killing of cattle took a buffalo from its owner without his consent, caused wrongful

loss, and committed theft, though his object was to benefit the animal, not to injure the owner.

¹² *Ram Baran*, (1893) 15 All. 299.

¹³ *Bakoo Sheikh*, (1864) W. R. (Gap No.) (Cr.) 21.

¹⁴ *Ramaswami Tavan*, (1921) 14 L. W. 588, 23 Cr. L. J. 700, [1921] AIR (M) 687; *Sinnaswami Mudali*, (1922) 16 L. W. 526; *Ata Muhammad*, (1923) 25 Cr. L. J. 494, [1923] AIR (L) 692; *Mandayan*, [1935] M. W. N. 178; *Gopalakrishna*, (1937) 47 L. W. 323, [1938] M. W. N. 224, 39 Cr. L. J. 687, [1938] AIR (M) 392.

¹⁵ *Sadho*, [1934] A. L. J. R. 640, 35 Cr. L. J. 1494, [1934] AIR (A) 881.

¹⁶ *Mahesh Dutt Singh*, (1919) 1 P. L. T. 606, 21 Cr. L. J. 165, [1920] AIR (P) 244.

(3) That such object was the common object of those composing such assembly.¹⁷

To sustain a conviction it is essential that the persons forming the unlawful assembly should be animated by a common object, and in the absence of such a finding the conviction is not sustainable and ought on that ground alone to be set aside.¹⁸ Where the common object has not been sustained, the High Court in a reference under s. 307 of the Criminal Procedure Code cannot invent another common object in order to support the conviction.¹⁹

(4) That the accused, or any member of such unlawful assembly, used force or violence.

(5) That such force or violence was used in the prosecution of such common object.

In cases of rioting it often happens that the Court may consider that the story told by the prosecution is false in some of its details, but is nevertheless sufficient to prove the guilt of the accused; but it is not permissible to base a conviction upon a hypothetical state of facts, which is quite unsupported by evidence, which was never put forward by the prosecution, and which was never suggested to the accused as being the case they had to meet.²⁰

In a charge of rioting where a number of men are accused, the Magistrate should deal with the case of each of the accused separately or discuss the evidence against each of the accused, especially when the evidence against each of the accused is by no means equally strong.²¹

Where the evidence of the prosecution is interested and where a considerable amount of enmity exists between the factions, the Court must scrutinize the evidence very carefully.²²

In order to establish that a party acted in the exercise of the right of private defence in a riot, it lies upon such party to establish the circumstances under which each blow that caused an injury to a member of the opposite party was inflicted.²³

The absence of injuries on the persons of the alleged rioters arrested shortly after the occurrence is a point which in a case where the evidence is uncertain and partisan must operate as a ground for giving the benefit of doubt as to their participation in the offence.²⁴

Procedure.—Cognizable Warrant — Bailable — Not compoundable²⁵— Any Magistrate.

Security.—Security for keeping the peace on conviction may be demanded under s. 106, Criminal Procedure Code.

Separate trial.—Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, as they had not one common object within the meaning of s. 141; and each party should be tried separately.¹

¹⁷ *Sabir*, (1894) 22 Cal. 276, *Aminulla*, (1922) 35 C. L. J. 853, 27 C. W. N. 536, 24 Cr. L. J. 355, [1922] AIR (C) 191.

¹⁸ *Poresh Nath Sircar*, (1905) 33 Cal. 295, 391; *Gaya Din*, (1934) 9 Luck. 517; *Kammoo*, [1942] A. L. J. R. 255, (1941) 43 Cr. L. J. 654, [1942] AIR (A) 225.

¹⁹ *Akbar Molla*, (1923) 51 Cal. 271.

²⁰ *Banga Hadua*, (1909) 11 C. L. J. 270, 11 Cr. L. J. 245.

²¹ *Ramasamy Naidu*, (1915) 16 Cr. L. J. 809, [1916] AIR (M) 884; *Girigowdra Basappa*, [1934] M. W. N. 1092.

²² *Majhi*, (1927) 9 L. L. J. 369, 28 Cr. L. J. 685, [1927] AIR (L) 617.

²³ *Hazura Singh*, (1927) 28 Cr. L. J. 839, [1927] AIR (L) 786.

²⁴ *Mohan Singh Bath*, (1939) 42 P. L. R. 484, 41 Cr. L. J. 667, [1940] AIR (L) 217.

²⁵ The offence cannot be compounded under any circumstances. It is *ultra vires* of a Magistrate to allow a non-compoundable offence to be compromised on the grounds that the offence committed might probably in the end turn out

to be a compoundable one or that the consequence of his action might probably, in his view, be better for the complainant: *Hira Singh*, (1907) P. R. No. 11 of 1907, 6 Cr. L. J. 336. Offences under s. 143 were regarded by the Legislature as concerning persons other than those immediately involved; these offences are offences, which directly affect the public peace and the conclusion of criminal cases relating to them is something more than a matter for agreement between individuals: *Agha Nazarali*, [1941] Kar. 352, 358.

¹ *Sheikh Bazu*, (1867) 8 W. R. (Cr.) 47; *Durzoola*, (1868) 9 W. R. (Cr.) 33; *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75; *Hossein Buksh*, (1880) 6 Cal. 96; *Bachu Mullah v. Sia Ram Singh*, (1886) 14 Cal. 358; *Chandra Bhuiya*, (1892) 20 Cal. 537; *Nawab*, (1881) P. R. No. 26 of 1881; *Saifulla*, (1882) P. R. No. 15 of 1882; *Nga Shwe Ya*, (1884) S. J. L. B. 275; *Nga Shwe Zan*, (1885) S. J. L. B. 331; *Nath Singh*, (1884) O. S. C. 75, 1 O. D. 123; *Banappa Kallappa*, (1943) 46 Bom. L. R. 166, 45 Cr. L. J. 701, [1944] AIR (B) 146.

Where there is a fight between two rival factions which gives rise to complaint and counter-complaint, the most desirable procedure is that both the cases should be tried by the same Judge, though with different assessors and juries. The first case should be tried to a conclusion and the verdict of the jury or the opinion of the assessors taken. The Judge, however, should postpone judgment in that case till he has heard the second case to a conclusion, and he should then pronounce judgments separately in each case. He is bound to confine his judgment in each case to the evidence led in that particular case and is not at liberty to use the evidence in one case for the purpose of the judgment in the other case and to allow his findings in one case to be influenced in any manner to the prejudice of the accused by the views which he may have formed in the other case. It is obviously necessary in such case that he should try the two cases in quick succession one after the other. In cases of difficulty, however, it is open to the Judge to get the second case transferred.²

Charge to jury.—The common object of an unlawful assembly can change in the course of an occurrence. A crowd may have a common object at one time and may have another common object as things develop, and it may well be that there are various common objects in the course of an occurrence, and these all have to be placed before a jury in order that the jury may decide if any of them has been proved against the accused and if so which of them.³

Cumulative sentences.—Separate sentences may be passed under this section and s. 323 (causing hurt);⁴ or under this section and s. 325 (causing grievous hurt).⁵ The Madras High Court considers this illegal.⁶ The Calcutta High Court in a case held that a double sentence under this section and s. 353 was illegal where the force which was used, and which formed one of the component elements of the offence of rioting, was criminal force used to public servants.⁷ But in a later case it laid down that separate sentences might be passed.⁸ Where the common object of the members of an unlawful assembly was to compel Excise officers to abandon the search of certain houses and, after this object was achieved, some of the members proceeded to assault the officers, the Patna High Court held that there could be no doubt that the assault was made in furtherance of the common intention of the assailants, and that they were liable to be convicted under s. 147 and s. 353.⁹ Though under s. 146 the use of force or violence is a necessary ingredient of the offence of rioting, yet separate sentences passed on those who actually used force or violence are not illegal.¹⁰ Where an accused person was found with several others to have entered upon another person's land with the common object of cutting crops standing on it, and in prosecution of that object hurt was caused, it was held that the accused could not be convicted and sentenced for criminal trespass under s. 447, in addition to a conviction and sentence for rioting under this section, the common object of the riot and the intention in the criminal trespass being substantially the same in the case.¹¹ Where the common object of an unlawful assembly was to assault the police-officers in discharging their duty and hurt was actually caused to some of them, separate sentences under this section and s. 332 were disallowed and the sentence under s. 332 was only maintained.¹² Under the amended s. 35, Criminal Procedure Code, separate sentences may be passed subject to s. 71 of the Penal Code.

No separate sentences should be passed for rioting and theft, when it is not

² *Banappa Kallappa*, (1943) 46 Bom. L. R. 166, 45 Cr. L. J. 701, [1944] AIR (B) 146.

³ *Abdul Gani*, (1924) 25 Cr. L. J. 1886, [1925] AIR (C) 494.

⁴ *Ram Adhin*, (1879) 2 All. 139; *Dungar Singh*, (1884) 7 All. 29, dissenting from *Ram Partab*, (1883) 6 All. 121; *Hurgobind*, (1871) 3 N. W. P. 174; *Chhidda*, (1925) 24 A. L. J. R. 178, 27 Cr. L. J. 287, [1926] AIR (A) 225; *Mohur Mir*, (1889) 16 Cal. 725; *Ram Angutha Singh*, (1913) 40 Cal. 511; *Kapil Mandal v. Rabbanni Sheikh*, (1925) 41 C. L. J. 471, 26 Cr. L. J. 1297, [1925] AIR (C) 1039; *Sahabraj Singh*, [1933] A. L. J. R. 1178, 34 Cr. L. J. 1099, [1933] AIR (A) 819; *Parmeshwar*, (1940) 16 Luck. 51.

⁵ *Pershad*, (1885) 7 All. 414, F.B.; *Bisheshar*, (1887) 9 All. 645; *Bhagwan Singh*, (1900) P. R.

No. 4 of 1901, F.B.; *Bhagwandin Singh*, O. S. C. 125; *Raghubar*, [1939] O. W. N. 27, 40 Cr. L. J. 217, [1939] AIR (O) 91.

⁶ *Mekraj Ali Sahib*, [1939] 2 M. L. J. 36, 50 L. W. 918, [1939] M. W. N. 609.

⁷ *Ramdihal*, (1898) 3 C. W. N. 174.

⁸ *Prokash Chandra Kundu*, (1914) 41 Cal. 836.

⁹ *Gendo Uraon*, (1927) 6 Pat. 828; *Ramdarshan Mahton*, (1929) 10 P. L. T. 136, 30 Cr. L. J. 634, [1929] AIR (P) 206.

¹⁰ *Kapil Mandal v. Rabbanni Sheikh*, (1925) 41 C. L. J. 471, 26 Cr. L. J. 1297, [1925] AIR (C) 1039.

¹¹ *Bhup Singh*, (1903) 8 C. W. N. 305, 1 Cr. L. J. 139.

¹² *Gowardhan Das*, (1907) P. W. R. (Cr.) No. 38 of 1907, 6 Cr. L. J. 446.

shown that any one of the rioters individually committed theft.¹³

As regards punishment, see s. 71, *supra*.

1. **Lahore Rule.**—Riots resulting in serious injuries or even death are of frequent occurrence in this Province, and cases relating to such riots require very careful handling. A large number of persons is generally involved and the evidence is often entirely of a partisan character. There is, moreover, great danger of innocent persons being implicated along with the guilty, owing to the tendency of the parties in such cases to try to implicate falsely as many of their enemies as they can.

2. The parties generally give widely divergent versions of the riot and in such cases the Police usually prosecute members of both the parties and place the divergent versions and the evidence in support thereof before the Court. It is for the Court to ascertain in such cases which of the two versions is correct and the Court cannot shirk this duty on the ground that the Police did not ascertain which of the stories was true (*cf.* 2 P. R. 1913).

3. When both parties deliberately engage in a fight no question of the right of self-defence arises. But, otherwise, the question as to which of the parties was the aggressor and which was acting in self-defence becomes of vital importance and the Court must do its best to arrive at a finding thereon for the party acting in self-defence cannot be held to be guilty of any offence unless the right of private defence is exceeded (see sections 96-106, Indian Penal Code).

4. When both parties to a riot are prosecuted, the two cases must be tried separately and evidence in the one case cannot be treated as evidence in the other, even with the consent of the parties (IV I. L. R. Lahore 376). Similarly judgments in such cases should be written separately and care should be taken to see that the evidence in the one case is not imported into the judgment in the other. Sometimes Courts consider it convenient to dispose of such cases in a single judgment, but in doing so they are liable to mix up the evidence in the two records. Even when the Lower Courts are careful enough not to mix up the evidence, the mere fact of their having written one judgment furnishes the convicts with a ground of appeal that the directions of their Lordships of the Privy Council in *Madat Khan v. The King Emperor* (I. L. R. VIII Lah. 193) have not been followed. Such objections have to be heard, examined and decided and a good deal of the time of the appellate Court is thus wasted.

5. In recording evidence in riot cases, care should be taken to bring out distinctly as far as possible the connection of each of the accused with the crime and the actual part played by him. In the judgment the evidence against each of the accused should be discussed separately along with the evidence produced by him in defence (if any), and should be scrutinized with care. The possibility of innocent persons being falsely implicated should be always borne in mind. The mention or omission of the name of an accused person in the First Information Report, when such report is made promptly by an eye-witness, and the presence or absence of injuries on his person are worthy of consideration in this respect, though these are, of course, by no means conclusive.

6. A charge of rioting presupposes the existence of an unlawful assembly with a common object as defined in section 141 of the Indian Penal Code. No charge of rioting can be sustained against any person unless it is proved that he was a member of such an unlawful assembly, and that one or more members of the assembly used force or violence in prosecution of its common object. It is, therefore, advisable to refer to the unlawful assembly, its common object, and the use of violence in the charge, so that the essential ingredients of the offence are not lost sight of. A lucid statement of the law of unlawful assembly and riot by Plowden, J., will be found in 4 P. R., 1889.

7. When a number of offences are committed by members of an unlawful assembly in the course of the riot in prosecution of their common object, each member is guilty not only of rioting but of every other offence committed by himself or by the other members of the unlawful assembly. Under section 35 of the Criminal Procedure Code he is liable to be punished separately for each of such offences, subject to the provisions of section 71 of the Indian Penal Code. As regards the bearing of the latter section on the question of separate sentences where a series of acts of violence is committed in the course of the riot, a Full Bench ruling of the Punjab Chief Court—4 P. R., 1901—may be consulted. Section 35 of the Criminal Procedure Code enables

¹³ *Mithoo Sing v. Gopal Lal*, (1899) 3 C. W. N. 761.

the Court to make the sentences for two or more of such offences concurrent. The appropriate sentence in the case of each accused person must, of course, be determined in view of all the circumstances of the crime and the actual part played by him.¹⁴

Charge.—The common object of the assembly must be stated in the charge in order to give the accused person an opportunity of meeting it.¹⁵ A conviction for rioting, based upon a charge, which does not specify the common object of the assembly charged with rioting, is improper.¹⁶ But the omission to set out the common object does not necessarily make the conviction bad. It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice.¹⁷ It is not a general proposition of law that a conviction under this section cannot be supported whenever the common object as stated in the charge is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy on their land, and thereby to forcibly oust them, but the common object established by the facts found was to maintain possession of the land by the accused, it was held that the common object in the charge had not been substantially made out, and that the conviction under this section was bad.¹⁸ In all cases of unlawful assembly the principal and the prominent common object should form the subject of the charge and not the incidental happenings. Where the charge against the accused was that they had formed themselves into an unlawful assembly with the common object of assaulting the complainant, but it was found that the common object was to set fire to the complainant's house and not to assault him, it was held that the accused should be acquitted inasmuch as the charge as laid was not proved.¹⁹ Where the common object charged was by means of criminal force to obtain possession of certain lands which comprised two plots, one of fifteen *cottahs* and the other of five *cottahs*, and it was found by the Court that the offence was committed for obtaining possession of the five *cottahs* plot, it was held that the variance between the common object alleged and that found was not such as to invalidate the conviction.²⁰ Where a charge, as drawn up by the Magistrate, alleged several alternative common objects of the unlawful assembly, it was incumbent on the appellate Court to determine, whether it was sustainable, and, if so, which of the common objects stated had been made out.²¹ Where the common object of an unlawful assembly was clearly set out in the charge and there was no question in the lower Courts as to the common object so set out, a conviction for rioting with the object set out was good even though there might be no express finding as to the common object, if the accused had not been in any way prejudiced by the absence of such finding.²² Where the charge did not specify the property, the taking possession of which was stated to be the common object of the unlawful assembly, and its specification would have altered the whole complexion of the case, it was held that the omission had prejudiced the accused and was not cured by s. 537, cl. (a), of the Code of Criminal Procedure.²³ Where the common object of an unlawful assembly was stated in the charge to have been to cause obstruction to measurement and demarcation of Khas Mahal land, it was held that if it was not established that the land was in the actual possession of the Government, the charge as laid was not proved.²⁴

¹⁴ L. H. R. O. (1942 edn.), Vol. III, ch. IV.

¹⁵ *Sabir*, (1894) 22 Cal. 276; *Behari Mahton*, (1884) 11 Cal. 106; *Allahrakhio*, (1934) 36 Cr. L. J. 231, [1934] AIR (S) 164.

¹⁶ *Chunder Coomar Sen*, (1899) 3 C. W. N. 605; *Poresh Nath Sircar*, (1905) 33 Cal. 295; *Basiraddi*, (1894) 21 Cal. 827; *Panchanan Bose*, (1919) 30 C. L. J. 19, 23 C. W. N. 693, 20 Cr. L. J. 721, [1919] AIR (C) 305.

¹⁷ *Budhu v. Mussit. Lachminia*, (1905) 9 C. W. N. 599, 2 Cr. L. J. 275; *Gowardhan Das*, (1907) P. W. R. (Cr.) No. 38 of 1907, 6 Cr. L. J. 446; *Kudrutulla*, (1912) 39 Cal. 781; *Torap Ali*, (1926) 53 Cal. 599; *Bishnath*, (1935) 11 Luck. 343; *Abdul Sheikh*, (1915) 17 Cr. L. J. 92, [1916] AIR (C) 355.

¹⁸ *Silajit Mahto*, (1909) 36 Cal. 765; *Ritbaran Singh*, (1917) 4 P. L. W. 120, 19 Cr. L. J. 789,

[1918] AIR (P) 146; *Venkadu*, [1930] M. W. N. 80, 31 L. W. 236.

¹⁹ *Akku Mian*, (1928) 29 Cr. L. J. 390, [1928] AIR (P) 405.

²⁰ *Baboon Sheikh*, (1910) 37 Cal. 340.

²¹ *Manaruddi*, (1908) 35 Cal. 718.

²² *Dasarathi Mahapatra v. Raghu Sahu*, (1908) 8 C. L. J. 69, 12 C. W. N. 944, 8 Cr. L. J. 129; *Harinder Singh*, (1917) 2 P. L. J. 541, 18 Cr. L. J. 911, [1917] AIR (P) 453; *Dakshinamurthi Rajali*, (1917) 7 L. W. 83, [1918] M. W. N. 129, 19 Cr. L. J. 200.

²³ *Poresh Nath Sircar*, (1905) 33 Cal. 295; *Alkas Ulla*, (1936) 40 C. W. N. 1409, 38 Cr. L. J. 68, [1936] AIR (C) 429.

²⁴ *Panchanan*, (1919) 30 C. L. J. 19, 23 C. W. N. 693, 20 Cr. L. J. 721, [1919] AIR (C) 305.

Where, in a trial for offences for rioting with the common object of assaulting certain persons, specific acts of violence were charged against some of the accused persons but not against others, the latter might nevertheless be convicted in respect of assaults proved to have been committed by them on persons referred to in the statement of the common object even though the charge of rioting failed, provided the Court was satisfied that they had not been misled in their defence.²⁵ Where the members of an unlawful assembly trespassed upon the lands of several persons, and caused damage to their crops in the course of a riot, a separate offence of trespass and mischief could be charged against the members of the assembly in respect of each separate holding which was damaged, and acquittal or conviction in respect of damage caused to the holdings of some of the owners was no bar to their trial for offences in connection with the properties of the other owners.¹ In cases of rioting it is usual to charge the accused individually also for acts that they are said to have committed. If that is not done the accused may have cause for argument that when the main charge of rioting and acting in concert in pursuance of a common intention has failed, they ought not to be convicted for the particular acts committed by them.²

In a trial for a charge under this section, it is not illegal to frame charges under ss. 324 and 325 against particular accused persons, although these offences were committed by them outside the scope of the common object mentioned in the charge under this section, if all the acts with which the accused are charged form one transaction.³ The offence of rioting does not of itself connote the causing of hurt and there can be no conviction for causing hurt under s. 323 after an acquittal of the charge of rioting if it is not indicated in the charge that the accused did cause hurt.⁴

Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt, it is sufficient to state in the charge that the common object was "to assault" the persons to whom hurt was caused.⁵

The charge should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, viz., in—, committed the offence of rioting, and thereby committed an offence punishable under s. 147 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

148. Whoever is guilty of rioting, being armed¹ with a deadly weapon² or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Rioting armed
with deadly wea-
pon.

COMMENT.

The offence under this section is an aggravated form of the offence under the last section. Enhanced punishment is provided if a person is armed with a deadly weapon. This section bears the same relation to s. 147 just as s. 144 does to s. 143. It does not create a separate offence.⁶

1. 'Being armed'.—If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under this section. It is only the actual person so armed who can be charged under it.⁷ The

²⁵ *Mattu Gope*, (1929) 9 Pat. 642.

¹ *Ghana Mahapatra*, (1929) 31 Cr. L. J. 472, [1929] AIR (P) 710.

² *Venkata Reddi*, [1941] M. W. N. 374, (1941) 42 Cr. L. J. 798, 53 L. W. 556, [1941] AIR (M) 598.

³ *Rasul*, (1928) 3 Luck. 664, 666.

⁴ *Balwant Ambadas*, [1941] Nag. 139.

⁵ *Chhanka Dhanuk*, (1927) 6 Pat. 832.

⁶ *Subbarao*, [1941] Mad. 592.

⁷ *Sabir*, (1894) 22 Cal. 276; *Ram Saran Rai*, (1899) 19 A. W. N. 77; *Bhujun Pauray*, (1865)

4 W. R. (Cr.) 8; *Choitano Ranto*, (1915) 16 Cr. L. J. 446, [1916] AIR (M) 788; *Ratan Lal*, (1933) 8 Luck. 570; *Fordil*, (1934) 35 P. L. R. 518, 36 Cr. L. J. 396, [1934] AIR (L) 632; *Bansropan Singh*, (1937) 39 Cr. L. J. 2, [1938] P. W. N. 97, 18 P. L. T. 760, [1937] AIR (P) 603; *Mohammad Ishaq Madari*, (1941) 43 P. L. R. 712, 43 Cr. L. J. 428, [1942] AIR (L) 59; *Baldeosingh*, [1940] N. L. J. 46, (1939) 41 Cr. L. J. 860, [1940] AIR (N) 120. See, however, *Srihari Shome v. Lal Khan*, (1900) 5 C. W. N. 250, as regards s. 144.

Madras High Court in a case held that a person who is a member of an unlawful assembly can be guilty under this section, when he himself is not armed with a deadly weapon, but some other member of the assembly is so armed.⁸ But this decision has been doubted in a subsequent case in which it is laid down that s. 149 of the Code can hardly have been intended to make rioters constructively guilty of the offence of rioting. That section is intended to lay upon all the members of an unlawful assembly responsibility for any offences, other than the offence of rioting, committed by any member of the unlawful assembly in prosecution of the common object.⁹ A person cannot be found guilty under this section unless he actually has a dangerous weapon in his hands.¹⁰

2. 'Deadly weapon'.—Such as fire-arms, swords, etc. The question whether or not a club (*lathi*) is a deadly weapon is a question of fact to be determined on the special circumstances of each case.¹¹ A *lathi* in itself is not a deadly weapon, unless and until it is used on the head or on some vital part of a person.¹² Stout male bamboos are deadly weapons.¹³

PRACTICE.

Evidence.—Prove points (1) to (5) as in s. 147; and further (6) That the accused was armed with a deadly weapon, or with something which was likely to cause death, when used as a deadly weapon.

A charge under this section read with s. 149 is incongruous and improper. A person can be convicted under this section only where there is a finding that the particular accused was present in the mob armed with a deadly weapon.¹⁴

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, were a member of an unlawful assembly, and did, in prosecution of the common object of such assembly, viz., in—, commit the offence of rioting with a deadly weapon (*or with something which used as a weapon of offence was likely to cause death*) to wit—, and thereby committed an offence punishable under s. 148 of the Indian Penal Code, and within my cognizance.¹⁵

And I hereby direct that you be tried on the said charge.

149. If an offence is committed by any member of an unlawful assembly¹ in prosecution of the common object of that assembly,² or such as the members of that assembly knew to be likely to be committed³ in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

COMMENT.

Principle.—An accused person whose case falls within the terms of this section cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object.¹⁶ "S. 149 declares in substance that every member of an unlawful assembly

⁸ *Subbigadu*, (1926) 50 M. L. J. 559, 562, 37 Cr. L. J. 894, 895, [1926] AIR (M) 741. See, to the same effect, *Suppiah Servai*, [1929] M. W. N. 888.

⁹ *Subbarao*, [1941] Mad. 592.

¹⁰ *Muthuswami Goundan*, [1942] 1 M. L. J. 498, [1942] M. W. N. 294, (1941) 55 L. W. 856, 43 Cr. L. J. 745, [1942] AIR (M) 420.

¹¹ *Nathu*, (1892) 15 All. 19.

¹² *Parma Singh*, (1911) 12 Cr. L. J. 108; *Ratan Lal*, (1938) 8 Luck. 570; *Raja Ram*, (1938)

40 Cr. L. J. 14, [1938] AIR (O) 256.

¹³ *Krishna Chetti*, (1883) 1 Weir 70.

¹⁴ *Jivan Raut*, (1922) 4 P. L. T. 502, 24 Cr. L. J. 407.

¹⁵ (1865) 4 W. R. (Cr. L.) 9 and 10; (1867) 8 W. R. (Cr. L.) 17.

¹⁶ *Bisheshar*, (1887) 9 All. 645; *Theethumalai Gaunder*, (1924) 47 Mad. 746, F.B.; *Chhidda*, (1925) 24 A. L. J. R. 178, 27 Cr. L. J. 287, [1926] AIR (A) 225.

is responsible for an offence committed by another member, or the other members, in prosecution of the common object of such assembly, or one which he must have known was reasonably likely to be committed in the prosecution of such common object. In other words, this provision, so to speak, takes him out of the region of abetment, and makes him responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly."¹⁷ If it is not possible to bring home the guilt to the accused under s. 325 read with this section then *a fortiori* it would be more difficult to bring home the guilt with the aid of s. 34.¹⁸

Sections 34 and 149.—Section 34 and this section deal with liability for constructive criminality, i.e., liability for an offence not committed by the person charged.

"Sect. 149...creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object—namely, one of those named in s. 141 [*The Queen v. Sabid Ali*¹⁹] and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of s. 34, is replaced in s. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but s. 149 cannot at any rate relegate s. 34 to the position of dealing only with joint action by the commission of indistinguishably similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."²⁰ Section 34 refers to cases in which several persons both intend to do and do an act; it does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases s. 149 may be applicable but s. 34 is not.²¹ On the other hand, if several persons numbering five or more, both do an act and intend to do it, both s. 34 and s. 149 may apply, since the singular "member" in s. 149 includes the plural (s. 9, *supra*). The basis of constructive guilt under s. 149 is mere membership of an unlawful assembly; the basis under s. 34 is participation in some action with the common intention of committing a crime. In a case to which s. 149 does not apply, all the accused persons can be found guilty of the offence constructively under s. 34 only on a finding that each of them took some part or other—in or towards the commission of the offence.²² Thus there is a clear distinction between s. 34 and this section.²³

Scope.—This section is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. It is divided into two parts: (1) an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly; and (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object. In order to bring a case within the first part the act must be one which, upon the evidence, appears to have been done with a view to accomplish the common object. "At first, there does not seem to be much distinction between the two parts of the section, and...the cases which would be within the first offences committed in prosecution of the common object would be, generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But...there may be cases which would come within the second part, and not within the first...Persons assemble with a view to attack and plunder the

¹⁷ Per Straight, J., in *Ram Partab*, (1883) 6 All. 121, 123.

¹⁸ *Bhabatram Mahto*, (1925) 7 P. L. T. 388, 390, 26 Cr. L. J. 1601, [1925] AIR (P) 706.

¹⁹ (1873) 20 W. R. (Cr.) 5, 11 Beng. L. R. 347, 349, F.B.

²⁰ *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 52, 52 Cal. 197, 27 Bom. L. R. 148; *James Dowdall*, (1936) 31 N. L. R. 215 (Sup.). The view that s. 149 creates no separate offence (*Theethumalai Gounder*, (1924) 47 Mad. 746, F.B.;

Chhedi Singh, (1924) 3 Pat. 870) is overruled by the Privy Council.

²¹ *Aniruddha Mana*, (1924) 26 Cr. L. J. 827, 829, [1925] AIR (C) 913.

²² *Fazoo Khan v. Jatoo Khan*, (1931) 35 C. W. N. 463, 33 Cr. L. J. 92, [1931] AIR (C) 643; *Mohammad Nawaz*, (1938) 40 P. L. R. 851, 39 Cr. L. J. 781, [1938] AIR (L) 548.

²³ *Parmeshwar Din*, [1941] O. W. N. 981, 988, (1941) 42 Cr. L. J. 758, [1941] AIR (O) 517.

house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object; and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house, and thereby commit an offence. Such a case might come within the second part."²⁴

In *Sabid Ali's* case, Phear, J., says that "inasmuch as the continuance of the unlawful assembly is, by the definition of section 141, made contemporaneous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words 'prosecution of the common object' with some difference of meaning in these two passages...(the two parts of the section). Also the mere fact that the Legislature thought fit to express the *second* alternative appears to show very distinctly that it did not intend the words 'in prosecution', which are found in the *first*, to be equivalent to 'during the prosecution'; for if they were, then the second alternative would have clearly been unnecessary...an offence, in order to fall within the first of the above alternatives, i.e., in order to be committed *in the prosecution* of the common object, must be immediately connected with that common object by virtue of the nature of the object...an offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself."²⁵

In dealing with cases under this section, while on the one hand it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his associates, which he himself neither intended, nor knew to be likely to be committed, on the other hand, it is equally necessary for the protection of the peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. These two cases respectively emphasize the necessity of keeping these considerations in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of this section may be different on different members of the same unlawful assembly.¹

This section is inapplicable to an offence under s. 396, but where an unlawful assembly has existed from the very outset before a dacoity with murder is committed in the course of a riot, this section is applicable.²

This section is not intended to make rioters constructively guilty of the offence of rioting.³

Ingredients.—The section has the following essentials :—

1. Commission of an offence by any member of an unlawful assembly.
2. Such offence must have been committed in prosecution of the common object of that assembly; or must be such as the members of that assembly knew to be likely to be committed.

1. 'Offence is committed'.—As to the meaning of 'offence' see s. 40; and of 'unlawful assembly', s. 141. This section only applies where there is an unlawful assembly.⁴ The word 'offence' in this section means only an offence under the Penal

²⁴ *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 10, 11, 11 Beng. L. R. 347, 362, F.B.; *Krishnarao Narayanrao*, (1903) 5 Bom. L. R. 1023; *Behari*, (1924) 26 Cr. L. J. 154, [1924] AIR (A) 670; *Faiz Bakhsh*, (1946) 48 Cr. L. J. 269, 48 P. L. R. 425.

²⁵ *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 8, 9, 11 Beng. L. R. 347, 355, 356, F.B.

¹ *Jahiruddin*, (1894) 22 Cal. 306; *Adil Moha-*

med, (1908) 8 C. L. J. 561, 9 Cr. L. J. 32. See also *Ram Sarup Rai*, (1901) 6 C. W. N. 98; *Dalal*, (1945) 48 P. L. R. 106, (1945) 47 Cr. L. J. 730, [1946] AIR (L) 222.

² *Bishunath*, [1935] O. W. N. 145.

³ *Subbarao*, [1941] Mad. 592.

⁴ *Maulu*, (1923) 26 Cr. L. J. 531, [1925] AIR (L) 532.

Code. It does not include offences under a special Act. This section, therefore, cannot be applied to offences created by the Indian Railways Act, 1890,⁵ or the Defence of India Rules, 1939.⁶ Where the accused were members of an unlawful assembly some other members of which removed railway rails, sleepers, etc., and there was no evidence that the accused themselves took any active part in any act specified by s. 126 of the Indian Railways Act, it was held that the accused could not be held constructively guilty of an offence under the Railways Act.⁷

2. 'By any member of an unlawful assembly.'—The section applies equally in cases where offences are committed by a single member of the assembly and in cases where offences are committed by two or more members of the assembly acting in furtherance of a common intention. If an offence is committed, whether by a single member of the assembly or by a group of members, the other members of the assembly may be liable under this section.⁸ M and his party were ploughing certain disputed land when the members of the complainant's party came up to interfere with them and to turn them out. The Sessions Judge found that the latter were not justified in forcibly preventing the ploughing of M's party and that on the other hand M was not justified in striking B (one of the complainant's party) on the head and thereby causing his death. It was held that as the members of the deceased's party were the aggressors, their object having been to dispossess the other party from the land, M's party were perfectly justified in exercising their right of private defence, and if M exceeded that right, he, and he alone, was guilty of the offence and this section did not operate to make M's companions equally guilty with him, as they were not at the time members of an unlawful assembly.⁹

3. 'In prosecution of the common object of that assembly.'—This phrase does not mean the same as the phrase "during the prosecution of the common object of the assembly." It means that the offence committed was *immediately* connected with the common object of the unlawful assembly, of which the accused were members. In other words, the act must be one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the unlawful assembly.¹⁰ The words "in prosecution of the common object" in the first clause of this section must be strictly construed as equivalent to "in order to attain the common object." When a person has already attained or caught up with his object and passes beyond it he can no longer be said to be pursuing or prosecuting it.¹¹ The test whether an offence is committed in prosecution of the common object is whether the common object is prosecuted in fact as well as in the intention of the doer. When that is the case, every person who is engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting. No offence, however, executes or tends to execute the common object, unless the commission of that offence is involved in the common object. When this is not the case, the offence committed not being committed in prosecution of the common object, in its strict sense, may yet fall under the second branch.¹² The existence of a common object before the commencement of the fight is not necessary. It is enough if the common object is adopted by all the accused.¹³ See ss. 34 and 111, *supra*.

The expression 'common object' is not used in the same sense as 'the common intention' in s. 34, which means the intention of all whatever it may have been. The expression refers to one of the five objects mentioned in s. 141. The object of an assembly as a whole may not be the same as the intention which several persons may

⁵ *Inder Sain*, (1920) 21 Cr. L. J. 418, [1920] AIR (L) 144; *Aydooss*, (1922) 17 L. W. 21, [1922] M. W. N. 800, 24 Cr. L. J. 360, (1923) AIR (M) 187; *Pavanur Athamu*, (1924) 26 Cr. L. J. 747, 20 L. W. 914, [1925] AIR (M) 239.

⁶ *Dukhan Das*, (1943) 23 Pat. 139.

⁷ *Aydooss*, (1922) 17 L. W. 21, [1922] M. W. N. 800, 24 Cr. L. J. 360, [1923] AIR (M) 187; *Vasudeva Mudali*, (1929) 52 Mad. 882.

⁸ *Legal Remembrancer, Bengal v. Golok Tikadar*, [1942] 1 Cal. 181. Observations of Field, J., in *Jhubboo Mahton*, (1882) 8 Cal. 739, 752, dissented from.

⁹ *Mihan Singh*, (1914) P. R. No. 26 of 1914, 16 Cr. L. J. 60, [1914] AIR (L) 557.

¹⁰ *Raghumandan alias Nandan*, (1934) 10 Luck. 320; *Ahmed*, (1926) 21 S. L. R. 159, 28 Cr. L. J. 61, [1927] AIR (S) 108.

¹¹ *Kumaran*, (1942) 1 M. L. J. 460, [1942] M. W. N. 298, (1942) 55 L. W. 192, 43 Cr. L. J. 813, [1942] AIR (M) 446.

¹² *Madat Khan*, (1887) P. R. No. 61 of 1887; *Rasul*, (1888) P. R. No. 4 of 1889; *Dhian Singh*, (1915) P. R. No. 16 of 1915, 16 Cr. L. J. 689; *Fatmaya*, [1942] Lah. 470.

¹³ *Golla Hanumappa*, (1911) 35 Mad. 243.

have when in pursuance of that intention they perform a criminal act and it may well be that the object of the assembly was lawful whereas the intention common to those of the assembly who jointly committed a criminal act was in itself criminal and the joint criminal act must be equally imputed to all of them.¹⁴

The Patna High Court held that where the principal offender in a case of rioting is convicted of an offence the others cannot be held to have committed constructively an offence different from the offence found to have been committed by the principal offender. Therefore, where the principal offender was convicted under s. 302, it was held that the others could not be convicted under s. 304 read with this section.¹⁵ This view has been dissented from by the Court of the Judicial Commissioner of Sind which is of opinion that it is not necessary that all the members of an unlawful assembly should either be found guilty of and convicted for an offence of which the principal is convicted or that they should all be acquitted. It is permissible to convict them of a minor offence which is included in the offence for which the principal is convicted.¹⁶ The Patna High Court has in a later case dissented from its earlier decision in *Ram Prasad Singh* and held that in construing s. 149 a question arises whether a member of the assembly is guilty necessarily of the same offence as the principal offender or whether it is to be determined, with reference to the facts of the case, what offence the members must have been known to be likely to be committed and whether if such offence is a minor offence they should be convicted accordingly. The latter construction appears to be more in accordance with the intention of the legislature on a reading of the words of the section. This view is consistent with the principles laid down in ss. 35 and 38 of the Code. And the principle of ss. 38 and 110 applies to offences under this section and the liability of individual members of an unlawful assembly under the latter section depends on the intention or knowledge of the members.¹⁷ Once the Court can find that an offence has been committed by some member or members of an unlawful assembly in prosecution of the common object, then whether the principal offender has been convicted for that offence or not, the other members may be constructively convicted of that offence, provided they are found to have had the necessary intention or knowledge.

It is not correct to say that when a member of an unlawful assembly is to be found constructively guilty of an offence under this section, it must be the same offence of which the principal is convicted and not some other offence.¹⁸

4. 'Or such as the members of that assembly knew to be likely to be committed.'—The word 'or' divides the definition into two branches.¹⁹ It is not used in an alternative sense.²⁰ The expression "such as the members of that assembly knew to be likely to be committed" imports at least an expectation founded upon facts known to all the members of the assembly that an offence of the particular kind committed would be committed: something more than a speculation that such an offence might happen to be committed.²¹ The word "knew" indicates a state of mind at the time of the commission of the offence and not the knowledge acquired in the light of subsequent events.²² The word "knew" is advisedly used, and cannot be made to bear the sense of "might have known".²³ If the offence be such as the members of the assembly knew to be likely to be committed by a person engaged in prosecuting the common object, and acting with the purpose of executing it, it may fairly be imputed to the other members of the assembly.

Thus this section does not subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it were proved he knew it to be likely

¹⁴ *Bhundu Das*, (1928) 7 Pat. 758, 760; *Rahman*, (1938) 20 Lah. 77.

¹⁵ *Ram Prasad Singh*, (1922) 1 Pat. 753.

¹⁶ *Ahmed*, (1926) 21 S. L. R. 159, 28 Cr. L. J. 61, [1927] AIR (S) 108.

¹⁷ *Bhagwat Singh*, (1935) 17 P. L. T. 350, [1936] P. W. N. 362, 37 Cr. L. J. 630, [1936] AIR (P) 481.

¹⁸ *U. N. Singh*, (1946) 25 Pat. 215, approving *Bhagwat Singh*, sup., and doubting *Ramcharan*, (1945) 24 Pat. 766; *Sidhu Gope*, (1945) 24 Pat. 578.

¹⁹ *Madat Khan*, (1887) P. R. No. 61 of 1887.

²⁰ *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 11, 11 Beng. L. R. 347, F.B.

²¹ *Madat Khan*, (1887) P. R. No. 61 of 1887; *Adalat*, (1945) 24 Pat. 519; *Dalal*, (1945) 48 P. L. R. 106, (1945) 47 Cr. L. J. 730, [1946] AIR (L) 222.

²² *Khamiso*, (1912) 6 S. L. R. 101, 13 Cr. L. J. 730.

²³ *Sabid Ali*, (1873) 20 W. R. Cr. 5, 12, 11 Beng. L. R. 347, F.B.; *Dial Singh*, (1926) 27 Cr. L. J. 547, [1926] AIR (L) 419.

that such offence would be so committed.²⁴

Culpable homicide.—To bring the offence of murder within this section, it must either necessarily flow from the prosecution of the common object or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. The offence of murder, as strictly defined by the Code, requires a previous intention or knowledge in the perpetrator; and to 'know' that murder is likely to be committed, is to know that some member of the assembly has such previous intention or knowledge. This interpretation of the section, so far as murder is concerned, is confirmed by comparing ss. 398 and 396 with s. 148 and this section.²⁵ Members of a party setting out heavily armed for the purpose of committing dacoity must know that there is every likelihood of something occurring either on their way or at the scene of dacoity to interfere with their criminal plans and that their deliberate intention is to use their arms wherever necessary, either to effect the object in view or to avoid the risk of capture at any stage of the adventure, and therefore if some of the members of the party fire upon the police killing any one, all are guilty of the offence of murder under this section and s. 302.¹ Where in a free fight between two parties a person of one party received injuries from the other party, from the result of which he died but the evidence did not disclose who of the participants was the actual person to inflict the injuries which caused the death, it was held that it was not a correct view of law that the culpability could not be brought home to all the persons taking part in the fight.²

In order to sustain a conviction under this section and s. 304, it must be shown that there was an unlawful assembly whose common object was to commit an offence under s. 304 and that the accused was one of them.³ Where the members of an unlawful assembly assailed their victim and one of them, a Sikh, who was wearing a *kirpan* (a dagger-like weapon) unsheathed it and caused a fatal blow, it was held that all the members of the unlawful assembly could not be constructively held liable for the causing of death simply because one of them was wearing a *kirpan*, a weapon which is carried by most Sikhs as an emblem of their religion and not for the purposes of offence or defence.⁴

Where a prisoner is constructively guilty of murder under s. 34, it is doubtful if he can be said to have committed the offence of murder within the meaning of this section, so as to make the other prisoners, by a double construction, guilty of murder.⁵

CASES.

Act done in prosecution of common object.—Where a member of an unlawful assembly caused a fatal wound when the unlawful assembly was prosecuting its common object, all the members of the unlawful assembly were equally held to be responsible.⁶ Where persons joined an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encouraged them to do so, they were held to be in the same position as those members of the unlawful assembly who struck the blows.⁷ Where each of several persons took part in beating a person so as to break eighteen ribs and cause his death, each of them was held to be guilty, as a principal, of the murder of the deceased.⁸ Where two members of an unlawful assembly used spears and deliberately pierced another man through the chest and abdomen, with the knowledge that death was likely to ensue, although without proof of any intention to cause death, all the members of the unlawful assembly were held guilty of murder.⁹ Where a small compact body of men armed with clubs,

²⁴ *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 11, 11 Beng. L. R. 347, F.B.; *Hardeo Singh*, (1920) 3 U. P. L. R. (P) 29, 22 Cr. L. J. 267, [1920] AIR (P) 795.

²⁵ *Ibid.*, p. 12; *Mahmadkhan Sultankhan*, (1907) 9 Bom. L. R. 153, 5 Cr. L. J. 168; *Imam Din*, (1920) 3 L. L. J. 245; *Rahman*, (1938) 20 Lah. 77.

¹ *Dhian Singh*, (1915) P. R. No. 16 of 1916, 16 Cr. L. J. 689, [1915] AIR (L) 418.

² *Gurdin*, (1926) 1 Luck. 180.

³ *Ramaswami Tevan*, [1921] 14 L. W. 588, 23 Cr. L. J. 700, (1921) AIR (M) 687.

⁴ *Gian Singh*, (1920) 31 Cr. L. J. 448, (1930)

AIR (L) 532; *Raghumandan*, (1934) 10 Luck. 320.

⁵ *Jhubboo Mahton*, (1882) 8 Cal. 739, 752.

⁶ *Sohna*, (1939) 41 P. L. R. 802, 41 Cr. L. J. 348, [1940] AIR (L) 53.

⁷ *Dushruth Roy*, (1867) 7 W. R. (Cr.) 58; *Kondayya*, [1940] 1 M. L. J. 775, [1940] M. W. N. 242, (1939) 51 L. W. 484, 41 Cr. L. J. 898, [1940] AIR (M) 298.

⁸ *Gour Chunder Das*, (1875) 24 W. R. (Cr.) 5; *Sheo Balak*, (1926) 3 O. W. N. 411, 27 Cr. L. J. 763, [1926] AIR (O) 367; *Rahman*, [1939] Lah. 77.

⁹ *Nazoo Fakir*, (1865) 4 W. R. (Cr.) 26; *Sohna*, (1939) 41 P. L. R. 802, 41 Cr. L. J. 348, [1940] AIR (L) 53.

and headed by a man carrying a gun, endeavoured to take forcible possession of certain lands, and one of the opponents was shot by their leader, it was held that all of them were guilty of murder.¹⁰ The accused's cattle were doing considerable damage to the crops belonging to complainants who drove them to the cattle-pound. While they were on the way to the pound the accused came armed with clubs, to rescue the cattle. At the command given by one of them, the others assaulted the deceased and beat him with the result that he died. It was held that the offence was committed in pursuance of the common object and each one of the accused was guilty of an offence under s. 302.¹¹ Where a number of persons set out to abduct women and two of them were armed with pistols and a person was shot in the prosecution of the common object, it was held that the obvious inference to be drawn was that the pistols were intended to be used, if necessary, to overcome any resistance that might be offered and the members of the gang knew that murder was very likely to be committed, and that the accused were constructively guilty of murder though they were not the murderers.¹² Where persons forming an unlawful assembly set out to beat a person and, not finding him, began to loot people and did not disperse when the police arrived but attacked the police and killed a police-officer, they were held guilty of committing offences under ss. 302 and 396 read with this section.¹³ Seven accused persons armed with lathis went to the house of the deceased with the common object of abducting a woman and murdering the deceased. They divided themselves into two batches, one entrusted to abduct and another to murder. The murder was committed by the second batch. It was held (acquitting one of the seven accused) that all the six assailants were guilty of murder under s. 302, because they were members of an unlawful assembly, the common object of which was to abduct deceased's wife and murder the deceased.¹⁴ Where the common object of an unlawful assembly was to attack two persons and in furtherance of that object some of the accused attacked and killed one of the two, it was held that all the accused were guilty under s. 302 read with this section.¹⁵ The party of the complainants and also that of the accused had assembled at a certain house to celebrate a wedding. The complainants' party consisted of five persons and that of the accused six. One of the complainants' party refused to allow the accused's party to join in the *hugga* for certain acts of the accused. This was very irritating to the accused, two of whom left and shortly afterwards returned with the other accused armed with *chavis* and *lathis*. The complainants, who were unarmed except for a spade which one of them had picked up to defend himself, were ready and willing to fight and did not wait to be attacked but went out of the house to meet the accused. A free fight ensued in which one of the complainants' party received a fatal injury. It was held that the accused were guilty under ss. 326 and 148 read with this section.¹⁶

Person retiring from fight has no further common object with those continuing it.—A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement, a member of the second faction was killed. It was held that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under this section, be made liable for the subsequent murder.¹⁷

Persons having no common object to commit particular offence are not liable for commission of it by others.—Where six persons at first united in abusing another and afterwards one of the six ordered him to be seized,—three others executed the order, and in doing so killed the person abused,—it was held that the remaining two accused were not liable to punishment, as the party had no illegal object in common

¹⁰ *Hari Singh*, (1878) 3 C. L. R. 49; *Golam Arfin*, (1870) 4 Beng. L. R. Appx. 47, 13 W. R. (Cr.) 33.

¹¹ *Rasul Khan*, (1915) 13 A. L. J. R. 470, 16 Cr. L. J. 459, [1914] AIR (A) 281.

¹² *Mansha Singh*, (1924) 7 L. L. J. 51, 26 Cr. L. J. 763, [1925] AIR (L) 371; *Bashir*, (1927) 4 O. W. N. 313, 28 Cr. L. J. 453, [1927] AIR (O) 609.

¹³ *Bishunath*, [1935] O. W. N. 145; *Qamrul*

Hasan, [1941] O. W. N. 1166, [1941] 43 Cr. L. J. 115, [1942] AIR (O) 60.

¹⁴ *Ramji Lal*, [1940] Lah. 554.

¹⁵ *Parmeshwar Din*, [1941] O. W. N. 981, (1941) 42 Cr. L. J. 758, [1941] AIR (O) 517.

¹⁶ *Bakhu*, (1941) 43 P. L. R. 729, 43 Cr. L. J. 443, [1942] AIR (L) 40.

¹⁷ *Kabil Casee*, (1869) 3 Beng. L. R. (A. Cr. J.) 1; *Raghunandan*, (1912) 15 O. C. 183, 13 Cr. L. J. 556.

until the deceased was ordered to be seized, and the evidence went to show that they took no part in it, but were merely unarmed spectators.¹⁸ Similarly, where a number of persons went together to eject a man from a plot of land, the title of which was in dispute, and upon a vigorous resistance being made, one of the party who was armed with a gun, fired at, and killed, the resisting person, it was held that he was guilty of murder, but that the other members of the unlawful assembly were not guilty of murder under this section as the act of killing was not the common object of the assembly, or "likely to be committed in the prosecution of that object."¹⁹ A murder was committed by one of a number of persons concerned in an unlawful assembly, one or two of them being armed with weapons of a deadly nature. It was held that the accused who actually took life was guilty of murder, but that the others were guilty of the minor offence of rioting. The question whether the other persons were guilty of murder depended upon the consideration whether such persons knew that a deadly weapon was likely to be used with a fatal result in the prosecution of their common object; and that though it might be presumed, in the case of a number of persons armed with deadly weapons going out to commit an act of violence, that they knew that those weapons might be used with a fatal result, the presumption was still one of fact and must be reasonable in the particular circumstances of the case.²⁰ A gang of persons, making preparations to commit dacoity, was discovered in the limits of a certain village and was pursued by villagers who seized and arrested two accused who were members of the gang. Shortly afterwards, a dacoit at large fired a gun and killed one of the villagers. It was held that the two accused were not guilty of murder as there could be no common object between them and the other after they separated.²¹ Where, after the object of an unlawful assembly was accomplished, and the opposite party driven away, one of the members entered into an altercation with another and wounded him with a fish-spear, it was held that he alone was responsible for the offence.²² Where a riotous mob started pelting stones, etc., with the intention of wreaking vengeance on the proprietor of a Dramatic Troupe for his refusal to give away the day's takings to the Congress and Khilafat funds, but when the police started fire, the common object changed into one of vengeance on the Deputy Superintendent consequent on one of the mob having been shot dead, it was held that persons who were present in the mob only at the first attack were not guilty of offences committed in the second attack and conversely those present only at the second attack were not guilty of the offences committed in the first attack.²³ Where the common object of the rioters was the abducting and murdering of a certain person the injuries caused by one or two of them to another person being the individual act of particular rioters and not in the prosecution of the common object, the other rioters were not guilty of an offence under s. 325 read with this section.²⁴ Where a gang, whose common object was to commit dacoity, was arrested and one of the members of the gang with the intention to make his escape fired at the pursuers and shot a person dead, the other members of the gang could not be convicted of an offence under s. 302 read with this section notwithstanding the fact that the members of the gang carried arms in order to overawe the people of the village or of the house in which they intended to commit dacoity and overcome any resistance.²⁵ Where in a case of rioting and burning of houses, the common intention of all the accused was not to burn houses, it was held that all the accused could not be convicted under s. 436 read with this section.¹ Where the accused's party went to a field to protest against the harvesting of the same by the complainant's party and the latter abandoned the reaping and thereafter some of the accused assaulted the complainant's party, it was held that as some section or individual members of the accused's party took the matter into their own hands and attacked people on the other side that would not make all the

¹⁸ *Foiz Ali*, (1864) 1 W. R. (Cr.) 20; *Sheoraj Singh*, (1926) 48 All. 375.

¹⁹ *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 11 Beng. L. R. 347, F.B. See *Chundersungjee*, (1869) Unrep. Cr. C. 14; *Nihal Singh*, (1927) 28 P. L. R. 674, 29 Cr. L. J. 35, [1927] AIR (L) 516; *Sajwan Mahto*, (1942) 23 P. L. T. 684, [1942] P. W. N. 219.

²⁰ *Rama Muppan*, (1879) 3 Mad. Jur. 416. See *Ram Khelawan Singh*, (1909) 36 Cal. 827.

²¹ *Hari Bijal*, (1915) 17 Bom. L. R. 906,

16 Cr. L. J. 745, [1915] AIR (B) 247.

²² *Binod*, (1875) 24 W. R. (Cr.) 66.

²³ *Ganapathi Sarma*, [1923] M. W. N. 104, 17 L. W. 197, 24 Cr. L. J. 531, [1923] AIR (M) 369.

²⁴ *Ratan*, (1932) 8 Luck. 301.

²⁵ *Lekha Singh*, (1932) 9 O. W. N. 977, 34 Cr. L. J. 101, [1933] AIR (O) 53.

¹ *Gaya Prasad*, [1941] O. W. N. 852, (1941) 42 Cr. L. J. 595, [1941] AIR (O) 487.

persons who had gone there merely to protest and took no part in the assault and did not share the common object of the assailants liable to punishment.² A crowd of Muslims, the common object of which was to obstruct a procession organized by the Hindus, threw stones and committed other acts of violence. One of the crowd stabbed with knife the Police Sub-Inspector who was leading the procession. The accused was shown to have participated in throwing stones at the processionists. It was held that the accused were guilty of rioting for throwing stones at the procession. They could not be held constructively liable under this section read with s. 302 for the murder of the Sub-Inspector because the stabbing of the Sub-Inspector was an isolated act by an individual rioter and it could not be said that the other members of the unlawful assembly knew it to be likely that the stabbing of the Sub-Inspector would be committed in prosecution of the common object.³

PRACTICE.

Evidence.—Prove (1) that there was an unlawful assembly.

(2) That the accused was a member of that unlawful assembly (s. 142).

(3) That he had intentionally joined or continued in such unlawful assembly.

(4) That an offence was committed by a member of such assembly.

(5) That such offence was committed (a) in prosecution of the common object of such assembly, or (b) such as the members of the assembly knew to be likely to be committed in prosecution of the common object, etc.

It is essential to prove that the person sought to be charged with an offence by the aid of this section was a member of the unlawful assembly at the time the offence was committed, and the burden of proof lies on the prosecution. Moreover, before an offence under any other section can be imputed under this section to all the persons who were members of an unlawful assembly at the time of its commission, it is necessary to show, among other things, that the offence sought to be imputed has been committed by a member of the assembly either known or unknown.⁴

When it is established that the number of offenders was five or more than five, the mere fact that some of them could not be identified does not affect the application of this section.⁵

If there are two explanations of the presence of a particular person on a particular occasion, one of which is lawful and the other of which is unlawful, the Court would not, as against an accused person, assume the unlawful intention.⁶

It may well be that a perfectly lawful assembly of citizens may become later a riotous mob and it may be that in the mob there will be a number of innocent people who do not share the common object of the rioters. When a person is found to be amongst a mob of rioters the law will presume that he shares their common object and intention. If he does not share that common object and intention, the onus is upon him to prove his innocence. What the common object and intention of a mob is, can only be inferred from its actions.⁷

Procedure.—Same as that for the offence committed. Not compoundable.

The Calcutta High Court has held that where a person is charged by implication under this section, he cannot be convicted of the substantive offence.⁸ The Madras High Court has dissented from this view and has laid down that when a charge has been framed under s. 326 and this section a conviction under s. 326 alone is not necessarily bad and that the legality of the conviction depends upon the question whether the accused was materially prejudiced by any omission in the charge.⁹ The same is the view of the Patna High Court.¹⁰ Where the accused have been acquitted

² *Janak Singh*, (1940) 23 P. L. T. 699, 43 Cr. L. J. 915, [1942] AIR (P) 444.

³ *Mohammad Ishaq Madari*, (1941) 43 P. L. R. 712, 43 Cr. L. J. 428, [1942] AIR (L) 59.

⁴ *Rasul*, (1888) P. R. No. 4 of 1889.

⁵ *Mangal Singh*, (1945) 48 P. L. R. 67, [1946] AIR (L) 309, (1945) 47 Cr. L. J. 909.

⁶ *Kammoon*, [1942] A. L. J. R. 255, (1941) 43 Cr. L. J. 654, [1942] AIR (A) 225.

⁷ *Rahmhit*, (1934) 35 Cr. L. J. 919, [1934] AIR (A) 776.

⁸ *Reazuddin*, (1912) 16 C. W. N. 1077, 18 Cr. L. J. 502; *Baij Nath*, (1924) 1 O. W. N. 588, 26 Cr. L. J. 513, [1925] AIR (O) 425.

⁹ *Theethumalai Gounder*, (1924) 47 Mad. 746, F.B.

¹⁰ *Rital Singh*, (1923) 5 P. L. T. 198, 24 Cr. L. J. 813.

of rioting they cannot be convicted of grievous hurt under s. 325 by the application of this section, where it has not been found that they or any of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object.¹¹

Order to give security.—The accused cannot be ordered to give security under s. 106 of the Criminal Procedure Code if they have been convicted of any offence read with s. 149 of the Penal Code. Where a Magistrate considers an order under s. 106, Criminal Procedure Code, is essential in the interest of public tranquillity, he should acquit the accused of offences read with s. 149 and restrict their conviction to offences under s. 147 or 148, Penal Code.¹²

Lahore Rule.—Section 149 of the Indian Penal Code, which makes every member of an unlawful assembly constructively liable for offences committed by other members in prosecution of the common object of the assembly, deserves careful study. If the number of offenders is ultimately found to be less than five, this section will not be applicable, but joint liability may still arise by virtue of s. 34 of the Indian Penal Code, if it is found that the act constituting the offence was committed in 'furtherance of the common intention of all'. As regards the precise scope and effect of s. 149 and s. 34, Indian Penal Code, 61 P. R. 1887 and 52 Cal. 197 (P. C.) may be consulted. When no joint liability can be established, each accused person can be held responsible only for his own acts.¹³

Trial by jury.—Where the trial is by jury the Sessions Judge ought, in commenting upon the provisions of this section, to draw the attention of the jury expressly to the common object.¹⁴

Charge.—An accused person is entitled to know with certainty and accuracy the exact value of the charge brought against him, where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.¹⁵ It is obligatory to set out the common object in the charge, otherwise the conviction would be vitiated.¹⁶ Where there is no count in the charge that the common object of the unlawful assembly was to commit dacoity, or to cause hurt for the purpose of committing theft, no conviction for dacoity by force of s. 34 or this section can be sustained.¹⁷ The former Chief Court of the Punjab ruled that it was not always necessary that the common object should be set out in the charge, but it was desirable to do so where the nature of the case allowed or required it. In any case such an omission was not a fatal defect and was curable under s. 537 of the Code of Criminal Procedure.¹⁸ The omission of this section from a charge does not create an illegality by reason of s. 233, Criminal Procedure Code. It is only an irregularity coming under s. 537 of the Code of Criminal Procedure.¹⁹ An accused person can be convicted under this section of a substantive offence even though no reference is made in the charge to this section. Where the accused was originally charged with and convicted of offences under ss. 147 and 353, but on appeal the convictions under s. 323 read with s. 149, and s. 353 read with s. 149 were substituted for the original convictions, it was held that s. 149 did not create a definite offence and that, therefore, omission to mention the section in the charge did not vitiate the convictions.²⁰

Where in a charge this section was mentioned instead of s. 34, it was held that the accused was not prejudiced because this section was wide enough to cover the principle of s. 34.²¹

The charge should run thus :—

¹¹ *Abhi Misser v. Lachmi Narain*, (1900) 27 Cal. 556.

¹² *Ramzan Khan v. Jamaluddin*, [1944] All. 541.

¹³ L. H. R. O. (1942 edn.), Vol. III, Ch. IV.

¹⁴ *Magan Das*, (1902) 29 Cal. 379.

¹⁵ *Behari Mahlon*, (1884) 11 Cal. 106.

¹⁶ *Kudrutulla*, (1912) 39 Cal. 781.

¹⁷ *Kottoora Thevan*, (1923) 46 M. L. J. 311,

[1924] AIR (M) 584.

¹⁸ *Dhian Singh*, (1915) P. R. No. 16 of 1915, 16 Cr. L. J. 689.

¹⁹ *Theethumalai Gounder*, (1924) 47 Mad. 746, F.B.; *Ghaziuddin Khan*, (1932) 8 Luck. 199.

²⁰ *Ramasray Ahir*, (1928) 7 Pat. 484; *Kandasami Goundan*, [1936] M. W. N. 989.

²¹ *Pira*, (1925) 27 P. L. R. 347, 27 Cr. L. J. 818.

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, were a member of an unlawful assembly, and in prosecution of the common object of which, viz., in—one of the members—, caused (*specify the offence*) to—, and you are thereby, under s. 149 of the Indian Penal Code, guilty of causing the said (*offence*) an offence punishable under s.— of the Indian Penal Code, and within my cognizance (*or within the cognizance of the Court of Session*).²²

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—Separate sentences may be passed under s. 147 and any other section which becomes applicable to the accused with reference to the terms of this section.²³ The Madras High Court has held that on a conviction under some of the hurt sections read with this section, separate sentences to run consecutively cannot be imposed.²⁴ See s. 71, *supra*.

The contention that in a case of a conviction under s. 302 read with this section, the appropriate sentence in all cases must be transportation for life cannot be acceded to the question of sentence must in each case depend upon the facts of the case.²⁵

150. Whoever hires or engages, or employs, or promotes,¹ or

Hiring, or conniving at hiring, of persons to join unlawful assembly.

connives² at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly,³ shall be punishable as a member of such unlawful assembly, and for any offence⁴ which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

COMMENT.

Object.—The object of this section is to bring within the reach of the law those who are really the originators and instigators of offences committed by hired persons. The ordinary law of abetment might be sufficient to punish those who, by hiring or engaging others, instigate them to join an unlawful assembly. But if the prime agent keeps aloof, and the work of hiring, although known to him, is left entirely to his manager or servants, he will probably succeed in evading the ordinary law. The terms of this section, therefore, extend not only to acts of instigation by the master, but to acts of instigation when done by others (his agents) and knowingly permitted, or connived at, by him.

1. 'Promotes'.—This word indicates cases of active assistance in hiring.

2. 'Connives'.—That is, passively allows.

3. 'Any unlawful assembly'.—This section refers to a particular unlawful assembly. Where, therefore, it is found that any person has hired or engaged any other person to join or become a member of a particular unlawful assembly, he is liable for any offence committed by any member of that unlawful assembly in the same way as if he had been a member of such unlawful assembly or himself had committed such offence. Where a Magistrate only found that "what the accused has been doing is collecting and harbouring men for the purpose of committing a riot should he find it in his interest to do so", and there was no finding that there had been any unlawful assembly, composed of persons said to have been hired by the accused, and in the course of which some offence had been committed for which the accused would have been responsible equally with those who were members of that unlawful assembly,

²² (1866) 5. W. R. (Cr. L.) 1.

²³ *Sheo Nath*, (1926) 3 O. W. N. 92 (Sup.), 27 Cr. L. J. 1172.

²⁴ *Subba Reddi*, [1936] M. W. N. 1380.

²⁵ *Rajagopalan*, [1944] Kar. 72, F.C.

nor that an unlawful assembly made up of the elements provided for by s. 141 was in the contemplation of the accused, it was held that the accused could not be convicted of having committed an offence under this section or s. 157.¹

4. 'Offence'.—See s. 40, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused hired or engaged, etc., the person in question, or that he promoted, or connived at, such hiring, etc. In the case of connivance it should also be proved (a) that the accused was legally bound to prevent the hiring; (b) that he was physically able to prevent it; and (c) that he did not prevent it, or do all that lay in his power towards preventing it.

(2) That such hiring, etc., was to join, or to become a member of an unlawful assembly.

Procedure.—Cognizable—Not compoundable. See the offence committed.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, hired (*or engaged, or employed*) [*or promoted (or connived at the hiring or engagement, or employment)*] of one AB to join as (*or become*) a member of an unlawful assembly, and that the said AB as a member of such unlawful assembly in pursuance of such hiring (*or engagement or employment*) committed (*specify the offence and the person*), and that you have thereby committed an offence punishable under ss. 150 and——of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session*).

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse,¹ shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.

Explanation.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

COMMENT.

The offence under this section consists in the disobedience to the mandate of the law, which has ordered the assembly to disperse. Section 145 provides for the punishment of a person who joins or continues in an unlawful assembly knowing it has been commanded to disperse. The 'assembly' under this section need not be an 'unlawful assembly'. It must only be an assembly likely to cause a disturbance of the public peace. The section does not apply to cases in which the assembly is unlawful from its inception or has become so before the command for dispersal is given.²

1. 'After such assembly has been lawfully commanded to disperse'.—Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.³ If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer

¹ *Ram Lochan Sarcar*, (1901) 29 Cal. 214.

² *Muhammad Abdullah*, (1933) 15 Lah. 610.

³ Criminal Procedure Code, s. 127.

soldier, sailor or airman in His Majesty's Army, Navy or Air Force or a volunteer enrolled under the Indian Volunteers Act (XX of 1869), and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.⁴ If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.⁵

The expression "lawfully commanded to disperse" means, in the City of Bombay, commanded as prescribed in s. 40 of the City of Bombay Police Act, 1902.⁶

C A S E S .

Refusal to disperse.—Where the object of only three persons was to draw a crowd and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, it was held that the gathering constituted an assembly of five or more persons within the meaning of this section and a refusal to disperse after being lawfully commanded by an officer superior in rank to an officer in charge of a police-station rendered the members liable to punishment.⁷

A procession of Hindus, some of them carrying and using various musical instruments, was about to pass in front of a mosque, with the probable consequence in the circumstances that a serious riot would have resulted, when they were confronted by a Sub-Inspector of Police, who ordered the leaders of the procession to stop the music and that the crowd should disperse. The leaders of the procession did not obey the order of the Sub-Inspector, but on the contrary advanced a short distance playing on a drum. Subsequently, however, on a show of force being made by the police the procession laid down their musical instruments and dispersed. It was held that the two leaders of the procession were guilty under this section.⁸

P R A C T I C E .

Evidence.—Prove (1) that the assembly was composed of five or more persons.

(2) That such assembly was likely to cause a disturbance of the peace.

It is not sufficient to establish, on a charge under this section, merely that in the opinion of the Magistrate the particular assembly was likely to cause such a disturbance; it is necessary to establish to the satisfaction of the Court that the assembly was in fact likely to cause it.⁹ The opinion of the police-officer dispersing it is admissible.¹⁰

(3) That such assembly had been commanded to disperse.

(4) That such command was lawful.

(5) That the accused joined, or continued in, such assembly, after it had been so commanded to disperse.

(6) That the accused did so knowingly.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, joined (*or continued in*) an assembly of five or more persons likely to cause a disturbance of the public peace, after knowing that such assembly had been lawfully commanded to disperse, and thereby committed an offence punishable under s. 151 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

⁴ Criminal Procedure Code, s. 128.

⁵ *Ibid.*, s. 129.

⁶ *Keshav Govind*, (1921) 23 Bom. L. R. 350, 22 Cr. L. J. 320, [1921] AIR (B) 322 (2).

⁷ *Tucker*, (1882) 7 Bom. 42; *Sikandar Khan*, (1940) 42 P. L. R. 477.

⁸ *Raghunath Venailk Dhulekar*, (1924) 47 All. 205.

⁹ *Murlidhar*, (1887) P. R. No. 22 of 1887; *Girdhar Singh*, (1921) 23 P. L. R. 53, 23 Cr. L. J. 5, [1922] AIR (L) 135.

¹⁰ *Tucker*, (1882) 7 Bom. 42.

152. Whoever assaults¹ or threatens to assault, or obstructs or attempts to obstruct, any public servant² in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly,³ or to suppress a riot⁴ or affray,⁵ or uses, or threatens, or attempts to use criminal force⁶ to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

Assaulting or obstructing public servant when suppressing riot, etc.

COMMENT.

The last section punished disobedience to the order of a public servant commanding an assembly to disperse; this section punishes more severely persons who assault a public servant endeavouring to disperse an unlawful assembly. This section is intended to prevent the use of force on a public servant in order to prevent him from discharging his duty.

1. 'Assault'.—See s. 351, *infra*.
2. 'Public servant'.—See s. 21, *supra*.
3. 'Unlawful assembly'.—See s. 141, *supra*.
4. 'Riot'.—See s. 146, *supra*.
5. 'Affray'.—See s. 159, *infra*.
6. 'Criminal force'.—See s. 350, *infra*.

PRACTICE.

Evidence.—Prove (1) that an unlawful assembly was held.

(2) That an endeavour was being made to disperse it.

(3) That the person endeavouring so to disperse it was a public servant.

(4) That such public servant was then acting in the discharge of his duty as such public servant.

(5) That the accused assaulted, or threatened to assault, or obstructed or threatened to obstruct such public servant, whilst so discharging his duties, or that he used, or threatened to use, or attempted to use, criminal force to such public servant, whilst so discharging his duties.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—This section contemplates an assault or obstruction to some particular public servant. Where, therefore, the charge against the accused as framed was merely to the effect that they assaulted and obstructed members of the police force in the discharge of their duties, etc., the conviction under this section was not upheld.¹¹

The charge should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, assaulted (*or threatened to assault, or used, or threatened to use, criminal force to*)—, a public servant, in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly (*or to suppress a riot or affray*) and thereby committed an offence punishable under s. 152 of the Indian Penal Code and within my cognizance (*or cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

153. Whoever maliciously,¹ or wantonly,² by doing anything which is illegal,³ gives provocation to any person intending or knowing it to be likely that such provocation⁴ will cause the offence of rioting to be com-

Wantonly giving provocation with intent to cause riot—

¹¹ *Ferasat*, (1891) 19 Cal. 105.

mitted, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

This section punishes a person who does illegal acts which provoke others to commit rioting but which do not amount to abetment.¹² It is divided into two parts. If rioting is committed the punishment is more severe.

1. 'Malignantly' implies a sort of general *malice*.¹³ According to Webster the adverbs 'maliciously' and 'malignantly' are synonymous. *Malice* is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means an unlawful act done intentionally without just cause or excuse.¹⁴ *Malignant* means extreme malevolence or enmity; violently hostile or harmful. A riot took place between Hindus and Mussalmans. The excitement caused by the riot had not entirely subsided, when the accused composed and published a poem, giving an account of the outbreak, and incidentally extolling certain classes of the Hindu community, namely, the Ghatīs and Kamatis, for the brave resistance which they had offered to the Mahomedan rioters. The poem extolled the Ghatīs and Kamatis and then followed these lines :—

"May God give glory to you, confer joy on you night and day,
Fight again for your country's good".

The poem was written in Gujarati, a language not ordinarily spoken by the Ghatīs and Kamatis or even by the Mahomedans. It did not appear that any copies of the work were distributed among the people who had taken part in the riot. Nor did any fresh riot take place subsequently to the publication of the work. The accused were prosecuted and convicted under s. 117 and this section, on the ground that the lines quoted above, especially the words "Fight again", were a direct instigation to the Ghatīs and Kamatis to renew the disturbances. It was held that the meaning of the passage complained of was to be gathered from the whole poem. The general spirit of the poem was clearly in favour of peace and reconciliation. It consisted from beginning to end of a lamentation over the riots, and the destruction and death they had caused, and of repeated counsel to peace and harmony between Hindus and Mahomedans. And there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mahomedans to renew the disturbances. The words "Fight again" were, no doubt, objectionable, but it would not be a proper construction of the words to allow them to override the whole context of the work.¹⁵

2. 'Wantonly' means recklessly,¹⁶ thoughtlessly, without regard for right or consequences. This word gives to the offence contained in this section a far larger, vaguer, and more comprehensive scope, than would be implied by the word 'malignantly' standing alone. It occurs in this section, while the word 'malignantly' occurs once again in s. 270.

Where certain persons taking part in a religious procession gratuitously disobeyed the orders of the police concerning the manner in which such procession was to be conducted, with the result that a riot was only averted by bringing armed police upon the scene, it was held that the persons concerned acted 'wantonly' within the meaning of this section.¹⁷ Similarly, where certain Mahomedans formed themselves into a procession, and proceeded along a certain route, and disobeyed the orders of the police and came into contact with a procession of Hindus, and a riot resulted, it was

¹² *Ahmed Hasham*, (1932) 35 Bom. L. R. 240, 57 Bom. 328.

¹³ *Kahanji*, (1893) 18 Bom. 758, 775; *Husain Bakhsh*, (1907) 29 All. 560, 571.

¹⁴ *Bromage v. Prosser*, (1885) 4 B. & C. 247..

¹⁵ *Kahanji*, (1893) 18 Bom. 758, 775.

¹⁶ *Husain Bakhsh*, (1907) 29 All. 569, 571.

¹⁷ *Ibid.*

held that they were guilty of an offence under this section as they refused to comply with the orders of the police.¹⁸

3. 'Illegal'.—An offence under this section requires that the offender should do something illegal by doing which he malignantly or wantonly gives provocation to any person intending or knowing it to be likely that a riot would be the result.¹⁹ As to the meaning of 'illegal', see s. 43, *supra*. A Mussalman procession passed by the door-way of the accused, outside which he had, without any permission, erected a screen and inside which was an image of the goddess Bhawani. The accused was asked to close the door or to put up a screen for a few minutes while the procession passed by, and he refused to do so. The Magistrate convicted the accused on the ground that "by this illegal omission of respect to the religious feelings of the Mussalmans, he provoked a riot". It was held that the conviction was wrong.²⁰ Where a priest left the temple at midnight leaving it in charge of a third person and then deliberately threw bricks at the temple hoping that the Hindus, believing that the bricks came from the Mahomedan quarter, would be enraged against the Mahomedans and there would be a riot between the Hindus and the Mahomedans, but nobody was hurt, it was held that the priest could not be convicted under s. 334, his act being neither rash nor negligent but deliberate, nor under this section as it could not be said that his act was illegal, the throwing of a brick at a temple not being prohibited by law.²¹ A bride and bridegroom of the depressed class were about to be carried in palanquins through a village, and objections were raised by the high caste Hindus of the village that depressed class people were never permitted to ride in palanquins through the village, that the palanquin should be carried empty and the bride and bridegroom should walk. There was a local practice against depressed classes riding in palanquins through the village. The Circle Inspector of Police who had been directed to be present apprehending a possible breach of the peace, intervened and ordered that the palanquins should be carried empty. Certain persons, in disobedience of this order, put the bride and the bridegroom into the palanquins and had them carried through the village. These persons were thereupon convicted under this section. It was held that the conviction was bad, as the accused had not done anything which was illegal; riding in palanquins through a village was not an act illegal in itself, nor had any civil Court held that there was any village custom having the force of law which prevented people of depressed classes from doing so in the village, and which the accused could be said to have transgressed. Disobedience of the Circle Inspector's order was not an illegal act, as he had no authority to issue the order.²²

4. 'Gives provocation to any person, etc.'—The provocation should have been given with the intention or knowledge that it is likely to cause rioting. Where a Mahomedan killed a cow not in the presence of any Hindu, but the Hindus came to know of it subsequently, it was held that no offence was committed under this section although the religious feelings of the Hindus were hurt on hearing of it. The act of killing the cow not having been done in the presence of any Hindu whose feelings would be wounded it would not amount to 'giving provocation' if on subsequently hearing of the act the religious feelings of certain Hindus were hurt.²³ Where the natural and probable effect of reading a pamphlet was to give provocation to the followers of the Head Priest of the Dawoodi Bohra community, it was held that the writer of the pamphlet might properly be said to have intended that such provocation would cause rioting and that he was therefore guilty of an offence under this section.²⁴

PRACTICE.

Evidence.—Prove (1) that the accused did an act which was illegal.

(2) That he did so malignantly or wantonly.

Very strong evidence is necessary to prove this.²⁵

(3) That the illegal act was the cause of provocation.

¹⁸ *Gulam Kadar*, (1927) 30 Bom. L. R. 367,

²⁹ Cr. L. J. 489, [1928] AIR (B) 156.

¹⁹ *Khushal Singh*, (1886) 6 A. W. N. 23.

²⁰ *Ibid.*

²¹ *Gaya Prasad*, [1929] A. L. J. R. 175, 29 Cr. L. J. 1088, [1928] AIR (A) 745.

²² *Jasnami*, (1936) 58 All. 934.

²³ *Abdullah*, (1919) 17 A. L. J. R. 200, 20 Cr. L. J. 216, [1919] AIR (A) 307 (1).

²⁴ *Rahimatalli Mahomedalli Mulla*, (1910) 22 Bom. L. R. 166, 22 Cr. L. J. 513.

²⁵ *Kahanji*, (1893) 18 Bom. 758.

(4) That the accused, when giving such provocation, intended or knew that it was likely that such provocation would cause a riot to be committed. Prove also whether the riot was or was not committed in consequence of such provocation.

If the riot was not committed the accused would be liable under the first clause ; if it was, then the offence would be punished under the second clause.

Procedure.—Cognizable—Warrant (if riot be committed), otherwise, summons—Bailable—Not compoundable—Any Magistrate—Triable summarily, if riot be not committed.

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, malignantly (*or wantonly*) by doing——which was illegal, gave provocation to——, intending (*or knowing it to be likely*) that such provocation would cause the offence of rioting to be committed, and thereby committed an offence punishable under s. 153 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

153A. Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes¹ or attempts to promote feelings of enmity or hatred between different classes² of Her Majesty's subjects, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Explanation.—It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce, feelings of enmity or hatred between different classes of Her Majesty's subjects.

COMMENT.

This section was added by Act IV of 1898, s. 5. It is extremely wide though controlled by the explanation. It supplements the law of sedition enacted in s. 124A.

When the Bill to amend s. 124A was introduced the Legislature thought of putting the words "promotes or attempts to promote feelings of enmity or ill-will between different classes of Her Majesty's subjects," as a clause in the proposed s. 124A. But the Select Committee omitted this clause and introduced the present section on the following grounds: "It appears to us that the offence of stirring up class-hatred differs in many important respects from the offence of sedition against the State. It comes more appropriately in the Chapter relating to offences against the public tranquillity. The offence only affects the Government or the State indirectly, and the essence of the offence is that it predisposes classes of the people to action which may disturb the public tranquillity. The fact that this offence is punishable in England as seditious libel is probably due to historical causes, and has nothing to do with logical arrangement".¹

Principle.—The section means that no subject of the Crown is entitled to write or say or do anything whereby the feelings of one class of His Majesty's subjects will be inflamed against another class of his subjects.²

Scope.—It is unnecessary, under this section, as in s. 124A, to establish the success of an attempt. A man cannot escape from the consequences of uttering words, with intent to promote feelings mentioned in the section, solely because the person to whom they are addressed may be too wise or too temperate to be influenced by them.

In a much criticised Lahore case (known as the *Rangila Rasul* case) Dalip Singh, J., held that this section was intended to prevent persons from making attacks on

¹ See *G. I.*, 1898, Part V, p. 13.

² *B. G. Tilak*, (1908) 10 Bom. L. R. 848, 8

Cr. L. J. 281; *Chida Nand*, (1929) 31 P. L. R. 880, 32 Cr. L. J. 962, [1930] AIR (L) 350.

a particular community and was not meant to stop polemics against deceased religious leaders (like Prophet Mahomed) however scurrilous and in bad taste such attacks might be.³ This view was not approved of in a subsequent case (known as *Risala-i-Vartman* case) tried before a Special Bench of the Lahore High Court, though there is no reference to the former case in the judgment. In the latter case also the article was a disguised satire on certain incidents in the life of Prophet Mahomed and was in extremely bad taste and scurrilous in nature.⁴ A Hindu who ridicules a prophet of the Mahomedans not out of any eccentricity but in the prosecution of a propaganda started by a class of persons who are not Mahomedans, promotes feelings of enmity and hatred between Hindus and Mahomedans, and is liable to punishment under this section.⁵

Intention.—The Allahabad High Court has held that the intention to promote hatred or enmity between different classes is not a necessary ingredient of the offence under this section. Even if a question of intention could arise, such intention must be gathered from the words used, and they themselves would be conclusive, and it would not be necessary for the prosecution further to prove that such an intention was behind the use of such words.⁶ If the language of a writing is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce.⁷ The Chief Court of Oudh has held that the gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The Court must be satisfied that the accused had a conscious intention of promoting, causing or exciting, enmity and hatred between various classes.⁸ The same is the view of the Patna High Court,⁹ and of the Chief Court of Sind.¹⁰

Feelings of enmity and hatred should be aroused between two 'classes' of His Majesty's subjects, that is to say, between two sections of the people which can be classified as two well defined groups opposed to each other. A vague, indefinite and nameless body, even though given one name, may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately. At the same time, however, it is not necessary that the classes should be so distinct and separate as to make it always easy to put an individual in one class or the other.¹¹ Similarly, the Calcutta High Court has held that the essence of the offence is malicious intention. If there is no malicious intention in the publication, honesty of purpose may be inferred.¹² The Bombay High Court has also held that it is necessary for the prosecution to prove that the accused had the intention, in acting as he did, to promote enmity between the Hindu and Moslem communities. His intention may be gathered from the words themselves or may be proved by evidence *dehors* those words. Equally, it is not incumbent on the prosecution to prove that his attempt to promote discord was successful provided he had the intent. Nor is it a good defence that the accused's action was prompted by a desire to protect himself and his community from violence although that is an element which may be taken into consideration in assessing his punishment.¹³

The intention of the writer must be gathered from the article as a whole, and a person cannot, therefore, be convicted under this section where the article does not show any such intention as is referred to in the section even though isolated portions of the article may, taken by themselves, fall within the section. A writer cannot be convicted of an offence under this section where it is possible that he may have, without any malicious intention and honestly, though wrongly in the opinion of the Court, thought that he should express himself in the manner in which he did with a view to the removal of causes which according to him were promoting or had a tendency to promote feelings of enmity or hatred between different classes of His Majesty's subjects.¹⁴

³ *Raj Paul*, (1927) 28 Cr. L. J. 721, 28 P. L. R. 514, [1927] AIR (L) 500.

⁴ *Devi Sharan Sharma*, (1927) 29 P. L. R. 497, 28 Cr. L. J. 794, [1927] AIR (L) 594, s. B.

⁵ *Shiba Sharma (Shiva Sharma)*, (1941) 16 Luck. 674.

⁶ *Gupta*, (1936) 58 All. 849, s. B.

⁷ *Kali Charan Sharma*, (1927) 49 All. 856, F. B.

⁸ *Munshi Singh*, (1935) 10 Luck. 712. Intention is essential: per Woodroffe, J., in *Amrita Bazar Patrika Press, Ltd.*, (1919) 47 Cal. 190, s. B.; *Satiya Ranjan Bakshi*, (1929) 56

Cal. 1090.

⁹ *Banomali Maharana*, (1942) 22 Pat. 48.

¹⁰ *Ram*, [1945] Kar. 31.

¹¹ *Gautam*, [1937] All. 69, s. B.

¹² *Hemendra Prasad Ghose*, (1926) 45 C. L. J. 432, 31 C. W. N. 168, 28 Cr. L. J. 205, [1927] All (C) 215.

¹³ *Manantrai Raiji*, (1929) Criminal Revision No. 86 of 1929, decided by Kemp and Baker, JJ., on May 17, 1929 (Unrep. Bom.).

¹⁴ *Iswari Prasad Sharma*, (1927) 46 C. L. J. 154.

The intention can be inferred from the effect the words, signs or other representations are likely to produce upon the class of persons to be affected by it. Intention can be deduced from the internal evidence of the words used by the writer. It is permissible to examine the general policy of the paper in which the article in question has appeared and also to take into consideration the persons for whom it was written and the state of feelings of the communities, between whom it is intended to promote feelings of enmity or hatred, at the time of the publication.¹⁵ Where the article complained of bears a meaning that it is calculated to produce hatred and enmity between two classes, the natural inference from the publication of such an article is that the person who published it had the malicious intention that it should produce such hatred and enmity. The burden of proof shifts to the accused when he asserts that the natural inference to be drawn from the publication of the article does not hold good in his case. It makes no difference that the accused is the editor of a newspaper.¹⁶

The preface to a book can be no guide with regard to the intention of an accused person. The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred the writer must be presumed to intend that which his act was likely to promote.¹⁷

1. 'Promotes'.—"The word 'promote' in Webster's Dictionary is said to mean to contribute to the growth, enlargement or prosperity of any process or thing that is in course; to forward; to further; to encourage; to advance; to excite, and also 'to urge on or incite another, as to strife'. A man may promote a thing without intending to do so, as a matter of fact it often happens that a man intending to promote one thing actually promotes the opposite, *ex.gr.*, measures intended to prevent drunkenness often increase it. Free trade intended to promote the prosperity of the country may injure the country. It would therefore appear that apart from 'intention' not being mentioned in the section it forms no essential part of the meaning of the word 'promotion'.

"However from the conjunction of the words 'attempt to promote' with 'promote', I am disposed to think that it was intended by the framer of the section that intention should be an element in the offence,...It is not essential to the meaning of 'promotion' that the object arrived at should be effected. That I take to be one of the differences between 'promoting' and 'causing'. Cause implies effect. Promotion does not. The promotion may fail of its object, in this respect it may be a synonym for 'foment'. It is also not essential that promotion should be with reference to something already in existence. It would be possible to promote hatred where amity had previously existed.

"It is also obvious that enmity may be promoted as strongly, or more strongly, by stories that are true than by stories that are false".¹⁸

This section does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under it. The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. Whether or not the promoting of enmity is the intention, is to be collected, in most cases, from the internal evidence of the words themselves; but other evidence can also be looked at. They are decisive in all cases where the intention is expressly declared; also if the words used naturally, clearly and indubitably have such a tendency then it must be presumed that the publisher intended that which is the natural result of the words used. But the words used and their true meaning are never more than evidence of intention and it is the real intention of the accused that is the test. There is no such doctrine as 'constructive intention'.¹⁹

¹⁵ *Devi Sharan Sharma*, (1927) 28 P. L. R. 497, 28 Cr. L. J. 794, [1927] AIR (L) 594; *Chamupati*, (1931) 13 Lah. 152, S.B.

¹⁶ *Kanchanlal Chunilal*, (1930) 32 Bom. L. R. 585, 31 Cr. L. J. 1103, [1930] AIR (B) 177.

¹⁷ *Shiba Sharma (Shiva Sharma)*, (1941) 16 Luck. 674.

¹⁸ Per Clark, C.J., in *Jaswant Rai*, (1907) P. R. No. 10 of 1907, at p. 85, 5 Cr. L. J. 439.

¹⁹ *P. K. Chakravarti*, (1926) 54 Cal. 59, 64, 65; *Devi Sharan Sharma*, (1927) 28 P. L. R. 497, 28 Cr. L. J. 794, [1927] AIR (L) 594; *Ram*, [1945] Kar. 81.

2. 'Classes'.—Feelings of enmity and hatred should be aroused between two 'classes' of His Majesty's subjects, that is to say, between two sections of the people which can be classified as two well defined groups opposed to each other. A vague, indefinite and nameless body, even though given one name, may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately. At the same time, however, it is not necessary that the classes should be so distinct and separate as to make it always easy to put an individual in one class or the other.²⁰ The "classes" contemplated must be not only clearly defined and separable but also numerous. A small and limited group of zamindars cannot be regarded as constituting a class;²¹ nor do landlords or moneylenders.²² The classes referred to are mutually exclusive. To bring any body of persons within the description of a "class" of His Majesty's subjects, the body of persons must possess a certain degree of importance numerically, and must be ascertained with certainty and distinguished from any other class. Every group of persons cannot be designated as a class.²³

The word 'classes' includes religious denominations.²⁴ Any definite and ascertainable class of His Majesty's subjects will come within the section, although the classes may not be divided on racial or religious grounds. 'Capitalists' is too vague a phrase to denote a definite and ascertainable class so as to come within this section.²⁵ A limited company, or its share-holders as distinct from its employees cannot be designated as a "class or classes of His Majesty's subjects."²¹ The words used must point to a well-defined and readily ascertainable group having some element of permanence and stability and sufficiently numerous and widespread to be designated a class,² e.g., Europeans and Indians,³ Hindus and Mahomedans,⁴ Kisans and Zemindars⁵ or landowners,⁶ workmen and mill-owners.⁷

There must be a deliberate attempt to incite one class against another.⁸ An attack in a speech upon certain policemen at a particular place which does not convey a reflection upon the governing authority does not constitute an offence under this section as the police officials do not constitute a class.⁹ An attack upon a school of opinion does not necessarily involve an imputation upon the class who hold or give effect to that opinion. But one is apt to lead to the other.¹⁰

An attack on the policy of the Government is not necessarily an attack on the British people.¹¹

3. Explanation.—The Explanation does not enlarge the provisions of the substantive section. In this explanation we have what the Judicial Committee (in *Besant v. Advocate-General of Madras*¹²) has called "a delicate balancing of two important public considerations" and further that "In applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony."¹³ The section is never intended to apply to the case of the honest agitator, whose primary object is to secure redress of certain wrongs, real or fancied, and who is not actuated by the base mentality of a mere mischief-monger.¹⁴

²⁰ *Gautam*, [1937] All. 69, s.b.

²¹ *Banomali Maharana*, (1942) 22 Pat. 48.

²² *Narayan Vasudev Phadke*, (1940) 42 Bom. L. R. 861, 42 Cr. L. J. 121, [1940] AIR (B) 379.

²³ *Ibid.*

²⁴ *Raj Pal*, (1927) 28 P. L. R. 514, 28 Cr. L. J. 721, [1927] AIR (L) 590.

²⁵ *Maniben Kara*, (1932) 34 Bom. L. R. 1642, 57 Bom. 253; *Nepal Chandra Bhattacharyya*, [1939] 1 Cal. 299; *Lay Maung*, [1939] Ran. 239; *Vishambhar Dayal Tripathi*, [1940] O. W. N. 965, (1940) 42 Cr. L. J. 40, [1941] AIR (O) 38.

¹ *Lay Maung*, supra.

² *Per Patkar, J.*, in *Charles Mascarenhas*, (1932) Crim. App. No. 431 of 1932, decided by Patkar and Barlee, JJ., on September 15, 1932 (Unrep. Bom.). The Lahore High Court has held that the police form both a "section" as well as a "class" of His Majesty's subjects in British India: "*Zamindar*", (1933) 35 P. L. R.

40, 35 Cr. L. J. 966, [1934] AIR (L) 219, s.b.

³ *Jaswant Rai*, (1907) P. R. No. 10 of 1907, at p. 43, 5 Cr. L. J. 439.

⁴ *Chamupati*, (1931) 13 Lah. 152, s.b.

⁵ *Munshi Singh*, (1935) 10 Luck. 712.

⁶ *Ramtingaya*, [1937] Mad. 14.

⁷ *Ibid.*

⁸ *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

⁹ *Om Prakash Mehta*, [1947] Nag. 788.

¹⁰ *Besant v. Advocate-General of Madras*, (1919) 46 I. A. 176, 43 Mad. 146, 21 Bom. L. R. 867.

¹¹ *Nabi Bux*, (1923) 17 S. L. R. 341, 25 Cr. L. J. 614, [1925] AIR (S) 59.

¹² (1919) 46 I. A. 176, 194, 43 Mad. 146, 163, 21 Bom. L. R. 867, 881, 882.

¹³ *Besant v. Advocate-General of Madras*, (1919) 46 I. A. 176, 194, 43 Mad. 146, 163, 21 Bom. L. R. 867, 881, 882, referred to by Rankin, J., in *P. K. Chakravarti*, (1926) 54 Cal. 59, 65.

¹⁴ *Banomali Maharana*, (1942) 22 Pat. 48.

It requires honesty and absence of malicious intention. A person who published as true a detailed account of a brutal murder of an Indian by a European based in fact on a mere rumour which had died out years before the publication and to the revival of which he himself had largely contributed, was held to be not protected from criminal liability by the explanation.¹⁵

Where the writer of an article inveighed both against the Babus and Meahs as professing brotherhood with the poor Mahomedan ryots and then robbing them, and referred to the alleged conduct of Christian Missionaries towards their converts, by way of illustration, without any deliberate attempt to excite one class against another, the conviction under this section was set aside as bad in law.¹⁶

Where the editor of a newspaper reproduces, in the ordinary way, as news, the contents of an inflammatory leaflet, inciting members of one community to violence against the members of another community, without intent to utilize the same to promote or further class hatred, but in circumstances which show a genuine intention to reprehend it and get it traced to its source and stopped, this section does not apply, although some readers of the paper may be thereby induced to entertain unreasonable feelings against the members of another class or community. Such a publication, where the intention was to bring it to the notice of the proper authorities, is covered by the explanation to the section.¹⁷

Where the writer of an article had complained in a sober language, free from exaggerations and incisive comments, for the consideration of public officers and others concerned with a view to their taking necessary action to prevent a repetition of what had previously taken place and the article contained no such statement, expression, or comment, as might fall within the purview of s. 505 or this section, it was held that he could not be convicted of an offence under this section.¹⁸

Where a drama was written at a time of great public excitement and the writer without any malicious intention and honestly thought that he should express himself in the manner in which he did with a view to the removal of causes which according to him were promoting or tending to promote feelings of enmity or hatred between Hindus and Mahomedans, it was held that as the writer was quite honest in the view which he took, though it might be a wrong one, he could not be held guilty under this section.¹⁹

An article purported to be a dream in which the writer (a Hindu) was borne to Heaven where he was given a mysterious animal to ride and on its back he visited Paradise and Hell. In the latter place he professed to have seen Prophet Mahomed surrounded by a large number of other historical Muslims and held certain conversations with them. The Prophet was depicted as being in Hell suffering extreme torture; around him were his wives and others similarly situated and in the same state of suffering. The article dealt with the Prophet not as an individual but as the founder of Islam, and attempted to emphasize the futility of the Prophet's claims as the 'Intercessor' for his followers. It was held that to depict the founder of Islam with his wives and numerous followers in Hell undergoing the tortures of the damned was bound to inflame the minds of Mahomedans in general against the writer of the article and that class who rightly or wrongly were believed by them to be behind him; that a scurrilous, vituperative, and foul attack on a religion or on its founder would require a considerable amount of explanation to take it out of the substantive part of this section and bring it within the four corners of the explanation; and that the writer was guilty of an offence under this section.²⁰ The liberty to criticise the religious belief of others does not include a license to resort to vile and abusive language. The license of a missionary to advocate his own religion and to denounce other religions is not unlimited. Holding up to obloquy and derision a religious belief would amount to stirring up resentment and hatred on the part of those who accept it as their creed.

¹⁵ *Jaswant Rai*, (1907) P. R. No. 10 of 1907, 5 Cr. L. J. 439.

¹⁶ *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

¹⁷ *P. K. Chakravarti*, (1926) 54 Cal. 59; *Hemendra Prasad Ghose*, (1926) 31 C. W. N. 168, 45 C. L. J. 432, 28 Cr. L. J. 205, [1927] AIR (C) 215.

¹⁸ *Deshbandhu Gupta*, (1924) 6 L. L. J. 162, 25 Cr. L. J. 976, [1924] AIR (L) 502.

¹⁹ *Iswari Prasad Sharma*, (1927) 46 C. L. J. 154.

²⁰ *Devi Sharan Sharma*, (1927) 28 P. L. R. 497, 28 Cr. L. J. 794, [1927] AIR (L) 594; *Chamupati*, (1931) 18 Lah. 152, S.B.

There is no distinction between an attack upon a system of religion in the abstract and one upon the people who believe in it.²¹ Where the ethnical origin of a community is sought to be traced by the author of a book, then so long as there is adherence to the historical part of the narrative, however unpalatable it may be to the members of that community, or so long as he is merely relying on certain customs, habits and practices prevailing among that community, there may be no offence under this section. But, on the other hand, where the author uses language which shows malice and attributes to the entire community certain immoral practices and habits, and there is generalisation of offensive remarks on the basis of a few instances and the characterisation of an entire community as possessing certain vices, so as to degrade the members of that community in the eyes of the other classes, the case certainly amounts to promoting feelings of hatred or enmity between classes.²²

The accused, a social worker, at a meeting of about six hundred labourers held on the May Day celebration, in moving a resolution expressing the solidarity of the working class and its determination to fight and destroy the capitalist system and to organize mass resistance in the form of general strike with a view to fight the offensive of retrenchment and wage-cut launched by capitalists, made a speech in which she urged upon the labourers to unite in order to fight their two enemies, viz., Government and capitalists "who are sucking the blood of the labourers", and eulogised the effects of a general strike. She pointed out that Government and capitalists had weapons, but labour was a stronger weapon; that the rule (*raj*) of labour should be established by the union of all labourers; and that everything was in the hands of labour who wanted to break the powers of capitalists and imperialists. The speaker emphasised that Government were getting afraid of labour, and that while Congress leaders were sentenced to short terms of imprisonment, the leaders of labour were sent to jail for long terms. She ended by exhorting all labour to unite for destroying the capitalist system. It was held that the accused had committed no offence punishable under this section, inasmuch as the speech was not strong enough to promote or attempt to promote feelings of enmity or hatred against the capitalists, apart from the fact whether they constituted or not a class within the meaning of the section.²³

PRACTICE.

Evidence.—Prove (1) that the accused promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects.

It is relevant to show the intention of the accused in writing the pamphlet complained of, and also to prove that the allegations contained therein are based on facts as distinguished from rumour. Evidence to show that the contents of the pamphlet are true or believed by the accused to be true would be relevant also on the question of the sentence to be passed in the event of conviction.²⁴

A person who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes may be prosecuted under this section, but he cannot be proceeded against under s. 108, Criminal Procedure Code.²⁵

(2) That he did so by words, or by signs, or by visible representations or otherwise.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Magistrate, Presidency or first class.

Sanction.—No Court shall take cognizance of this offence unless upon complaint made by order of, or under authority from, the Provincial Government or some officer empowered by the Provincial Government in this behalf.¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, by speaking (*or writing*) the words—(*or by signs, or visible representations*), viz.—promoted (*or attempted to promote*) feelings of enmity (*or hatred*) between (*specify the classes*) of His Majesty's subjects and thereby committed an offence punishable under s. 153A of the Indian Penal Code, and within my cognizance.

²¹ *Kali Charan Sharma*, (1927) 49 All. 856, F.B.

²² *Gupta*, (1936) 58 All. 849, S.B.

²³ *Maniben Kara*, (1932) 34 Bom. L. R.

1642, 57 Bom. 253.

²⁴ *Raj Pal*, (1925) 7 Lah. 15.

²⁵ *Chiranjil Lal*, (1928) 50 All. 854.

¹ Criminal Procedure Code, s. 190.

And I hereby direct that you be tried on the said charge.

Punishment.—The test as regards sentence should be whether the speech of the accused was a violent one and whether the intention of the accused was to excite people to commit violence. To exhort people of an important body like the Union of the East Indian Railway and to bring in the examples of Soviet Russia and Ireland to run down the Zemindars and Talukdars of Oudh were very serious offences and deserved a severe sentence.²

154. Whenever any unlawful assembly¹ or riot² takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land,³ shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager,⁴ knowing that such offence is being or has been committed,⁵ or having reason to believe⁶ it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

Owner or occupier of land on which an unlawful assembly is held.

COMMENT.

The section declares in the first place that the owner of the land, on which a riot or unlawful assembly is committed or held, becomes punishable, if he or his agent or manager knowing that such offence is being committed or has been committed or having reason to believe that it is likely to be committed, does not give the earliest notice thereof in his or their power at the nearest police station. (It will be observed that this portion of the section is extremely comprehensive in character, and embraces not only the past and present, but also the future). The second provision makes it punishable on the part of the owner or his agent or manager, if he or they, 'having reason to believe that a riot was about to be committed', do not use all lawful means in his or their power to prevent it. The third imposes the same penalty, if in the event of a riot taking place he or they do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.³

The section contemplates three different breaches of duty :

- (1) Omission to give notice of a riot or unlawful assembly;
- (2) Abstention from preventing it; and
- (3) Negligence to suppress it.

Many duties of the police are by law imposed on landholders. The present section proceeds apparently upon a presumption that, in addition to any such duty, the owner or occupier of land is cognizant in a peculiar way of the designs of those who assemble on his land, and is able not only to give the police notice, but also to prevent and to disperse and suppress the assembly.⁴ Under s. 45 of the Criminal Procedure Code village headmen, accountants, landholders and others are bound to report certain matters to the nearest Magistrate or to the officer in charge of the nearest police-station.

1. 'Unlawful assembly.'—See s. 141, *supra*. 2. 'Riot'.—See s. 146, *supra*.

3. 'An interest in...land' means any fragment of the ownership. The section would therefore apply to tenants and mortgagees, remaindermen and reversioners; but not to one merely entitled to a charge on land or to an easement.⁵

² *Munshi Singh*, (1935) 10 Luck. 712.

³ Per Ameer Ali, J., in *Kazi Zeamuddin Ahmed*, (1901) 28 Cal. 504, 508.

⁴ M. & M. 128. See *Doma Sahu*, (1917) 2

P. L. J. 83, 18 Cr. L. J. 447, [1917] AIR (P) 523.

⁵ Stokes, Vol. 1, p. 146.

It is impossible to punish in every case every person who has any interest in the land. The responsibility depends on the fact of the person who caused the riot being himself the person who has an interest in the land, or an agent or a manager of such person, and one of the facts to be proved is whose agent or manager the person fomenting the riot is.

4. **'Agent or manager.'**—The criminal liability of a person for the acts and omissions of an agent or manager depends upon the question by whom the latter was appointed. Where, therefore, it was shown that three Hindu *pardanashin* ladies had the management of the estate and were responsible for the appointment of the agent who had fomented the riot, and that their adopted sons had nothing to do with such appointment, though they took some share in the active management of the estate, it was held that the ladies were alone liable.⁶ The accused was the sole proprietor of a village. A serious riot involving loss of life took place at that village, and the accused's agent instead of doing anything to prevent or suppress the riot accompanied the rioters and stood close by, while the riot was going on, after which he absconded. The accused, who had no knowledge that a riot was likely to be committed, was convicted under this section and fined. It was held that the landlord was liable under this section for the acts of commission as well as omission not only of himself, but of his agent or manager.⁷

5. **'Knowing that such offence, etc.'**—The Allahabad High Court has ruled that it is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that he should be aware of the likelihood of such an occurrence. That his manager should have taken an active part in the riot is sufficient to warrant the conviction of the owner under this section.⁸ Similarly, the Calcutta High Court has decided that knowledge, on the part of the owner or occupier of the land, of the acts or intentions of the agent, is not an essential element of an offence under this section, and he may be convicted under it though he may be in entire ignorance of the acts of his agent or manager.⁹

The owner or occupier of land on which an unlawful assembly is held cannot be convicted under this section unless there is a finding that the riot was premeditated.¹⁰

6. **'Reason to believe.'**—See s. 26, *supra*.

Co-sharer.—A non-resident partner who has taken no active part in the management of the estate cannot, like a resident sharer, be convicted under this section.¹¹

No delay in prosecution.—Prosecutions under this and the following sections should be instituted without delay, having regard to the object of the law laid down in these sections which is to impress upon landholders their responsibilities and obligations in respect of riots or unlawful assemblies committed under the circumstances mentioned in these sections and thus serve as wholesome warnings not only to the persons concerned but also to others.¹²

PRACTICE.

Evidence.—Prove (1) that a riot took place.

(2) That the land upon which it was committed was owned or occupied by the accused; or that the accused had, or claimed, an interest in the land upon which it was committed.

(3) That the accused (*or his agent or manager*) knew that it was being, or had been, committed; or had reason to believe that such riot was likely to be committed.

(4) That the accused (*or his agent or manager*) omitted to give the earliest notice in his power to the principal officer at the nearest police-station.

⁶ *Siva Sundari Chowdhurani*, (1912) 39 Cal. 834.

⁷ *Kazi Zeamuddin Ahmed*, (1901) 28 Cal. 504.

⁸ *Payag Singh*, (1890) 12 All. 550.

⁹ *Kazi Zeamuddin Ahmed*, *supra*; *Nripendra v. Gobinda*, (1923) 39 C. L. J. 236, 25 Cr. L. J. 1258, [1924] AIR (C) 1018; *Lekhraj*, (1904) 1 A. L. J. R. 145 (n.); *Raja Bhagwan Bakhsh*, (1905) 8 O. C. 418, 3 Cr. L. J.

27.

¹⁰ *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75.

¹¹ *Radha Nath Chowdhry*, (1880) 7 C. L. R. 289.

¹² *Eshak Meah*, (1902) 7 C. W. N. 245; *Sarat Chandra Roy Chowdry*, (1902) 7 C. W. N. 301.

(5) That the accused (*or* his agent *or* manager) omitted to use all lawful means in his power to prevent such riot, or to suppress it if it had taken place.¹³

Evidence taken in another case to which the accused were not parties was held inadmissible to convict them under this section. The records of another case would not of themselves be legal evidence for conviction.¹⁴

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

COMMENT.

Under the preceding section the owner of land is punishable for the taking place of an unlawful assembly or riot on his land. This section requires that the unlawful assembly or riot should take place in the interest of the owner or any person claiming interest in the land. The section, therefore, imposes unlimited fine. The preceding section referred to an unlawful assembly as well as a riot : this section refers to riot only.

The principle on which this and the following sections proceed is to subject to fine all persons in whose interest an affray is committed and the agents of such persons, unless it can be shown that they did what they lawfully could do to prevent the offence.

A zemindar ought not to be made liable under this section for a sudden and unpremeditated riot which there was no reason to infer he could have anticipated, or thought likely to happen.¹⁵

PRACTICE.

Evidence.—Prove (1) that the riot was committed.

(2) That it took place with respect to some land, or that it arose out of some dispute.

(3) That the accused was the owner or occupier of such land, or claimed an interest therein, or claimed some interest in the subject of such dispute.

No conviction could be made unless it is shown that the accused had property in the land.¹⁶

(4) That such riot was committed for the benefit or on behalf of the accused, or that the accused accepted or derived some benefit therefrom.

(5) That the accused or his agent or manager had reason to believe (*a*) that such riot was likely to be committed; or (*b*) that the unlawful assembly, which committed such riot, was likely to be held.

(6) That the accused, his agent, or manager did not respectively use all lawful means, etc., (*a*) to prevent such assembly or riot from taking place; or (*b*) for suppressing and dispersing the same.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Summary trial.

¹³ See *Tarakant Das*, (1900) 4 C. W. N. 691.

¹⁴ *C. G. D. Betts and Mahomed Ismail Chowdhry*, (1871) 6 Beng. L. R. Appx. 83, 15 W. R. (Cr.) 6.

¹⁵ *Hurnath Roy*, (1865) 3 W. R. (Cr.) 54.

¹⁶ *Pramotha Nath Ray Chowdry*, (1913) 17 C. W. N. 1247, 15 Cr. L. J. 191, [1914] AIR (C) 634 (1).

Where there is no evidence to show that an absentee co-sharer in a zemindary takes an active part in the management, and a resident co-sharer has been sentenced to pay a fine under s. 155, the non-resident zemindar ought not to be convicted under this section.¹⁷

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

Liability of agent of owner or occupier for whose benefit riot is committed.

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

COMMENT.

The last section punished the owner of land or any person claiming an interest in it; this section punishes the agent or manager of such person.

PRACTICE.

Evidence.—For points necessary to be proved, see s. 155. See also *Brae's case*,¹⁸ which lays down that to constitute an offence under this section it must be shown by legal evidence (1) that a riot was committed; (2) that the riot, if committed, was committed for the benefit of the accused; and (3) that the accused had reason to believe that a riot was likely to be committed.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Triable summarily.

157. Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired,¹ engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Harbouring persons hired for an unlawful assembly.

COMMENT.

Object.—This section, as compared with s. 150, is of a wider application. It provides for an occurrence that may happen and makes the harbouring, receiving or assembling, of persons who are likely to be engaged in any unlawful assembly, an offence. It contemplates the imminence of an unlawful assembly and the proof of facts which in law would go to constitute an unlawful assembly.¹⁹ It refers to some unlawful assembly in the future and provides for an occurrence which *may happen*, not which *has happened*. An act of harbouring a person, with the knowledge that, in some time past, he had joined or was likely to have been a member of an unlawful assembly, is not an offence under this section.²⁰

¹⁷ *Harendra Lal Roy*, (1904) 8 C. W. N. 908,

1 Cr. L. J. 866.

¹⁸ (1883) 10 Cal. 338.

¹⁹ *Ram Lochan Sarcar*, (1901) 29 Cal. 214.

²⁰ *Radharaman Shaha*, (1931) 58 Cal. 1401.

1. 'Hired, etc., or about to be hired, etc.'—Under this section it must be proved that the persons were hired or about to be hired for the purposes specified therein. It is not sufficient to show that some of the accused's servants have been taken from a district where men bear a well-known character as *lathials* (men with clubs) and had been in his service some time before the riot.²¹

Where certain salt *satyagrahis* trying to make contraband salt stopped at the accused's vacant hotel and the accused was convicted under this section for harbouring those persons, it was held that though there was no doubt that the accused harboured the *satyagrahis*, yet the conviction could not stand, as for a conviction under this section, it must be shown that they were hired, engaged or employed and of that there was no evidence.²²

PRACTICE.

Evidence.—Prove (1) that the house or premises in question was or were in the occupation or charge of, or under the control of, the accused.

(2) That the accused harboured, received, or assembled therein the persons in question.

(3) That such persons had been hired, engaged, or employed, or were about to become so, to join or become members of an unlawful assembly.

(4) That when the accused did as in (2) he knew that such persons had been so hired, etc., for that purpose.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Summary trial.

158. Whoever is engaged or hired, or offers or attempts to be

Being hired to take part in an unlawful assembly or riot;

hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

and whoever, being so engaged or hired as aforesaid, goes arm-

or to go armed.

ed, or engages or offers to go armed, with any deadly weapon¹ or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with five, or with both.

COMMENT.

This section is intended to punish those persons who hire themselves out as members of an unlawful assembly or assist any such members. It is divided into two parts. Higher penalty is awarded where the accused is armed with a deadly weapon.

1. 'Deadly weapon.'—Such as, fire-arms, swords, etc. Whether a particular thing is a deadly weapon or not is a question of fact depending upon the special circumstances of each case.

PRACTICE.

Evidence.—Prove (1) the engagement or hiring of the accused; or the offer or attempt by the accused to become so.

(2) That the object of such engagement or hiring was to do, or assist in doing, an act which would make an assembly an unlawful one (see s. 141).

Prove also (for the last part of the section) whether the accused went or offered to go armed with a deadly weapon.

Procedure.—Cognizable—Summons (if the case comes under the first clause)—Warrant (if it falls in the second)—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Triable summarily under the first clause of the section.

²¹ *Radha Nath Chowdhry*, (1880) 7 C. L. R. 289.

²² *Samuel Aaron*, [1931] M. W. N. 326, 33 L. W. 571, 32 Cr. L. J. 664, [1931] AIR (M) 440.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, engaged or hired (*or offered or attempted to be hired or engaged*) to do or assist in doing (*here specify the act which amounts to an offence under s. 141*) and went armed (*or offered to go armed*) with a deadly weapon (*or with—which used as a weapon of offence was likely to cause death*), and thereby committed an offence under s. 158 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

159. When two or more persons,¹ by fighting in a public place,² disturb the public peace,³ they are said to “commit an affray”.

Affray.

160. Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

Punishment for committing affray.

COMMENT.

The word ‘affray’ is derived from the French word *effraier*, to terrify, and that, in a legal sense, it is taken for a public offence to the terror of the people. From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.²³ No quarrelsome or threatening words whatsoever shall amount to an affray.²⁴ An affray is an offence against the public peace because it is committed in a public place and is likely to cause general alarm and disturbance.

Ingredients.—The section has three essentials :—

1. Fight between two or more persons.
2. Such fight must be in a public place.
3. The fight must disturb the public peace.

1. ‘Two or more persons’.—The fight must be between two or more persons.

2. ‘By fighting in a public place’.—“A public place is one where the public go, no matter whether they have a right to go or not...Many shows are exhibited to the public on private property, yet they are frequented by the public—the public go there”.²⁵ It is obvious that what is a public place may vary from time to time, and what the Court has to consider is, was a particular place at the time public?—a place where the public undoubtedly were.¹ Places like railway platforms, theatre halls, and open spaces resorted to by the public for purposes of recreation, amusements, etc., are public places. The place where the public are actually in the habit of going must be deemed to be public. An open field with no compound wall is a public place.²

The offence of affray postulates the commission of a definite assault or a breach of the peace, and mere quarrelling or abusing in a street without exchange of blows is not sufficient to attract the application of this section. Where two brothers were found quarrelling and abusing each other on a public road and a large crowd gathered and the traffic was temporarily stopped, but no actual fighting took place, it was held that no affray was committed.³ Where a quarrel arose between four persons stationed at the entrance of a temple for the purpose of collecting fees and three other persons who wished to enter the temple without previous payment of the fee demanded, it was held that this offence was committed.⁴ Where two persons met and after abuse came to

²³ 1 Hawk., s. 1, p. 487.

²⁴ 1 Hawk., s. 2; *Angappanasari*, (1893) 1 Weir 71.

²⁵ Per Grove, J., in *Wellard*, (1884) 14 Q. B. D. 63, 66, 67; *Hari Singh v. Jadu Nandan Singh*, (1903) 31 Cal. 542; *Musa*, (1916) 40 Mad. 556; *Govindarajulu*, (1915) 39 Mad. 886; *Ramkaranlal*, (1916) 13 N. L. R. 68, 18 Cr.

L. J. 650, [1916] AIR (N) 15 (1).

¹ *Wellard*, (1884) 14 Q. B. D. 63, 66, 67.

² *Muthuswami Iyer*, [1937] M. W. N. 23, 45 L. W. 251, 38 Cr. L. J. 588, [1937] AIR (M) 286.

³ *Jagannath Sah*, [1937] O. W. N. 37, 38 Cr. L. J. 169, [1937] AIR (O) 425.

⁴ (1879) 1 Weir 71.

blows and each struck the other down while others had also joined the fight and one of them died of the injuries received, but there was no evidence as to who the assailant was, it was held that this offence was committed.⁵ In a public place two persons attacked and overpowered another person, who merely defended himself. It was held that the two persons were rightly convicted of affray under this section, as there was a "fighting" in a public place, notwithstanding the fact that the third person only defended himself in exercise of his right of private defence.⁶ Where members of one party beat members of another party and the latter did not retaliate or make any attempt to retaliate, it cannot be said that there was fighting so as to constitute an affray, since fighting, which is one of the ingredients of the offence of affray, connotes necessarily a contest or struggle for mastery between two or more persons against one another. A struggle or contest necessarily implies that there are two sides each of which is trying to obtain the mastery so that unless there is some violence offered or threatened against one another there can be no fight but only an assault or beating.⁷

Public places.—an omnibus,⁸ a railway platform,⁹ a public urinal,¹⁰ a goods yard of a railway station,¹¹ an unfenced compound,¹² a place forming part of the compound of a Hindu temple,¹³ and harbour premises,¹⁴ are public places.

Not public places.—A private *chabutra* adjoining a public thoroughfare,¹⁵ a railway station and platform at a time when no train is due except a goods-train,¹⁶ and a private garden,¹⁷ are not public places.

3. 'Disturb the public peace'.—It is essential that there must be a disturbance of the public peace. The offence under this section postulates the commission of a definite assault or breach of the peace. Mere quarrelling in a street over money matters without exchange of blows is not sufficient.¹⁸

Affray and riot.—An affray differs from a riot. The former cannot be committed in a private place, and does not require five or more persons; the latter requires at least five persons, and can be committed in a private place.

Affray and assault.—An affray differs from an assault. The one must be committed in a public place; the other may take place anywhere. The former is regarded as an offence against the public peace; the latter, against the person of an individual. An affray is nothing more than an assault committed in a public place and in a conspicuous manner, and is so called because it affrighteth and maketh men afraid.

PRACTICE.

Evidence.—Prove (1) that the accused and another person, or other persons, were fighting.

In an affray specific evidence as to the acts of each fighter cannot be expected; mere general evidence as to the accused taking part in it will be sufficient.¹⁹ The Court must be satisfied that each one of the accused took an active physical part in fighting.²⁰

(2) That such fight was in a public place.²¹

(3) That the fight disturbed the public peace.²²

A conviction under this section, on a prosecution initiated by the police, would be no bar to a subsequent trial under s. 323 on a complaint laid by the party injured.²³

Procedure—Not cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

⁵ *Langer*, (1912) 13 P. L. R. 156 (Summary), 13 Cr. L. J. 718.

⁶ *Babu Ram*, (1930) 53 All. 229.

⁷ *Rani Reddi v. Narasi Reddi*, (1938) 48 L. W. 375, [1938] M. W. N. 975, [1938] 2 M. L. J. 583, 40 Cr. L. J. 86, [1938] AIR (M) 924.

⁸ *Holmes*, (1853) 3 C. & K. 360.

⁹ *Davies*, (1857) 26 L. J. Exch. 393.

¹⁰ *Harris*, (1871) L. R. 1 C. C. R. 282; but see *Orchard*, (1848) 3 Cox 248.

¹¹ *Cawasji v. G. I. P. Railway*, (1902) 4 Bom. L. R. 290, 26 Bom. 609.

¹² *Hari Singh v. Jadu Nandan Singh*, (1903) 31 Cal. 542.

¹³ *Musa*, (1916) 40 Mad. 556.

¹⁴ *Govindarajulu*, (1915) 39 Mad. 886.

¹⁵ *Sri Lal*, (1895) 17 All. 166.

¹⁶ *Madan Mohan*, (1888) 3 A. W. N. 197.

¹⁷ *Nga Chet Kyi*, (1885) S. J. L. B. 333.

¹⁸ *Ganesh Das*, (1928) 30 Cr. L. J. 571, [1928] AIR (L) 813. *Kallasani*, (1927) 29 Bom. L. R. 1478, 28 Cr. L. J. 1032, [1927] AIR (B) 629, distinguished in *Dodhu Kalu*, (1929) 31 Bom. L. R. 922, 30 Cr. L. J. 965, [1929] AIR (B) 451; *Jagannath Sah*, [1927] O. W. N. 37, 38 Cr. L. J. 169, [1937] AIR (O) 425.

¹⁹ *Moher Sheikh*, (1898) 21 Cal. 392.

²⁰ *Ratnam Pillai*, [1933] M. W. N. 721.

²¹ *Vadde Ramugadu*, (1882) 1 Weir 71.

²² *Ibid.*; *Baluchami Pillai*, (1933) 38 L. W. 760, [1933] M. W. N. 718, 65 M. L. J. 723, 35 Cr. L. J. 76, [1933] AIR (M) 843.

²³ *Ram Sukh*, (1924) 47 All. 284.

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

THIS Chapter deals with two classes of offences, of which one can be committed by public servants alone, and the other comprises offences which relate to public servants though they are not committed by them.

“Those offences which are common between public servants and other members of the community, we leave to the general provisions of the Code. If a public servant embezzles public money, we leave him to the ordinary law of criminal breach of trust. If he falsely pretends to have disbursed money for the public, and by this deception induces the Government to allow it in his accounts, we leave him to the ordinary law of cheating. If he produces forged vouchers to back this statement, we leave him to the ordinary law of forgery. We see no reason for punishing these offences more severely when the Government suffers by them than when private people suffer. A Government, indeed, which does not consider the sufferings of private individuals as its own is not only selfish but short-sighted in its selfishness. The revenue is drawn from the wealth of individuals, and every act of dishonest spoliation, which tends to render individuals insecure in the enjoyment of their wealth is really an injury to the revenue. On every account, therefore, we think it desirable that the property of the state should, in general, be protected by exactly the same laws which are considered as sufficient for the protection of the property of the subject.”¹

The fact that transgression by a public servant may always be punished by dismissal from the public service explains the comparative leniency of some of the punishments provided by this Chapter and the absence of any notice of certain malpractices.

161. Whoever, being or expecting to be¹ a public servant,² accepts or obtains, or agrees to accept, or attempts to obtain³ from any person, for himself or for any other person,⁴ any gratification⁵ whatever, other than legal remuneration,⁶ as a motive or reward⁷ for doing or forbearing to do any official act⁸ or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person,⁹ with the Central or any Provincial Government or Legislature, or with any public servant,¹⁰ as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—“Expecting to be a public servant”. If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

“Gratification”. The word “gratification” is not restricted to pecuniary gratifications, or to gratifications estimable in money.

“Legal remuneration”. The words “legal remuneration” are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government, which he serves, to accept.

¹ Note E, p. 121.

“A motive or reward for doing”. A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

ILLUSTRATIONS.

(a) A, a munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section.

(b) A, holding the office of Resident at the Court of a subsidiary Power, accepts a lakh of rupees from the Minister of that Power. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that Power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. A has committed the offence defined in this section.

(c) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

COMMENT.

This section deals with the acceptance by a public servant of an illegal gratification or bribe “as a motive or reward for doing, or forbearing to do, any official act, or for showing, or forbearing to show, in the exercise of his official functions, favour or disfavour to any person.”²

Not only a public servant *in esse* but also one who expects to be a public servant *in posse* comes within the purview of this section.

Scope.—This section refers only to the taker and not to the giver of the bribe. The giver or offerer is brought under s. 116 by the doctrine of abetment.³

1. ‘Expecting to be’.—“If a person expecting to be appointed to a public office obtains money from another as the price of favour to be shewn to that other in the exercise of his functions in that office, he is surely as corrupt as one who does the same being actually in office. It must be proved of course that he gave the other party reason to believe that he was about to obtain the office, it must be proved also...that he himself expected to obtain it. In practice the provision would probably be brought into action only against persons who after having obtained the expected office are found guilty of the previous corrupt transactions, and generally only against persons who having obtained the expected office have acted officially in the corrupt manner previously promised”.⁴

2. ‘Public servant’.—A person who *de facto*, though wrongly, discharges the duties of an office through which he apparently figures as a public servant, may be tried for getting a bribe.⁵ See s. 21, *supra*, as to the definition of ‘public servant.’ A public servant who has gone on leave does not cease to be a public servant.⁶ The station-master of a State railway is a public servant within the meaning of this Chapter of the Code.⁷

3. ‘Obtains or agrees to accept, or attempts to obtain’.—The use of these words shows that solicitation by a public servant or other person was contemplated in framing the provisions of the Penal Code on the subject, and there is nothing in the Code to except from the definition of abetment the species of abetment involved in compliance with the corrupt wishes of the principal offender.⁸ A mere asking is sufficient to constitute an attempt.⁹

² *Srilal Chamaria*, (1918) 46 Cal. 607, 616.

³ *Venkatarama Naidu*, (1929) 57 M. L. J. 239, 30 L. W. 235, [1929] M. W. N. 695, 30 Cr. L. J. 1055, [1929] AIR (M) 756; *Public Prosecutor v. Viswanathan*, [1947] 1 M. L. J. 179, [1947] M. W. N. 158, (1947) 60 L. W. 149.

⁴ 2nd Rep., s. 66, p. 359.

⁵ *Ramkisto Dass*, (1871) 16 W. R. (Cr.) 27.

⁶ *Venkatashubbiah*, [1947] 2 M.L.J. 160, (1947) 48 Cr. L. J. 1008.

⁷ *Bhagwati Prasad*, (1929) 5 Luck. 297.

⁸ *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

⁹ *Baldeo Sahai*, (1879) 2 All. 253.

It is not necessary for the prosecution to show how the illegal gratification came to be demanded or obtained, so long as it can be clearly established by evidence that it was obtained.¹⁰

4. 'Any other person'.—The other person may or may not be a public servant, and therefore wholly unconnected with the official conduct.¹¹

5. 'Gratification' includes all gratifications of appetite and all honorary distinctions. Even where the payment paid is in the nature of *dasturi* in order to secure the Government contract, the payment comes within the mischief of this section.¹²

The words of the section exclude the defence that the benefit bargained for was to go to somebody else, and also the notion that an officer is protected if he agrees to let his official acts be swayed by the motive of accepting a gratification to be used for advancing some public not private object, such as, charity, science, or religion. The *mahars* of a village having been suspended from their office, a meeting of the villagers was held at the house of the village Patel, at which the Patel was present, to consider the question of their restoration to office, and an agreement was come to that they should be restored on their paying Rs. 300 towards the repair of a temple. It was held that the Patel being a public servant had committed this offence.¹³ Where a clerk whose duty was to place before his superior officer applications for gun licenses, informed an applicant for renewal of a license that the license would not be renewed unless he invested Rs. 100 in War Bonds, it was held that this amounted to an attempt to obtain a gratification within the meaning of this section.¹⁴

Cases.—A *putwari* who took grain as a consideration for showing favour to the giver in discharge of his functions as a *putwari* was held guilty of an offence under this section.¹⁵ The taking of a bribe by a head clerk to influence a Principal Sudder Ameen in his decisions was held sufficient for a legal conviction whether the head clerk did or did not influence or try to influence that officer.¹⁶ The *kulkarni* of a village told the ryots who had been given a grant of *tagavi*, that he had worked for them for eight days and that they must pay him twelve annas each or they would get into trouble, and in consequence thereof the ryots paid him the money. It was held that he had committed this offence.¹⁷ Where a Colonel of a regiment accepted from a firm of caterers sums of money paid to induce him to accept their representative as tenant of the regimental canteen, it was held that he was guilty of bribery.¹⁸ Where a constable and others entered into a house and apprehended certain persons as gamblers, and afterwards released them on payment of a sum of money by the latter, it was held that the offence committed was that of taking a bribe as regards the constable, and abetment of that offence as regards the others.¹⁹ Where a Subordinate Judge went in company with a litigant in his Court to a cloth shop and accepted a present of cloth which was paid for by the litigant to gain favours with the Judge in his suit, it was held that the Judge was guilty of an offence under this section.²⁰

6. 'Legal remuneration' means what is given to a public servant by the Government which he serves or by any person having authority from that Government to give,—or what is given to him by any person whosoever, if the Government permits him to accept the gift.²¹

The word "Government" in the definition of "legal remuneration" includes a Court of Wards,²² the Senate of the Allahabad University,²³ an employer of a railway

¹⁰ *Tapesri Prasad*, (1916) 15 A. L. J. R. 127, 18 Cr. L. J. 317, [1917] AIR (A) 81.

¹¹ *Bhagwandas Kanji*, (1907) 9 Bom. L. R. 331, 31 Bom. 335.

¹² *Mohanlal Moolchand*, (1946) 47 Cr. L. J. 873.

¹³ *Appaji bin Yadavrao*, (1896) 21 Bom. 517, 520; *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 543, 544, 23 Cr. L. J. 466, [1923] AIR (B) 44.

¹⁴ *B. K. Sen*, (1944) 24 Pat. 138.

¹⁵ *Muds-ood-deen*, (1870) 2 N. W. P. 148.

¹⁶ *Kaleechurn Serishtadar*, (1865) 3 W. R. (Cr.) 10.

¹⁷ *Krishnaji Ganesh*, (1898) Unrep. Cr. C. 955.

¹⁸ *Whitaker*, [1914] 3 K. B. 1283.

¹⁹ *Mahomed Hossein*, (1866) 5 W. R. (Cr.) 49; *Adikanda Swain*, (1945) 47 Cr. L. J. 316.

²⁰ *Bhimrao Narsimha Hublikar*, (1924) 27 Bom. L. R. 120, 20 Cr. L. J. 696, [1925] AIR (B) 261; *Jehangir Cama*, (1927) 29 Bom. L. R. 996, 28 Cr. L. J. 1012, [1927] AIR (B) 501; *Govind Balwant Laghate*, (1916) 18 Bom. L. R. 266, 17 Cr. L. J. 256.

²¹ *M. & M.* 135.

²² The Bombay Court of Wards Act (Bom. Act I of 1905), s. 21 (2); the Central Provinces Court of Wards Act (XXIV of 1889), s. 19 (2); the United Provinces Court of Wards Act (U. P. Act IV of 1912), s. 33; the Ajmere Government Wards Regulation (I of 1888), s. 11 (2); the Punjab Court of Wards Act (Punjab Act II of 1903), s. 42 (3).

²³ The Allahabad University Act (XVIII of 1887), s. 13 (2).

servant,²⁴ a municipal board under the United Provinces Municipalities Act,²⁵ a Cantonment authority,¹ and a Municipality.²

7. 'A motive or reward'.—It is essential that a bribe should be obtained "as a motive or reward".³ This phrase evidently means "on the understanding that the bribe is given in consideration of some official act or conduct." Such an understanding need not be proved by explicit evidence of any precise agreement. It may be inferred from circumstances.⁴ A connection between the payment and the performance of the official duty must be established before it can be said that gratification offered was a motive or reward for purposes mentioned in the section.^{4a} A bribe is not the less a bribe because its payment is postponed.⁵ When a bribe has been given it is immaterial to inquire what effect, if any, the bribe had on the mind of the receiver.⁶

The explanation of this phrase as given in the section will not allow a public servant to justify his acceptance of a gift or bribe by urging that the order passed by him was nevertheless a just one and against the very person from whom he had received the bribe. Thus, it guards against such a plea as was set up as an excuse for Lord Bacon. "It is pretended", says Mr. Hume in his History, "that Bacon had, still in the seat of justice, preserved the integrity of a Judge, and had given just decrees against those very persons from whom he had received the wages of iniquity". It is an offence even when the act done for the bribe given is a just and proper one. The gist of the offence is a public servant taking gratification other than legal remuneration in respect of an official act.⁷

"The term 'reward' is manifestly intended to apply to a 'past service'. What is forbidden speaking generally is the receiving any gratification 'as a motive' to do, 'or a reward' for having done any such thing as is described in the definition".⁸

8. 'Official act'.—It must be an act or omission in connection with the official functions of the accused. Some village watchmen found a widow at the shop of a certain goldsmith at night, and the goldsmith gave them a reward to hold their tongues and to prevent them from being disgraced. It was held that they were not guilty of any offence.⁹ Because to keep silence on a private matter, which is in no way concerned with any matter of the police, much less of crime, and which the watchmen had no business to make the subject of official report, or mention to any person, is unconnected with the "doing or forbearing to do any official act", or with "showing or forbearing to show, in the exercise of their official functions, favour or disfavour to any person". Where two of the accused offered a gratification to a public servant in consideration of his not proceeding against them and the other accused, whose papers and books he had seized for bringing them to legal punishment, it was held that the offence committed did not fall under this section and s. 109, but under s. 214.¹⁰ Where the allegation made was that a Police Sub-Inspector helped a candidate for the Legislative Council as he got "silver tonic", it was held that this did not amount to a charge of bribery as contemplated as canvassing for votes at a council election was not an "official act".¹¹

The Allahabad, the Lahore and the Nagpur High Courts are of the opinion that it is sufficient if the accused thought that a particular public servant had an opportunity to show him favour in the exercise of his official functions,¹² or that a public servant had promised to show favour in the exercise of his official functions,¹³ although he might in

²⁴ The Indian Railways Act (IX of 1890), s. 137 (1).

²⁵ U. P. Act II of 1916, s. 84.

¹ The Cantonments Act (II of 1924), s. 36A.

² The Bengal Municipal Act (Beng. Act XV of 1932), s. 540; the U. P. District Board Act (U. P. Act X of 1922), s. 89; the Bombay District Municipal (Amendment) Act (Bom. XXVI of 1930), s. 5; the City of Karachi Municipal Act (Bom. Act XVII of 1930), s. 290 (2).

³ *Upendra Nath Chowdhury*, (1916) 21 C. W. N. 552, 18 Cr. L. J. 565, [1917] AIR (C) 850.

⁴ *Bhagwandas Kanji*, (1907) 9 Bom. L. R. 381, 31 Bom. 335; *Chinnaswami*, [1910] 1 M. W. N. 776, 9 M. L. T. 187, (1910) 11 Cr. L. J. 696.

^{4a} *Pillai*, [1948] 1 M. L. J. 142.

⁵ *Indra Nath Banerjee v. E. G. Rooke*, (1909)

14 C. W. N. 101.

⁶ *Shipway v. Broadwood*, [1899] 1 Q. B. 369, followed in *Indra Nath Banerjee v. E. G. Rooke*, (1909) 14 C. W. N. 101; *Harrington v. Victoria Graving Dock Co.*, (1878) 3 Q. B. D. 549.

⁷ *Anant Wasudeo Chandekar*, (1925) 26 Cr. L. J. 1467, 8 N. L. J. 138, [1925] AIR (N) 313.

⁸ 2nd Rep., s. 67, p. 359; *Venkatasubbiah*, [1947] 2 M. L. J. 160, 60 L. W. 486, [1947] M. W. N. 491, (1947) 48 Cr. L. J. 1008.

⁹ *Abdul Aziz*, (1883) 3 A. W. N. 179.

¹⁰ *Megraj*, (1880) P. R. No. 13 of 1881.

¹¹ *Nirsu Narayan Singh*, (1926) 6 Pat. 224.

¹² *Kishan Lal*, (1904) 1 A. L. J. R. 207 (n).
¹³ *Ajudhia Prasad*, (1928) 51 All. 467; *Gopeshwar Mandal*, [1947] Nag. 611.

reality have no such opportunity. The section does not require that the public servant must, in fact, be in a position to do the official act, favour or service at the time. Where the accused offered a bribe to an officer, mistaking him for the one whom he wanted to offer it, it was held that he was guilty of abetment of the offence under this section.¹⁴ The Madras and the Calcutta High Courts have held to the contrary. Where the charge against a *karnam* was that he received a bribe from a villager on the understanding that he would get him some *darkhast* land, the Madras High Court held that this did not constitute an offence under this section as getting a *darkhast* land was not the official act of a *Karnam*.¹⁵ It has also held that where a person, in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio* offers a bribe to him, he commits no offence by doing so and presumably the public officer would commit no offence by taking it.¹⁶ The accused, a taxi-driver, was prosecuted for an offence under the Motor Act. The case against him was dismissed. On the following day he was said to have offered Re. 1 to a police-officer as a bribe to withdraw the charge which the police-officer had brought against him. It was held by the Calcutta High Court that the accused could not be convicted of abetment of an offence under this section as it was not within the powers of the police-officer to show any favour to the accused who had already been discharged by the Magistrate and no money could have been paid to him as a motive or reward for doing anything for the accused.¹⁷

It is an offence even when the act to be done in return for the bribe is a just and proper act. It is not necessary to show that as a matter of fact favour was shown to the person who offered the bribe. It is sufficient if the person giving the gratification is led to believe that the official act would go against him if he did not give gratification.¹⁸

The performance of the act which is consideration for the bribe is not essential.

9. 'Rendering or attempting to render any service or disservice to any person'.—It is an offence if a public servant accepts any gratification as a motive or reward for rendering or attempting to render any service to any one with any public servant as such.¹⁹ Where the accused made an offer to the manager of a municipal office of a reward of Rs. 200 for using influence with the chairman and other councillors to get from them a contract for a third person, it was held that he was guilty of an offence under this section.²⁰

10. 'With any public servant'.—The Federal Court of India has held that under the concluding words of this section a public servant may be guilty under that section even independently of the exercise of his official functions, for instance, where he obtains a reward for rendering or attempting to render any service to a person with another public servant.²¹

Accomplice.—The mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.²²

Offer of bribe amounts to abetment.—A person offering a public servant an illegal gratification for any of the purposes stated in the section is liable for abetment of an offence under this section.²³ "The person who offers the bribe to a public servant is treated as the abettor of the offence created by section 161. If the bribe is accepted, the public servant is punishable under section 161 and the giver of the bribe under that section read with section 109. The case is put in Illustration (a) of the latter section. If the bribe is not accepted, the public servant commits no offence, but

¹⁴ *Phul Singh*, [1942] Lah. 402.

¹⁵ *Venkiah*, (1924) 47 M. L. J. 662, 20 L. W. 618, [1924] M. W. N. 894, 26 Cr. L. J. 396, [1924] AIR (M) 851.

¹⁶ *Venkatarama Naidu*, (1929) 57 M. L. J. 239, 30 L. W. 235, [1929] M. W. N. 695, 30 Cr. L. J. 1055, [1929] AIR (M) 756. Courts-Trotter, C. J., points out the necessity of amending this section.

¹⁷ *Shamsul Huq*, (1920) 33 C. L. J. 379, 23 Cr. L. J. 1, [1921] AIR (C) 344. This view is followed by the Judicial Commissioner at Peshawar in *Rahimullah*, (1924) 36 Cr. L. J. 626, [1935] AIR (Pesh.) 26.

¹⁸ *Bhimrao*, (1924) 27 Bom. L. R. 120, 26 Cr. L. J. 696, [1925] AIR (B) 261.

¹⁹ *Afzalur Rahman*, [1943] F. C. R. 7, (1943) 22 Pat. 349.

²⁰ *Ramachandriah*, (1927) 51 Mad. 86.

²¹ *Afzalur Rahman*, [1943] F. C. R. 7, (1943) 22 Pat. 349.

²² *Deodhar Singh*, (1899) 27 Cal. 144; *Deo Nandan Pershad*, (1906) 33 Cal. 649; *Maganlal*, (1889) 14 Bom. 115; *Khadam Ali*, (1919) P. W. R. (Cr.) No. 15 of 1919, 20 Cr. L. J. 258, [1919] AIR (L) 284; *Mangal Sain*, (1933) 34 P. L. R. 836, 35 Cr. L. J. 452.

²³ *Maganlal*, (1889) 14 Bom. 115; *Ahad Shah*, (1917) P. R. No. 18 of 1918, 19 P. L. R. 316, 19 Cr. L. J. 621, [1918] AIR (L) 182; *Prov. Govt., C. P. & Berar v. Murkidhar*, [1942] N. L. J. 104.

the person who offers the bribe is still punishable under section 161 read with section 116. The case is again put in Illustration (a) of section 116. In both cases the offence committed by the person who offers the bribe is according to the scheme of the Code an abetment of the offence described in section 161.²⁴

There is no rule of law or morality which warrants a discrimination in favour of the giver as distinguished from the taker of the illegal gratification.²⁵

A mere offer to pay an illegal gratification to a public servant, although no money or other consideration is actually produced, amounts to an attempt to bribe.¹ If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him; and the judge taketh it not; yet this is an offence punishable by law, in the party that offers it.² To bribe or to attempt to bribe a public servant is only punishable under the Penal Code as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification. Illustration (a) to s. 116 is only an example of abetment of an offence under this section. There are many other ways of instigating a public servant to commit an offence under this section besides by means of a direct offer of a bribe.³ If a public servant allows illegal gratification to be delivered, but not in order to its acceptance, but merely for the purpose of having complete evidence of the transaction, the person offering the gratification will be punished for abetment under s. 116.⁴ A person offered a bribe to a Magistrate by thrusting currency notes into his hands. His defence was that he did so with a view to lay a trap as the Magistrate was known to be a corrupt official. It was held that his act amounted to abetment of the offence under this section.⁵ Even if a public servant is corrupt and solicits a bribe directly or indirectly, the giving him of a bribe is none the less an abetment of his offence.⁶ The distinction between an offer and an invitation for offers to be made is well recognised in the law of contracts, and there is no reason why in a criminal case the same distinction should not be observed, if the sole question is whether an offer has been made or not.⁷ The authors of the Code, however, say: "The person who, without any demand express or implied on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the general rule (law of abetment)...as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. We do not propose that such a person shall be liable to any punishment...We are strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who, unless temptation had been put in his way, would have acted uprightly".⁸

Where the accused offered Rs. 500 to a railway goods clerk deputed to assist the police in inquiring into frauds in the goods office, it was held that he was guilty of abetment.⁹ The accused took out ration cards in the names of his father and mother, who had already obtained separate ration cards for themselves, and when the matter was discovered he offered Rs. 25 to the Inspector to drop the case. The Inspector had already made a report to the Rationing Officer when the offer was made. It was held that the accused was guilty of an offence under this section read with the first part of s. 116.¹⁰

Attempt.—To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectually in implicit as in explicit terms.¹¹ B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a

²⁴ Per Richardson, J., in *Sri Lal Chamarla*, (1918) 46 Cal. 607, 616; *Syed Burham Sahib*, [1930] M. W. N. 1129, 32 L. W. 17, 31 Cr. L. J. 1088, [1930] AIR (M) 671; *Kesri Chand*, [1945] All. 450, 454.

²⁵ *Kesri Chand*, [1945] All. 450.

¹ *Rameshwar Singh*, (1924) 3 Pat. 647. See *Ramachandriah*, (1927) 51 Mad. 86.

² *Vaughan*, (1769) 4 Burr. 2494, 2500.

³ *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 594, 23 Cr. L. J. 466, [1923] AIR (B) 44.

⁴ *Raghudatt Singh*, (1894) 1 U. B. R. (1892-1896) 154; *Nga Hnin*, (1917) 9 L. B. R. 52, 18 Cr. L. J. 327, [1917] AIR (LB) 83; *Ahad Shah*,

(1917) P. R. No. 18 of 1918, 19 P. L. R. 316, 19 Cr. L. J. 621, [1918] AIR (L) 152; *Chaube Dinkar Rao*, (1933) 55 All. 654.

⁵ *Lakshminarayana Aiyar*, [1917] M. W. N. 881, 6 L. W. 677, 19 Cr. L. J. 29, [1918] AIR (M) 738.

⁶ *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

⁷ *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 23 Cr. L. J. 466, [1923] AIR (B) 44.

⁸ Note B, pp. 126, 127.

⁹ *Zaharia*, (1898) P. R. No. 9 of 1898; *Mahomed Hossein*, (1866) 5 W. R. (Cr.) 49.

¹⁰ *Ram Sewak*, (1946) 48 Cr. L. J. 467.

¹¹ *Baldeo Sahai*, (1879) 2 All. 253.

pension, after referring to his own influence in that Department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by money and, on the overture being rejected, concluded by declaring that A would rue and repent the rejection of it. It was held that the offence of attempting to obtain a bribe was consummated.¹² Similarly, a demand of money by a Court peon from the plaintiff, as a motive or reward for serving summonses on his witnesses without an identifier, was held to be an attempt to obtain an illegal gratification.¹³

Amendment.—The words “Central or any Provincial Government or Legislature” were substituted for the words “Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor” by the (Government of India (Adaption of Indian Laws) Order, 1937. In Burma, the words “Legislature or the Government” were substituted for the same words by the Government of Burma (Adaptation of Laws) Order, 1937.

CASE.

Abetment.—While a suit was pending before a Subordinate Judge, he was approached by one J who told him that the plaintiff would give him Rs. 10,000 if he would decree the suit. The Judge at once turned him out of the house. A few days later, one M, who was a *pujari* of the plaintiff, came to see the Judge at his house. The Judge had reason to suspect him to be an emissary of the plaintiff for the purpose of offering him a bribe; and with the intention of setting up a trap for the man the Judge himself suggested his willingness to take a bribe, and an amount and a date were settled. On the date fixed M and D, the son of the plaintiff, came with the money and handed it over to the Judge, whereupon they were caught by certain officers who had been concealed in the house by the Judge. J, D and M were put on their trial under this section read with s. 116. It was held that as J did not offer any bribe, nor was he or claimed to be an agent or representative of the plaintiff, his statement, or expression of opinion, that the plaintiff would be willing to offer a bribe did not amount to an abetment of the offence under this section, that D and M, the bribe-givers, were guilty of abetment of an offence under this section, although they only complied with a demand made by the public servant, and although the public servant had no guilty intention of receiving the money as a bribe.¹⁴

PRACTICE.

Evidence.—Prove (1) that the accused at the time of the offence was, or expected to be, a public servant.

(2) That he accepted, or obtained, or agreed to accept, or attempted to obtain from some person a gratification.

(3) That such gratification was not a legal remuneration due to him.

(4) That he so accepted, etc., such gratification, as a motive or reward, for (a) doing, or forbearing to do an official act; or (b) showing, or forbearing to show favour or disfavour to some one in the exercise of his official functions; or (c) rendering, or attempting to render, any service or disservice to some one, with the Central or Provincial Government or Legislature, or with any public servant.

Conclusive evidence is required to establish a charge of bribery against a public servant or of his having committed an offence in the discharge of his public duties.¹⁵

The section does not require any particular criminal intention in the minds of the giver or receiver of the bribe.¹⁶

The Federal Court of India has laid down that a charge under this section is one which is easily and may often be lightly made, but is, in the nature of things, difficult to establish, as direct evidence in most cases is meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused

¹² *Baldeo Sahai*, (1879) 2 All. 253.

¹³ *Ratan Moni Dey*, (1905) 32 Cal. 292.

¹⁴ *Chaube Dinkar Rao*, (1933) 55 All. 654.

¹⁵ *Mehr Ilahi*, (1911) P. W. R. (Cr.) No. 26

of 1911, 12 Cr. L. J. 485.

¹⁶ *Lakshminarayana Aiyar*, [1917] M. W. N. 831, 6 L. W. 677, 10 Cr. L. J. 29, [1918] AIR (M) 738.

every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.¹⁷

Evidence as to general reputation admissible.—The accused was convicted of an offence under s. 500 of the Penal Code, for having defamed an Extra Assistant Commissioner by publishing an imputation that the latter had compelled him to pay a bribe in order to avoid a prosecution for a certain offence. The accused wanted to produce evidence as to the complainant having taken bribes on other occasions, and general evidence as to the complainant's reputation, but this was disallowed by the trial Court. It was held that evidence as to the complainant having taken bribes on other specific occasions would be irrelevant, but that the accused was entitled to produce evidence to show that the complainant had the reputation of being a bribe-taker.¹⁸

Evidence of previous and subsequent similar conduct is relevant to an issue of intention or other state of mind although it cannot be used to prove the commission of the crime.¹⁹

Evidence of accomplice.—Where the complainant did not willingly offer the bribe, but the accused, a police-officer, demanded it before taking up the charge lodged by the complainant and made use of his official position to enforce his demand, it was held that the circumstances were such as would justify a conviction on the testimony of accomplices with a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices.²⁰

The testimony of a bribe-giver must be corroborated in material particulars.²¹ Because his evidence is put on the footing of the evidence of an accomplice.²² Raising money for the purpose of giving a bribe and the merits of the case to decide which in favour of the bribe-giver a Judge accepts the illegal gratification are sufficient to corroborate the former who is really an accomplice.²³

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

Made cognizable by Act II of 1947. Officer below the rank of Deputy Superintendent of Police cannot investigate it without the order of a first class Magistrate. But Bombay Act XXX of 1946, s. 3, makes the offence cognizable only. This Act is held to be applicable only to the city of Bombay.^{23(a)}

Sanction.—Sanction of Government is necessary for prosecution of Judges, Magistrates and public servants not removable from their office without the sanction of Government.²⁴ Thus, a District Munsiff cannot be prosecuted without a sanction;²⁵ but a Police Patel,¹ a Municipal Corporator,² and an Excise Inspector in the U. P.³ can be. If a Judge has not done an act in the capacity of a Judge no sanction is necessary.⁴ Where the alleged illegal gratification is an independent act committed by persons whose position gave them the opportunity to commit, but it is in no way bound up with the performance of their duties, no sanction is necessary.⁵ A Government officer accepting an illegal gratification for forbearing to do an official act is not "acting or purporting to act in the discharge of his official duty" and no sanction is necessary for his prosecution.⁶

Joinder of charges.—Where a bribe was collected from certain inhabitants of a village by subscription and handed over to the recipient in a lump sum, it was held

¹⁷ *Hector Huntley*, [1944] F. C. R. 262, 271, 23 Pat. 518; *Balkrishna*, [1947] N. L. J. 310.

¹⁸ *Devi Dyal*, (1922) 4 Lah. 55.

¹⁹ *Shivkali Goswami*, [1944] All. 758, F.B.

²⁰ *Deo Nandan Pershad*, (1906) 33 Cal. 649. See *Chagan Dayaram*, (1890) 14 Bom. 331; *Malhar Martand Kulkarni*, (1901) 26 Bom. 193, 3 Bom. L. R. 694.

²¹ *Hira Lal*, (1918) P. R. No. 16 of 1918, 19 Cr. L. J. 517; *Muhammad Usuf Khan*, (1928) 30 Cr. L. J. 311, [1929] AIR (N) 215.

²² *Jagdish Prasad*, [1936] O. W. N. 892, 37 Cr. L. J. 951, [1936] AIR (O) 401.

²³ *Harsukh Rai*, (1918) P. W. R. (Cr.) No. 3 of 1919. See, however, *Khadam Ali*, (1919) P. W. R. (Cr.) No. 15 of 1919, 20 Cr. L. J. 258, [1919] AIR (L) 284.

^{23(a)} *Rustam Ardeshir Banaji*, (1947) 49 Bom. L. R. 821.

²⁴ Criminal Procedure Code, s. 197.

²⁵ (1871) 6 M. H. C. Appx. 21; *Gulam Muhammad Sharif-ud-daulah*, (1886) 9 Mad. 439; *Ponnuswami Thewar*, (1921) 15 L. W. 199, 42 M. L. J. 139, [1922] M. W. N. 122, 23 Cr. L. J. 148; [1922] AIR (M) 62.

¹ *Bhagwan Devraj*, (1879) 4 Bom. 357.

² *Municipal Corporation of Calcutta*, (1878) 3 Cal. 758.

³ *Jalal-ud-din*, (1925) 48 All. 264.

⁴ *Palaniandy Pillai v. Arunachellum Pillai*, (1908) 32 Mad. 255.

⁵ *U Tun Kywe*, [1939] Ran. 72; *Khurshed Ahmad*, [1940] 2 Cal. 162.

⁶ *Lumbhardhar Zutshi*, (1947) 49 Bom. L. R. 609, *H. H. B. Gill v. Emperor*, (1946) 49 Bom. L. R. 266, F.C., 47 Cr. L. J. 662, [1947] AIR (C) 162, dissented from.

that the recipient could not be charged under this section merely with the receipt of the whole sum collected, but that he must be charged in respect of not more than three separate items constituting the total collection.⁷ The former Chief Court of the Punjab, after distinguishing this case, held that where sums of money were collected from various persons of a village and paid to a public servant in a lump sum as illegal gratification, one charge of having received that lump sum was legal and not open to objection on the ground of misjoinder of charges.⁸

Charge.—The charge should always state the nature of the office, held by the accused so as to make him a public servant,⁹ and the name of the person from whom the gratification was obtained.¹⁰ It should run thus :—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant in the—Department, directly accepted from (*state the name*), for another party (*state the name*), a gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under s. 161 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.¹¹

Punishment.—A simple order to refund a bribe is quite inadequate to the gravity of the offence under this section.¹² The Law Commissioners observe : “The punishment of fine will, we think, be found very efficacious in cases of this description, if the Judges exercise the power given them as they ought to do, and compel the delinquent to deliver up the whole of his ill-gotten wealth”.¹³

In apportioning the punishment in bribery cases the Court is entitled to take into consideration the fact that the corruption of the nature of which the accused has been convicted is undoubtedly widely prevalent not only amongst the class of subordinate officials to which he belongs, but also in much higher places.¹⁴

Where a trap is laid to catch a bribe-giver, a sentence of imprisonment can be imposed.¹⁵

Separate convictions.—Where a certain sum of money is paid to a public servant as illegal gratification on one day and a certain sum on another day for the same purpose, the offence of receiving illegal gratification becomes a continuous offence and there ought not to be separate convictions for offences under this section and s. 165.¹⁶

162. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person¹, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person, with the Central or any Provincial Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Taking a gratification, in order, by corrupt or illegal means, to influence public servant.

COMMENT.

A person, who accepts for himself or for some other person, a gratification for

⁷ *Nand Lal*, (1904) 24 A. W. N. 228. See *N. A. Subramania Iyer*, (1901) 28 I. A. 257, 25 Mad. 61, 3 Bom. L. R. 540; *D. Viraswami Naidu*, (1929) 81 Cr. L. J. 1195, [1930] AIR (M) 508.

⁸ *Girahari Lal*, (1911) P. R. No. 11 of 1911, 12 Cr. L. J. 217.

⁹ (1865) 5 W. R. (Cr. L.) 8.

¹⁰ *Schul Chunder Bagchee*, (1865) 3 W. R. (Cr.) 69.

¹¹ Crim. P. C., Sch. V, No. xxviii (1) (3).

¹² *Mutty Lal Chuttopadhya*, (1871) 16 W. R. (Cr.) 64 (74).

¹³ Note E, p. 123; 2nd Rep., s. 63, p. 358.

¹⁴ *Karam Chand*, (1943) 46 P. L. R. 166, 45 Cr. L. J. 64, [1943] AIR (L) 255.

¹⁵ *Kesri Chand*, [1945] All. 450.

¹⁶ *Jagat Chandra Sarma v. Lal Chand Das*, (1901) 5 C. W. N. 332.

inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act, is punishable under this section.¹⁷ Under this section the public servant is to be induced by corrupt or illegal means,. The next section deals with the case where the public servant is induced by personal influence.

To admit solicitation of a bribe by a third person without the privity or connivance of the public servant concerned as an excuse for giving a bribe to such public servant is an absolute absurdity.¹⁸

1. 'For any other person'.—These words must be read so as to include every one other than the actual recipient of the gratification.¹⁹

Amendment.—The words "or with any member of . . . University" were inserted by Act XVIII of 1888, s. 18 (2).

The words "Central or any Provincial Government or Legislature" were substituted for the words "Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant Governor" by the Government of India (Adaption of Indian Laws) Order, 1937. In Burma, the words "Legislature or the Government" were substituted for the same words by the Government of Burma (Adaption of Laws) Order, 1937.

PRACTICE.

Evidence.—Prove (1) that the accused accepted or obtained, or agreed to accept, or attempted to obtain, from some one, for himself or for some one else, a gratification.

(2) That he accepted, etc., the same, as a motive or reward to induce by corrupt or illegal means, a public servant (a) to do or forbear to do an official act; or (b) to show, in the exercise of his official functions, favour or disfavour to some person; or (c) to render, or attempt to render, any service or disservice to some person, with the Central or Provincial Government, etc., or with any public servant as such.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

A conviction under this section cannot be had if the evidence does not show the person or persons from whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions.²⁰

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant in the —Department, accepted (*or obtained, or agreed to accept, or attempted to obtain*) from—*for yourself (or for —,)* a gratification (*this should be specified*) as a motive or reward for inducing, by corrupt or illegal means,—a public servant, to do (*or to forbear to do*) an official act, viz.—[*or to show favour (or disfavour) to—*] [*or to render (or attempt to render) a service (or disservice) to—*] with the Central (*or Provincial*) Government (*or Legislature or with a public servant to wit—*) and thereby committed an offence under s. 162 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

163. Whoever accepts or obtains, or agrees to accept or at-

Taking gratification, for exercise of personal influence with public servant.

tempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central or any Provincial Government or Legislature,

¹⁷ *Obhoy Churn Chuckerbutty*, (1865) 3 W. R. (Cr.) 19; *Hira Lal*, (1918) P. R. No. 16 of 1918, 19 Cr. L. J. 517.

¹⁸ *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 153.

¹⁹ *Nemichand*, Criminal Appeal No. 47 of

1915, decided on January 19, 1916 (Unrep. Bom.).

²⁰ *Setul Chunder Bagchee*, (1865) 3 W. R. (Cr.) 69.

or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

ILLUSTRATION.

An advocate who receives a fee for arguing a case before a Judge ; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist ; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust,—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

COMMENT.

Section 162 and this section apply to cases where the person exercising corrupt or undue influence takes gratification from a third person. If he does so without receiving any gratification no offence will be committed under either of these sections. He may, however, be guilty as an abettor of the offence under s. 161.

“This clause [s. 163] is much more comprehensive than the English law, which appears to punish private persons taking reward for influencing public officers, only when their influence is used to procure office for a party”.²¹

Under s. 162 the gratification is taken, in order ‘by corrupt or illegal means’, to influence a public servant. Under this section it is taken for the ‘exercise of personal influence’ with a public servant. Both these sections extend also to attempts.

The accused accepted a sum of money from A for attempting to abet the acceptance by the wife of a public servant of a sum of money with a view to inducing her by personal influence to induce her husband to show favour to A in the exercise of his official functions. There was proof that there was an offer of money but not of actual payment to her. It was held that the accused was guilty under this section and s. 161.²²

Amendment.—The words “or with any member of University” were inserted by Act XVIII of 1887, s. 18(2).

The words “Central or any Provincial Government or Legislature” were substituted for the words “Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor” by the Government of India (Adaptation of Indian Laws) Order, 1937. In Burma, the words “Legislature or the Government” were substituted for the same words by the Government of Burma (Adaptation of Laws) Order, 1937.

PRACTICE.

Evidence.—Prove the same points as for s. 162 except that in (2) proof of “personal influence” should be given instead of “corrupt or illegal means”.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class.

Charge.—See s. 162 and substitute for “by corrupt or illegal means” the words “by the exercise of personal influence”.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for abetment by public servant of offences defined in section 162 or 163.

ILLUSTRATION.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable.

²¹ 2nd Rep., s. 65, p. 359.

²² *Hira Lal*, (1918) P. R. No. 16 of 1918, 19

Cr. L. J. 517.

with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section punishes abetment by a public servant of offences mentioned in ss. 162 and 163 when committed in respect of himself.

This section is one of the 'express provisions' made by the Code for the punishment of abetment, which are referred to in s. 109 and other sections of Chapter V. Enhanced punishment is provided for an offence which would have been punishable under the provisions of abetment of an offence.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That as such he abetted an offence punishable under s. 162 or this section. Establish abetment under s. 107.

(3) That an offence under s. 162 or this section was committed.

Procedure.—Not cognizable—Summons—Bailable—Not compendable—Court of Session, Magistrate, Presidency or first class.

Sanction.—Sanction of Government is necessary before prosecution is launched.²³

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant in the——Department, abetted the commission of the offence punishable under s. 162 (or s. 163) by——, and thereby committed an offence punishable under s. 164 of the Indian Penal Code, and within my cognizance (or cognizance of the Court of Session or the High Court).

And I hereby direct that you be tried [by the said Court (*omit these words if not committed to Court of Session*)] on the said charge.

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant.

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(a) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a cause pending in A's Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

COMMENT.

The mere taking of presents by a public functionary, when it cannot be proved that such presents were corruptly taken, is made penal by this section. Under s. 161 the gratification is taken as a motive or reward for doing or forbearing to do an official act; under this section the question of motive or reward is not material as the section prohibits the taking of a thing without consideration from a person having any connection with the official functions of the public servant. There is no absolute prohibition, but the limit is drawn by the framers of the Code who say:

"Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No Government would wish to prevent person intimately connected by blood, by marriage or by friendship, from rendering services to each other; and no tribunals would enforce a law which should make the rendering of such services a crime. Where no such close connexion exists, the receiving of large presents by a public functionary is generally a very suspicious proceeding; but a lime, a wreath of flowers, a slice of betel-nut, a drop of atar of roses poured on his handkerchief, are presents which it would in this country be held churlish to refuse, and which cannot possibly corrupt the most mercenary of mankind. Other presents, of more value than these, may, on account of their peculiar nature, be accepted, without affording any ground for suspicion. Luxuries socially consumed, according to the usages of hospitality, are presents of this description; it would be unreasonable to treat a man in office as a criminal, for drinking many rupees-worth of champagne in a year, at the table of an acquaintance; though if he were to suffer one of his subordinates to accept even a single rupee in specie, he might deserve exemplary punishment."²⁴ If a public servant was allowed to take presents he might be induced to take a bribe in the shape of presents.

A police-officer, employed to bring up each case with the witnesses for trial, asked for and obtained one rupee from the prosecutor in a case after the prosecution had ended. It was held that he was guilty of an offence under this section, and not under s. 161. Stuart, C. J., observed: "The only question is whether the rupee here was a 'valuable thing' within the meaning of that section [s. 165]. The value must, I think, be looked at with reference to the proportion it bears to the money or property of which it forms part, and here the rupee was rather less than a third of the whole sum obtained by Chattra [complainant] from the Criminal Court."²⁵

This section does not prohibit a sale or purchase by a public servant, at a fair price, to or from a person transacting business before him.¹

If a person, being in any way connected with the official functions of a public servant, induces him to accept anything for an inadequate consideration, he abets the offence mentioned in this section.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he has accepted or obtained, or has agreed to accept, or has attempted to obtain, for himself or for some one else, a valuable thing.

(3) That he gave no consideration for it, or gave a consideration which he knew to be inadequate.

(4) That the person from whom the accused accepted, etc., the same, was known to the accused to have been, or then was, or was likely to be, concerned in a proceeding or business transacted or about to be transacted by himself, or which had a connection with the official functions of himself, or of a public servant to whom the accused was subordinate or from a person known to the accused to be interested in,

²⁴ Note E, pp. 123, 124.

²⁵ *Kampla Prasad*, (1877) 1 All. 530, 532.

¹ Stokes, Vol. I, p. 151.

or related to, the person so concerned. As to the non-admissibility of the evidence of similar but unconnected instances of receiving illegal gratifications, see *M. J. Vyapoory Moodeliar's case*.²

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class.

Sanction.—Sanction of Government is necessary before prosecution is launched.³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department, accepted (*or obtained, etc.*) for yourself (*or for*——) a valuable thing, viz.——, without consideration (*or for consideration which you knew to be inadequate*) from——whom you knew to have been concerned in a proceeding (*or business transacted by you*), viz.——, [whom you knew to be interested in, or related to, the person so concerned] and thereby committed an offence punishable under s. 165 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

166. Whoever, being a public servant, knowingly disobeys any direction of the law¹ as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury² to any person,³ shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant disobeying law, with intent to cause injury to any person.

ILLUSTRATION.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

COMMENT.

The offence made punishable by this section consists, not in an inadvertent or even careless, but in a wilful departure from the direction of the law intending to cause injury to any person. There must be a wilful disobedience of an express direction of the law, and a disobedience to an order is not sufficient, even though that order may be one that is given under a provision of law.⁴ A mere breach of departmental rules will not bring a public servant within the purview of this section. The Law Commissioners observe that this section is very comprehensive, and includes several offences respecting the abuse of official authority, and "regarding officers omitting to arrest offenders and suffering prisoners to escape, so far as the offence is voluntary, and in general only breach of official duty, by which it is intended, or which is known to be likely to injure any party, or to save any person from legal punishment."⁵

1. 'Direction of the law.'—It may be a direction given by a written law or a mandate proceeding from a competent authority which the public servant is bound by law to obey—as a writ or order for the liberation of a person from prison.⁶ If the direction of law given by a special Act is violated, the punishment will be under that Act. Thus, a postal official absenting himself from his station without leave will be charged under the Post Office Act and not under this section.⁷ Where a peon whose duty it was to require the signature of a person on whom a notice was served represented the notice to be a warrant and arrested him, it was held that he had disobeyed a direction of law and that he was guilty under this section.⁸

² (1881) 6 Cal. 665.

³ Criminal Procedure Code, s. 197.

⁴ *Appaji Narayan*, (1895) Unrep. Cr. C. 764, Cr. R. No. 27 of 1895.

⁵ 2nd Rep., s. 83, p. 365.

⁶ M. & M. 189.

⁷ *Viraswami Naick*, (1877) 1 Weir 72.

⁸ *Rangasami Naidu*, (1910) 20 M. L. J. 568 11 Cr. L. J. 400.

2. 'Injury.'—See s. 44, *supra*.

3. 'Person.'—See s. 11, *supra*.

English law.—Neglect of official duty is a misdemeanour according to English law, if the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he conducted himself in the particular manner charged.

(3) That such conduct was in the exercise of his public duties as such servant.

(4) That such conduct was in disobedience to a direction of law.

(5) That when the accused disobeyed such direction of law, he did so knowingly.

(6) That when the accused was guilty of such disobedience, he thereby intended or knew that he was likely thereby to cause an injury.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class.

Sanction.—Sanction of Government is necessary before prosecution is launched.⁹

Charge.—The charge should be stated as nearly as possible in the language of the section of the Act which is disobeyed.¹⁰ The particular direction of the law should be specified.¹¹ The charge should run thus :—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, did (*or omitted to do, as the case may be*), such conduct being contrary to the provisions of Act——, section——, and known by you to be prejudicial to——, and thereby committed an offence punishable under s. 166 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.¹²

167. Whoever, being a public servant,¹ and being, as such public servant, charged with the preparation or trans-
Public servant framing an incor-
rect document with
intent to cause
injury. lic servant, charged with the preparation or trans-
lation of any document,² frames or translates that
document in a manner which he knows or believes
to be incorrect, intending thereby to cause³ or know-
ing it to be likely that he may thereby cause injury⁴ to any person,
shall be punished with imprisonment of either description for a term
which may extend to three years, or with fine, or with both.

COMMENT.

The preceding section dealt generally with the disobedience of any direction of law; this section deals with a specific instance, viz., that of framing an incorrect document with intent to cause injury. This section is similar to s. 218.

The gist of the offence consists in an intention to cause injury to any person by a perversion of official duty.

1. 'Public servant.'—See s. 21, *supra*.

2. 'Charged with the preparation or translation of any document.'—

The word 'charged' is not to be narrowly construed. Where an officer is expressly appointed to prepare a document he is a public servant charged with the preparation of that document. There is no difference between the preparation and the framing of an electoral roll. According to the dictionaries "to prepare" is to make ready or make by a regular process, and "to frame", to construct by combination of parts or adaptation to design. A person who prepares a document in the ordinary meaning of the former word could be said to have framed it.¹³ A head-clerk of a Municipality

⁹ Criminal Procedure Code, s. 197.

¹⁰ (1865) 2 W. R. (Cr. L.) 2.

¹¹ *Karm Din*, (1890) P. R. No. 34 of 1890.

¹² *Crim. P. C. Sch. V*, No. xxviii (1) (4).

¹³ *Brigbharti*, (1940) 22 P. L. T. 443, 42 Cr. L. J. 508, 511, [1941] AIR (P) 539.

appointed to prepare the electoral rolls, prepared them incorrectly and went away on leave before signing or delivering them, and they were, therefore, signed and delivered by his *locum tenens*. It was held that for this section to apply the preparing and framing must be complete and final so far as the author is concerned, and it was difficult to exclude anything that it would have been permissible for the head-clerk to do to the rolls until the time came for his signing them and delivering them. He could not therefore be convicted under this section.¹⁴

"Making what purports to be a copy of a document is not included in the words 'preparation or translation of any document', nor in the words 'frames or translates that document'".¹⁵

As to the meaning of "document", see s. 29, *supra*.

3. 'Intending thereby to cause.'—"Where an act in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, ... the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies criminal intent."¹⁶ If the act is done without intending to cause injury to anybody it would not amount to an offence under this section.¹⁷

4. 'Injury.'—See s. 44, *supra*.

Submitting false report.—Where an *amin*, who was entrusted with the execution of a warrant for the attachment of movable property, submitted a report to the Court with a certificate, falsely stating in them that certain persons forcibly rescued the attached property, while it was in fact released by an amicable arrangement with the consent of the judgment-creditor, it was held that he was a public servant charged with the preparation of a document within the meaning of this section and was liable to be punished under it.¹⁸ It was held similarly where a process server who was conducting a sale of attached moveables made a false report relating to the sale.¹⁹

Making false entry.—A Station House Officer, in order to support an Inspector, made a false entry in his diary that "four cartmen stated to him as they had said before the Inspector." It appeared from the evidence that he took no action on the complaint of the cartmen, and his statement that no complaint of dacoity was made to him was falsified by his own witnesses. It was held that he was guilty of intentionally framing an incorrect public record.²⁰

Incorrect copy.—The accused, a village *patwari*, prepared an incorrect copy of an entry in his *roznamah* for a plaintiff in a civil suit. The entry related to a contract between the plaintiff and another. It was held that the accused had committed an offence under this section of framing an incorrect document.²¹ Accused, a copyist in a Court, framed an incorrect copy of a document filed with a certain record, by adding a name not contained in the original. The incorrect copy was delivered duly certified to the person who had applied for it, and who was probably in collusion with the copyist. This copy was afterwards made use of in a suit against the person whose name had been fraudulently added, and then the fraud was detected. It was held that this section was not applicable as it was not shown that the accused intended or knew it to be likely that he would cause injury to any person, but the accused was guilty under s. 197.²²

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he had the charge of the preparation or the translation of the document.

(3) That he had such charge, in his capacity of a public servant.

(4) That he framed, or translated it in an incorrect manner.

¹⁴ *Brijbehari*, (1940) 22 P. L. T. 443, 42 Cr. L. J. 508, [1941] AIR (P) 539.

¹⁵ Per Barkley, J., in *Dewa Singh*, (1878) P. R. No. 15 of 1879, at p. 43.

¹⁶ Per Lord Mansfield in *Woodfall*, (1770) 5 Burr. 2661, 2667.

¹⁷ *Bakthavatsalu Naidu*, [1931] M. W. N. 361, 34 Cr. L. J. 677, [1933] AIR (M) 326.

¹⁸ *Mulhalagiri Raju*, (1892) 1 Weir 74.

¹⁹ *Dalip Singh*, (1929) 31 Cr. L. J. 656, [1930] AIR (L) 92.

²⁰ *Pasupuleti Ramdoss*, [1911] 2 M. W. N. 64, 12 Cr. L. J. 502.

²¹ *Hira Singh*, (1872) P. R. No. 32 of 1872.

²² *Dewa Singh*, (1878) P. R. No. 15 of 1879.

(5) That he knew, or believed, that he was incorrectly framing or translating the same.

(6) That he did as above, with intent, or with knowledge that it was likely that he would thereby cause injury.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

Separate convictions.—The offence of a public servant framing an incorrect document with intent to cause injury under this section is included in the offence of forging a document and using it as genuine under ss. 467 and 471 of the Code and a conviction both under the provisions of this section and ss. 467 and 471 is not maintainable.²³

Sanction.—Sanction of Government is necessary before prosecution is launched.²⁴

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, being a public servant, to wit—, and being, as such public servant, charged with the preparation (*or translation*) of the document relating to—, framed (*or translated*) that document in a manner which you knew (*or believed*) to be incorrect, intending thereby to cause (*or knowing it to be likely that you might thereby cause*) injury to—and that you thereby committed an offence punishable under s. 167 of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—An official, however humble, who deliberately tampers with official records and issues false copies, whatever his motives may be, deserves severe punishment, not merely for his own conduct but as a deterrent to others who may be tempted to follow his example.²⁵

168. Whoever, being a public servant,¹ and being legally bound to as such public servant not to engage in trade, engages Public servant unlawfully engag- in trade,³ shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes those public servants only who are legally bound not to engage in trade. It is in a way incomplete without the assistance of some other enactment, or rule of law which imposes the legal prohibition required.

Public servants are not allowed to trade in order that they may not neglect their duties. Being in official position they could easily obtain unfair advantages over other traders.

1. 'Public servant.'—See s. 21, *supra*.

2. 'Legally bound.'—See s. 48, *supra*. Only those public servants who are prohibited under any Act from trading come within the purview of this section. For any breach of a departmental rule they cannot be punished under the Code.

3. 'Engages in trade.'—The Indian Penal Code contains no definition of the very general word 'trade', and no explanation of the equally wide term 'engages in trade.' This section has been made the radix for a number of special enactments going to control the conduct of public servants in the matter of varied descriptions of traffic and money dealings. The section is in a way incomplete without the assistance of some other enactment or rule of law which imposes the legal prohibition required; and the enactment containing the prohibition naturally and necessarily defines the area which is covered by it, both as to the class of public servants to whom it applies, and

²³ *Gulzari Lal*, (1926) 3 O. W. N. 760, 28 Cr. L. J. 90, [1926] AIR (O) 615.

²⁴ Criminal Procedure Code, s. 197.

²⁵ *Sukhnandan Lal*, (1926) 28 Cr. L. J. 31, [1926] AIR (A) 719.

the nature of the dealings in which those servants are prevented from engaging. In the majority of cases, the municipal law, so to speak, hands over to the Indian Penal Code an offender who engages in any commercial dealing prohibited by it. But there are cases where the penalty for such an offence is provided by the special Act itself.¹

Several statutes have been passed from time to time prohibiting public officers from engaging in trade. Such statutes either provide the penalty to be inflicted for their breach or refer to this section of the Code.

A person engages in trade who habitually buys and sells with a view to profit. The word 'trade' does not include lending money at interest. Lending money at interest does not amount to 'unlawfully engaging in trade.' Where a public servant lent money to others for buying wheat but had taken no part in its speculation nor had set up a shop for its sale or purchase, it was held that he was not liable under this section.² But where a police constable carried on a shop contrary to the prohibition contained in s. 10 of the Police Act, he was held guilty under this section.³

A Vice-Chairman of a Municipal Board was vested with authority to make contracts for the construction of municipal works, and to pass the contractor's bills and issue cheques for the payment of the same out of municipal funds. In pursuance of this authority, the Vice-Chairman gave two contracts for the construction of municipal drains to L, a regular contractor with the Board. L being without funds for the execution of the contracts, the Vice-Chairman, who had a private money-lending business, advanced money to L for that purpose, and subsequently passed L's bills and repaid himself from the realization of municipal cheques issued by him. It was held that the Vice-Chairman was guilty of an offence under this section.⁴

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he, as such, was legally bound not to engage in trade.

(3) That he had engaged in trade.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class.

The Court can take cognizance of this offence without the previous sanction of the Provincial Government.⁵

Sanction.—Sanction of Government is necessary before prosecution is launched.⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the ——— day of ———, at ———, being a public servant, to wit ———, and being, as such public servant, legally bound not to engage in trade, did engage in trade, and thereby committed an offence punishable under s. 168 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

169. Whoever, being a public servant,¹ and being legally bound² as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

Public servant
unlawfully buying
or bidding for prop-
erty.

COMMENT.

This section is merely an extension of the principle enunciated in the last section. It prohibits a public servant from purchasing or bidding for property which he is legally bound not to purchase.

1. 'Public servant.'—See s. 21, *supra*.

¹ *Narayan*, (1910) 6 N. L. R. 114, 116, 117, 11 Cr. L. J. 613, 614.

² *Nek Muhammad*, (1903) P. R. No. 22 of 1903.

³ *Sagar Singh*, (1917) 19 Cr. L. J. 152, 1918] AIR (C) 150.

⁴ *A. B.*, (1911) 7 N. L. R. 53, 12 Cr. L. J. 281; *Rajkrishna Biswas*, (1871) 8 Beng. L. R. Appx. 1, 16 W. R. (Cr.) 52.

⁵ *Dulloomiya v. Tularam*, (1932) 28 N. L. R. 156, 34 Cr. L. J. 70, [1932] AIR (N) 133.

⁶ Criminal-Procedure Code, s. 197.

2. 'Legally bound.'—Sec s. 43, *supra*. The public servant must be legally bound not to bid for property. Thus, where a Sub-Inspector was charged with having purchased a pony, which had been impounded, it was held that he should have been convicted under this section and s. 19 of the Cattle Trespass Act (I of 1871) and that he could not be convicted under s. 406 of criminal breach of trust.⁷ Where a member of a District Board was convicted for having purchased, in the name of another, a buffalo belonging to the Board at an auction sale held by the Board, it was held that he was not guilty under this section as the purchase of the buffalo would not be "acquiring an interest in any contract with or by the Board" within the meaning of s. 34 of the District Boards Act, 1922.⁸

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he, as such, was legally bound not to purchase or bid for the property in question.

(3) That he did purchase or bid for that property, either in his own name, or in the name of another, or jointly, or in shares with others.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class.

Sanction.—Sanction of Government is necessary before prosecution is launched.⁹

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, being a public servant in the—Department and being legally bound as such public servant not to purchase (*or bid for*) certain property, viz.—, purchased (*or bid for* that property) in your name [*or in the name of—*] *or jointly or in shares with—*] and thereby committed an offence punishable under s. 169 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office¹ or **Personating a public servant.** ^a falsely personates any other person holding such office,² and in such assumed character does or attempts to do any act under colour of such office,³ shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section punishes a person who pretends to hold any public office as a public servant or falsely personates any other person holding such office, and does any act in the assumed character of a public servant.

Scope.—"Section 170... does not make the act of pretending to hold a particular office as a public servant punishable, unless the person in such assumed character does, or attempts to do, any act under colour of such office."¹⁰

Ingredients.—The section requires two things :—

1. A person (*a*) pretending to hold a particular office as a public servant, knowing that he does not hold such office, or (*b*) falsely personating any other person holding such office.

2. Such person in such assumed character must do or attempt to do an act under colour of such office.

1. 'Pretends to hold any particular office as a public servant, knowing that he does not hold such office.'—The particular office must be an existing office. If it is uncertain who legally fills the office, a person doing an official act in pursuance of what he honestly believes to be his lawful title to the office, does not come within the section.

⁷ *Rajkristo Biswas*, (1871) 16 W. R. (Cr.) 52, 8 Beng. L. R. (Appx.) 1.

⁸ *Suraj Narain Chaube*, [1938] All. 776.

⁹ Criminal Procedure Code, s. 197. See *Krishna Kant*, (1925) 2 O. W. N. 395, 26 Cr. L.

J. 1157, [1925] AIR (O) 565.

¹⁰ Per Copleston, J. C., in *Nga Pe*, (1896) 1 U. B. R. (1892-1896) 168; *Umakant Bakwant*, (1907) 9 Bom. L. R. 222, 706, 5 Cr. L. J. 211 6 Cr. L. J. 70.

As to the meaning of 'public servant', see s. 21, *supra*.

2. 'Falsely personates any other person holding such office.'—'Falsely' does not mean 'fraudulently.' A fraudulent or dishonest intention is immaterial.¹¹ "To 'personate' means to pretend to be a particular person."¹²

3. 'In such assumed character does or attempts to do any act under colour of such office.'—It is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated.¹³ The accused was arrested when he was demanding one anna's worth of fruit from a fruit-seller for one pice on the representation that he was a head constable, which in fact he was not. It was held that if he pretended to be a police-officer and as such police-officer tried to extort money or things from a fruit-seller, he committed an offence under this section, and it was not necessary that the act done under colour of office should be a legal act on the part of the accused.¹⁴ Where the accused, a constable in the Criminal Investigation Department, pretended to be a police-officer and as such police-officer demanded the production of certain papers from people who had cattle with them, it was held that he was guilty under this section.¹⁵ Where a person posed as a Government servant and by so doing obtained services which he otherwise would not have obtained and which the other person was bound to give on demand by a Government officer, it was held that he was guilty under this section.¹⁶

'Under colour of such office'.—An act is done 'under colour' of an office, if it is an act having some relation to the office, which the actor pretends to hold. If it has no relation to the office, as, if A pretending to be a servant of Government, travelling through a district, obtain money, provisions, etc., the offence may amount to cheating under s. 415, but is not punishable under this section.¹⁷ The phrase 'an act under colour of such office' points to acts which could not have been done without assuming official authority or responsibility, and would not connote acts of a ministerial or mechanical character, which might be done without requiring the justification of office in the person doing them.¹⁸ A mere promise to appoint a person as a constable cannot be regarded as an act under colour of the office of a C.I.D. Officer. Nor can the writing on the paper of something unintelligible and non-sense be regarded as an act done under colour of the office of a C.I.D. Officer.¹⁹ Where one kulkarni performed certain ministerial official duties in connection with a record on behalf of another, the offence under this section was not committed.²⁰ Where a Village Revenue Officer, in the absence of the Village Magistrate, exercised the powers of a Village Magistrate, and it was found that he acted in good faith, it was held that a conviction under this section could not be sustained.²¹ The mere assumption of a false character without any attempt to do an official act is not sufficient. Where the accused went to the platform of a railway station and obtained admission on a pretence that he was a C.I.D. Officer without purchasing a platform ticket, it was held that his conviction under this section was wrong, because the act of the accused did not assume an official authority.²² But the act of the accused did constitute the offence of cheating. Where a person, pretending to be a police-officer, reprimanded some villagers on account of the state of the roads in the vicinity, and obtained some money from them, a conviction under this section was upheld on the ground that the act committed by the accused had some relation to the office he pretended to hold, as the police are often deputed on such matters.²³

PRACTICE.

Evidence.—Prove (1) that the accused personated some public servant; or that he pretended to hold the office of a public servant.

(2) That he was not a public servant; or that he did not hold such office.

¹¹ *Tun Aung Gyaw*, (1906) 3 L. B. R. 222, 4 Cr. L. J. 483.

¹² Per Crompton, J., in *Hague*, (1864) 4 B. & S. 715, 720.

¹³ *Aziz-ud-din*, (1904) 27 All. 294.

¹⁴ *Ibid.*

¹⁵ *Roshan*, (1934) 37 Cr. L. J. 81, [1935] AIR (L) 92.

¹⁶ *Bashirullah Khan*, [1942] Nag. 484.

¹⁷ *M. & M.* 142.

¹⁸ *Umakant Bakwant*, (1907) 9 Bom. L. R.

222, 706, 5 Cr. L. J. 211, 6 Cr. L. J. 70.

¹⁹ *Lakshminarayana*, (1943) 45 Cr. L. J. 211, [1943] AIR (P) 378.

²⁰ *Umakant Bakwant*, (1907) 9 Bom. L. R. 222, 706, 5 Cr. L. J. 211, 6 Cr. L. J. 70.

²¹ (1881) 1 Weir 74.

²² *Sukhdeo Pathak*, (1917) 3 P. L. J. 389, 4 P. L. W. 39, 19 Cr. L. J. 209, [1918] AIR (P) 653.

²³ *Sadanund Doss*, (1865) 2 W. R. (Cr.) 29.

(3) That he acted falsely in such personation; or that he knew that he did not hold such office.

(4) That he, when assuming such character, did or attempted to do something under colour of such office.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, pretended to hold the office of—, as a public servant (*or falsely personated—holding such office*), and in such assumed character did (*or attempted to do*)—under colour of such office and thereby committed an offence punishable under s. 170 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

171. Whoever, not belonging to a certain class of public ser-

Wearing garb or carrying token used by public servant with fraudulent intent.

vants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed,¹ or with the knowledge that it is likely to be believed,

that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Under s. 140 the wearing of the garb or carrying of the token of a soldier is made punishable. This section punishes the wearing of a garb or carrying of a token used by a public servant with the intention to pass off as such public servant. The offence is complete, although no act is either done or attempted to be done in the assumed official-character. The mere circumstance of wearing the garb, or using the token, with the intention or knowledge supposed is sufficient. If any act is done then the preceding section will apply. The English law is to the same effect. If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtain goods, this appearing in a cap and gown is a sufficient false pretence though nothing passes in words.²⁴

1. '**With the intention that it may be believed, etc.**'—Intention is the gist of the offence under this section. The intention must be to practise deception by wearing the garb or carrying the token of a public servant. Where the accused was found carrying a police jacket under his arm, with intent that it should be believed that he was a police constable, it was held that he committed no offence under this section as he was not wearing the jacket.²⁵

PRACTICE.

Evidence.—Prove (1) that the accused wore the garb, or carried the token in question.

(2) That such garb or token resembled that of a public servant.

(3) That the accused did not belong to the class of public servants, who use such garb or token.

(4) That he did as in (1) with the intention, or with the knowledge, that it was likely that it might be believed he was such public servant.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Sentence.—Where an accused person is convicted of wearing the garb of a police constable, and of personating by means of such garb a police constable, and, as such, ordering a person to be kept in custody, only one sentence ought to be passed on him under the provisions of s. 71 of the Code.¹

²⁴ *Barnard*, (1837) 7 C. & P. 784.

²⁵ *Nga Po Kyaw*, (1904) U. B. R. (P.C.), (1904-1906) 3, 1 Cr. L. J. 554.

¹ *Tukaram*, (1888) Unrep. Cr. C. 405, Cr. R. No. 67 of 1888.

CHAPTER IXA.

OF OFFENCES RELATING TO ELECTIONS.

THIS Chapter has been introduced in the Code by the Indian Elections Offences and Inquiries Act (XXXIX of 1920) to give effect to the recommendations of the Joint Select Committee appointed to report on the Government of India Act. In their Report they observed: "The Committee are themselves firmly convinced that a complete and stringent Corrupt Practices Act should be brought into operation before the first election for the Legislative Councils. There is no such Act at present in existence in India, and the Committee are convinced that it will not be less required in India than it is in other countries". Act XXXIX of 1920 was, therefore, enacted to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act.

The Government of India thought it desirable that advantage should be taken of this opportunity to make election offences part of the general law of the land, not only in respect of Legislative bodies, but also in the case of election to public bodies generally.

The Select Committee to which the Indian Elections Offences and Inquiries Bill was referred, in their Report, observed: "We feel there are distinct advantages at the present time when election is to play so important a part in the new public life of India that the public conscience should be markedly drawn to the danger of corrupt practices in relation to the franchise, whether that franchise relates to legislative or other bodies. We feel it is of the greatest importance that the principle of the purity of the franchise should be insisted on in the general criminal law of the country and that it should not be left to local legislatures to deal with the broad principles enacted in Part I of the Bill. There will be sufficient scope for those bodies in elaborating and supplementing the law as proposed in the Bill for we recognize that it is by no means exhaustive. Experience may no doubt show that minor offences will require to be provided against and that local conditions may need local treatment. We feel, however, that to lay down the broad basis of a law so necessary to protect the purity of the franchise is an appropriate piece of work for the Imperial Legislative Council".¹

The present chapter, therefore, "seeks to make punishable under the ordinary penal law, bribery, undue influence and personation and certain other malpractices at elections not only to the legislative bodies, but also to membership of public authorities where the law prescribes a method of election; and, further, to debar persons guilty of such malpractices from holding positions of public responsibility for a specific period".²

The new offences that are thus inserted in the Penal Code are bribery, undue influence, personation and deliberate false statements with the object of prejudicing a candidate at or in connection with elections.³

Election Order.—See in this connection the Government of India (Provincial Elections (Corrupt Practices and Election Petitions) Order, 1936.⁴

171A. For the purposes of this Chapter—

(a) "candidate" means a person who has been nominated as a candidate at any election¹ and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat; pro-

¹ "Candidate",
"Electoral right"
defined.

¹ *Gazette of India*, 1920, Part V, p. 178.

² See the Statement of Objects and Reasons, *G. I.*, 1920, Part V, p. 135, s. 4.

³ *Ibid.*, s. 7.

⁴ Published in the *Gazette of India*, dated July 25, 1936, Part I, pp. 955-963.

vided that he is subsequently nominated as a candidate at such election ;

(b) “electoral right” means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.¹

COMMENT.

The definition of ‘candidate’ is taken from the English Municipal Corporations Act, 1882, s. 77, and Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vic., c. 70, s. 34. A person becomes a candidate as soon as he declares himself⁵ a candidate or is nominated as a candidate. Such declaration may be in the form of an election manifesto or address.

1. ‘Election’.—‘Election’ is defined as including election to all classes of public bodies where such a system is prescribed by law (*vide* Explanation 3 to s. 21, *supra*).

171B. (1) Whoever—

(i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right ; or

(ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right, commits the offence of bribery :

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers, or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

COMMENT.

This section defines the offence of bribery at an election. It abridges the definition given in the Corrupt Practices Prevention Act (17 & 18 Vic., c. 102).

‘Bribery’ is defined primarily as the giving or acceptance of a gratification either as a motive or as a reward to any person, either to induce him to stand as, or not to stand as, or to withdraw from being, a candidate, or to vote or refrain from voting at an election. It also includes offers or agreements to give or offer and attempts to procure a gratification for any person. Gratification is already explained in s. 161 and is not restricted to pecuniary gratifications or to gratifications estimable in money.⁶

Sub-sec. (2).—‘Offers’.—By this clause the attempt to corrupt is made equivalent to the complete act.

⁵ *The Kennington Case (Walsall)*, (1866) 4 O.M. & H. 98.

⁶ See the Statement of Objects and Reasons, G I., 1920, Part V, p. 185, s. 8.

Treating.—Treating will be bribery if refreshment is given or accepted with the intent required by the law.⁷ Treating of non-electors in order that they might influence voters⁸ or of women in order that they might influence their fathers or brothers would be illegal.⁹ See Explan. to s. 171 E as to the meaning of 'treating'.

The gist of the offence of treating is the corrupt inducement to the voter to vote or refrain from voting, which may be given at any time, although for obvious reasons it is usually given at or shortly before the election. Thus it has been held that the seat may be avoided for acts of treating done in July, though the dissolution did not take place till August.¹⁰

CASES.

Bribery.—Paying a voter's debts;¹¹ permitting a voter to shoot rabbits on the estate of the candidate;¹² paying travelling expenses of a voter on condition that he must vote for the payer;¹³ paying rates and taxes of a voter;¹⁴ payment made to keep away voters from voting;¹⁵ payment to a voter for loss of time;¹⁶ offering money to a rival candidate for withdrawing his candidature.¹⁷

Not bribery.—Payment to election agents;¹⁸ payment of election expenses to a candidate.¹⁹

Treating.—Where the respondent stood drinks to all the members of a political club who were present three years before the election, this was held to be not treating, partly on account of the length of time between it and the election.²⁰

Where the sitting member, after the election, treated a number of people (who met him on his leaving the borough to congratulate him) with whisky, but it was shown that he did not know whether they were voters or not, and in fact only two of them were, the election was not avoided.²¹

Where refreshment was strictly confined to those who were actually engaged in the work of the election, and were known supporters of the sitting member, his committee men in fact, the election was upheld.²²

Where refreshment was provided on the polling day by the sitting member's agent, but no one, as it appeared, partook of it, except those who had come with the express object of voting for him, nor was there any previous announcement that such refreshment would be provided nor anything said to voters, at the time they got the refreshment, the election was not avoided.²³

Where the respondent gave an entertainment in the month of October, 1905, which all persons in the borough were invited to attend by an advertisement in a local paper, and printed handbills inviting all the friends of the candidate to attend and meet the retiring member, and stating that there would be a band and tea, coffee, and refreshments, and two dozen bottles of whisky were provided after the 'At Home' began with the candidate's consent, the election taking place in the following January, it was held that there was no corrupt intention, and therefore the respondent was not guilty of treating.²⁴

Where, however, a garden party was given in September, 1905, at the country seat of the respondent's father, nominally by a political social council, at which refreshments were provided on a lavish scale, and political speeches were made, this was held to be treating by an agent, the election taking place in January, 1906.²⁵

⁷ See the Statement of Objects and Reasons, G. I., 1920, Part V, p. 135, s. 8.

⁸ *The Lonford Case*, (1870) 2 O'M. & H. 6, 15.

⁹ *The Tamworth Case*, (1869) 1 O'M. & H. 75, 86.

¹⁰ *The Youghal Case*, (1869) 1 O'M. & H. 291, 21 L. T. 316.

¹¹ *The Londonderry Case*, (1869) 1 O'M. & H. 274.

¹² *The Launceston Case*, (1874) 2 O'M. & H. 129.

¹³ *Cooper v. Slade*, (1857) 6 H. L. C. 746.

¹⁴ *Worcester*, (1819) C. & D. 173.

¹⁵ *The Bradford Case*, (1869) 1 O'M. & H. 30, 32.

¹⁶ *The Bolton Case*, (1874) 2 O'M. & H. 145.

¹⁷ *Ahmad Kabir Chowdhury*, (1937) 39 Cr.

L. J. 483, [1938] AIR (C) 274.

¹⁸ *The Youghal Case*, sup., p. 295.

¹⁹ *The Belfast Case*, (1869) 1 O'M. & H. 281, 285.

²⁰ *St. George's Division Case*, (1896) 5 O'M. & H. 89, 100.

²¹ *The Carrickfergus Case*, (1869) 1 O'M. & H. 264, 265.

²² *The Bradford Case*, (1869) 1 O'M. & H. 35, 39.

²³ *Carrickfergus Case*, (1869) 1 O'M. & H. 268.

²⁴ *The Borough of Great Yarmouth Case*, (1906) 5 O'M. & H. 176, 196.

²⁵ *Bodmin Election Petition*, (1906) *The Times*, June 12th.

Where a philanthropic society was started, of which the respondent was president, and in time of distress a large number of tickets, many of which bore the respondent's name, were given away, which entitled the possessors to food or coals, and the respondent alluded to such distribution in his speeches, this was held not to be bribery or cheating, but the Judges expressed an opinion that it might be, if the giving of the tickets were coupled with a request for the individual's vote, or if the tickets were given dishonestly and colourably on a large scale, although there were no selection of voters only, and even if a large proportion of the recipients were non-voters, and that in the latter case it would probably amount to bribery or treating at common law.¹

A conversazione, though given in the name of a political association, was to be paid for by the respondent, and refreshments were to be obtained by producing a ticket which cost three pence. It was proved that the refreshments could not have been supplied for the amount which was charged. The Court held that the refreshments were supplied in an excessive quantity to influence voters in favour of the respondent and avoided the election for treating by agents, but acquitted the respondent of personal treating.²

The giving of drink to those present at meetings of political associations, even before the electoral campaign has begun, is most dangerous.³

Smoking concerts are objectionable, as affording an opportunity of treating.⁴

171C. (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

Undue influence
at elections.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever--

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury¹ of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

COMMENT.

This section defines 'undue influence at elections'. The offence is punishable under s. 171F.

"Undue influence at an election is defined as the voluntary interference or attempted interference with the right of any person to stand, or not to stand as, or withdraw from being, a candidate, or to vote or refrain from voting. This covers all threats of injury to person or property and all illegal methods of persuasion and any interference with the liberty of the candidates or the electors. A sub-section is added to explain that the inducing or attempting to induce a person to believe that he will become the object of Divine displeasure is also interference. It is not, however, inter-

¹ *The St. George's Division Case*, (1895) 5 O'M. & H. 89, 100; *The Wigan Case*, (1881)

4 O'M. & H. 1, 13, per Bowen, J.

² *The Borough of Rochester Case*, (1892) 4

O'M. & H. 156, 159, Day's El. Cas. 98.

³ *Worcester*, (1892) Day's El. Cas. 85, 88.

⁴ *The Borough of Rochester Case*, (1892) O'M. & H. 156, Day's El. Cas. 98.

ference within the meaning of the clause to make a declaration of public policy or a promise of public action".⁵

"The second sub-clause is merely explanatory of the general definitions in the first sub-clause and does not restrict the generality of the words used there. We have considered the criticisms of this clause based on the generality of the words employed but we are satisfied that any attempt at specific enumeration would be open to a serious danger of loopholes in what we regard as a most salutary provision".⁶

Where an attempt or threat is proved, it is unnecessary to prove that any person was in fact prevented from voting because the offence is complete.

1. 'Injury'.—See s. 44, *supra*.

CASES.

On the night preceding the day of an election the complainant, a candidate, was prevented from coming out of his house to canvass for votes, by his rival candidate, the accused, and others who were picketing the complainant's house. It was held that the accused had not interfered or attempted to interfere with the free exercise of an electoral right or threatened any candidate or voter with injury, and no *prima facie* case under this section was made out.⁷

English cases.—Where it was proved that an agent for the sitting member, who was a large employer of labour, first extracted a promise from his men not to vote at all, and subsequently threatened that if they voted for L, they should have no further employment from him, the election was avoided, although some of the men so threatened left of their own accord previously to the election.⁸

One H, one of the respondent's principal agents, and chairman of one of the district committees at the election, who was a Justice of the Peace, and a trustee of several charities, and a very influential person in the borough, stood with his gardener, J. M., just outside one of the polling stations, and spoke to many of the voters as they came to the poll, and solicited one voter, who was wearing the petitioner's colours, to vote for the respondent. When another voter wearing the petitioner's colours was coming out of the polling station, J. M. called out, "We shall know him and remember him another day". It was held that though this conduct was highly improper, yet it did not amount by itself to undue influence so as to avoid the election.⁹

Where undue influence by the improper exercise of spiritual influence was proved to have been committed by agents of the respondents, the elections were avoided. In this case it appeared that a pastoral had been issued by the Catholic bishop to the clergy throughout certain constituencies, and was read by them from the altar a few days before the election. The pastoral denounced the political party to which the petitioners belonged, condemned their principles as unlawful and unholy, and threatened with spiritual injury and loss all persons who should vote for them.¹⁰

171D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper¹ in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way,² commits the offence of personation at an election.

Personation at elections.

COMMENT.

This section defines 'personation at elections'. The offence is punishable under s. 171F.

The definition of 'personation' closely follows the definition in s. 24 of the Ballot

⁵ Statement of Objects and Reasons, G. I., 1920, Part V, p. 135, s. 9.

⁶ Statement of Objects and Reasons, G. I., 1920, Part V, p. 178.

⁷ *Ram Saran Das*, (1926) 7 Lah. 218.

⁸ *The Westbury Case*, (1869) 1 O'M. & H.

47, 50.

⁹ *The Lichfield Case*, (1880) 3 O'M. & H. 136.

¹⁰ *The Southern Division of Meath Case*, (1892) 4 O'M. & H. 130, 135, Day's El. Cas. 132, 141.

Act, 1872, and covers both a person who attempts to vote in another person's name, or in a fictitious name, a voter who attempts to vote twice, and any person who abets, procures or attempts to procure such voting.¹¹

Corrupt motive essential.—To constitute the offence of personation under this section it is necessary to prove that the accused in doing the act with which he is charged was actuated by a corrupt motive.¹²

1. 'Having voted once... applies at the same election for a voting paper'.—The offence of double voting can be charged not only under this section but also under s. 55 (1) of the Madras District Municipalities Act (Mad. Act V of 1920).¹³ It will be punishable also under similar provisions of the District Municipal Acts of other provinces.

2. 'Whoever abets... the voting by any person in any such way'.—These words mean the abetment of the voting at an election in the name of another person living at that date, or in a fictitious name, or a second time.¹⁴ If at an election a man applies to the presiding officer for a ballot paper in a name other than his name of origin, or in the name by which he is generally known, but in a name which appears on the register of voters, and which was inserted therein by the overseers in the belief that it was the name of the applicant, and for the purpose of putting him on the register, he is entitled to vote, and if he does so he is not guilty of personation.¹⁵

Personation.—The usual method of voting at an election was for the voter to obtain a paper called the signature slip and thereupon to go to the election officer and obtain a voting paper. An applicant went to an election officer in charge of signature slips and produced a certain piece of paper bearing a certain number. The name L appeared in the electoral roll against that number and the applicant professed to be L. A *patwari* pointed out that the applicant was not L but was one M. After some dispute the applicant admitted that he was not L. It was held that the applicant was not guilty of an attempt to commit the offence of fraudulently applying for a voting paper and thereby personating at an election.¹⁶ The Court observed: "In this case the obtaining of the 'signature slip' was an act which by itself would not have amounted to an application for a voting paper. The applicant was frustrated in the act of obtaining a signature slip. If he had not been frustrated, all that he would have committed was the obtaining of a signature slip on false pretences. The completion of this act would not have amounted to a completion of the act of applying for a voting paper."¹⁷

The applicant was accused of having abetted the personation of a voter at a municipal election in that, not being himself acquainted with the person who came forward to vote, he had, on the advice of others, put his name to a "signature sheet" in token that the thumb-mark made by the voter was that of the person entitled to vote under a certain name on the electoral roll. It was held that, inasmuch as the acts done by the applicant constituted the specific offence provided for by this section, he could only be tried for the offence, and could not be tried for abetment of the general offence provided for by s. 465 of the Code.¹⁸

Where the accused, a candidate at a Municipal election, was not aware of the fact that a certain voter was falsely personating one HS and the accused did not profess to attest on his personal knowledge the voting paper of the voter, and where the polling officer also was aware of the fact that the accused was not attesting on personal knowledge, it was held that the accused was not guilty of intentionally aiding the commission of an offence under this section.¹⁹

In the electoral roll of a Municipality one MD son of FM was recorded as a person entitled to vote. The accused MD whose father's name was A asked for a ballot paper in the name of MD son of FM and when questioned he asserted that his father's name was FM. There was no evidence on the record that the officer who prepared the electoral

¹¹ Statement of Objects and Reasons, *G. I.*, 1920, Part V, p. 185, s. 10.

¹² *Venkayya*, (1929) 53 Mad. 444.

¹³ *Sesha Ayyar v. Venkatasubba Chetty*, [1924] M. W. N. 268, 19 L. W. 201, 25 Cr. L. J. 442, [1924] AIR (M) 487.

¹⁴ *Ram Nath*, (1925) 24 A. L. J. R. 180, 184, 27 Cr. L. J. 705, [1926] AIR (A) 231.

¹⁵ *Fox*, (1887) 16 Cox 166.

¹⁶ *Malkhan, Singh*, (1924) 22 A. L. J. R. 1102, 26 Cr. L. J. 359, [1925] AIR (A) 226.

¹⁷ *Ibid.*, p. 1103.

¹⁸ *Ram Nath*, (1924) 47 All. 268.

¹⁹ *Ram Nath*, (1925) 24 A. L. J. R. 180, 27 Cr. L. J. 705, [1926] AIR (A) 231.

roll intended to put the accused on the register and that MD son of FM had no existence at all. It was held that the accused was guilty of the offence of personation.²⁰

Where it is not shown that the accused knew he was not entitled to vote in that there was upon the list the name of another person which name was the same as his own, no offence is committed.²¹

171E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both :

Punishment for
bribery.

Provided that bribery by treating shall be punished with fine only.

Explanation.—‘Treating’ means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

COMMENT.

This section prescribes the punishment which should be inflicted for the offence of bribery and treating. Bribery by treating is punishable with fine only.

PRACTICE.

Evidence.—Prove, where the accused is the giver of the bribe,

- (1) that he gave gratification to a particular person ;
- (2) that he did so with the object of (a) inducing him or any other person to exercise any electoral right, or (b) of rewarding any person for having exercised any such right.

Prove, where the accused is the acceptor of the bribe,

- (1) that he accepted either for himself or for any other person a gratification ;
- (2) that he did so as a reward (a) for exercising any electoral right, or (b) for inducing or attempting to induce any other person to exercise any such right.

Procedure.—Not cognizable—Summons —Bailable—Not compoundable— Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section.²²

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows :—

(Where accused is the giver of the bribe.)

That you, on or about the——day of——, at——, gave a gratification, to wit——, to——with the object of [inducing him or——to exercise his electoral right] [or rewarding——for having exercised his electoral right] and thereby committed an offence under s. 171E of the Indian Penal Code and within my cognizance.

(Where accused is the acceptor of the bribe.)

That you accepted for yourself or for——a gratification, to wit——, as a reward [for exercising your or his electoral right] or [for inducing or attempting to induce——to exercise his electoral right].

And I hereby direct that you be tried on the said charge.

171F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for
undue influence or
personation at an
election.

²⁰ *Muhammad Din*, (1928) 30 Cr. L. J. 853, [1929] AIR (L) 52.

²¹ *Mulchand*, (1936) 38 Cr. L. J. 306, 30 S. L. R. 425, (1937) AIR (S) 21.

²² Criminal Procedure Code, s. 196; *Ponnu-swami Thevar*, (1921) 15 L. W. 199, [1922] M. W. N. 122, 42 M. L. J. 139, 23 Cr. L. J. 148, [1922] AIR (M) 62.

COMMENT.

* This section specifies the punishment for undue influence at an election (s. 171C) or personation at an election (s. 171D.).

Where a voter who was not present at a polling station was personated by his brother and the candidate in whose favour he voted attested the identity slip vouchsafing that the person who had appeared at the polling station was the voter himself, it was held that there was deliberate offence of abetment of false personation.²³

PRACTICE.

Evidence.—Prove (1) that the accused voluntarily interfered or attempted to interfere with the free exercise of any electoral right; or

(2) that the accused threatened any candidate or voter or any person in whom a candidate or voter is interested, with injury of any kind; or

(3) that the accused induced or attempted to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure.

In the case of personation at an election prove (1) that the accused at an election applied for a voting paper or voted in the name of any other person, whether living or dead, or in a fictitious name; or

(2) that the accused having voted once at an election applied at the same election for a voting paper in his own name; or

(3) that the accused abetted, procured, or attempted to procure, the voting by any person in any one of the above ways.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

In the Bombay Presidency, in the Punjab, in the Central Provinces, in the North-West Frontier Province and in Burma if the offence is of personation at an election, then it is cognizable.²⁴

The accused abetted the personation of a voter at a Municipal election in that not being himself acquainted with the person who came forward to vote, he had, on the advice of others, put his name to a "signature sheet" in token that the thumb-mark made by the voter was that of the person entitled to vote under a certain name on the electoral roll. It was held that, inasmuch as the acts done by the applicant apparently constituted the specific offence provided for by this section, he could only be tried for that offence, and could not be tried for abetment of the general offence provided for by s. 465.²⁵

Sanction.—Previous sanction is necessary for prosecution under this section.¹ If the act of the accused is punishable under this section sanction of the local Government is necessary. For want of sanction he cannot be tried under s. 465.²

Sentence.—An offence of personation at elections is a most serious one and deserves a severe sentence.³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily interfered (*or attempted to interfere*) with the free exercise of an electoral right, to wit——[*or threatened——, a candidate (or voter or person in whom a candidate (or voter) to wit——is interested*] with injury, to wit——] *or* [induced (*or attempted to induce——*) a candidate (*or voter*) at an election, to wit——, to believe that he or any person in whom he is interested, to wit—— will become an object of Divine displeasure (*or of spiritual censure*)] and thereby committed an offence punishable under s. 171F of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

²³ *Badan Singh*, (1928) 30 Cr. L. J. 933, [1928] AIR (A) 150.

²⁴ *Vide* The Bombay Criminal Procedure (Elections Offences) Amendment Act (Bom. XXIX of 1935), s. 3 (b); Punj. Act I of 1936; C. P. Act XIX of 1936; North-West Frontier Province Act X of 1937, s. 3, and VIII of

1938, s. 3; Burma Act III of 1936.

²⁵ *Ram Nath*, (1924) 47 All. 268.

¹ Criminal Procedure Code, s. 196.

² *Ram Nath*, (1924) 47 All. 268.

³ *Badan Singh*, (1928) 30 Cr. L. J. 933, [1928] AIR (A) 150.

The charge for the offence of personation at an election should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at the election, to wit—, applied for a voting paper (*or voted*) [in the name of another person, to wit—, who is living (*or dead*)] [*or in a fictitious name, to wit—*] [*or in your name after having voted once at the said election*] and thereby committed an offence punishable under s. 171F of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Where the offence falls within the second paragraph of s. 171D the following should be substituted in place of the second paragraph in the above charge:—

That you, on or about the——day of——, at the election, to wit—, abetted (*or procured or attempted to procure*) the voting by——(*specify the act committed and which is punishable under the first para. of s. 171D*) and thereby committed an offence punishable under s. 171F of the Indian Penal Code and within my cognizance.

171G. Whoever with intent to affect the result of an election

False statement
in connection with
an election.

makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

COMMENT.

False statements of fact in relation to the personal character or conduct of a candidate are penalized by this section which corresponds to s. 1 of the Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vic., c. 40). The offence under this section is not a species of the more general offence of defamation and the section cannot be said to have been carved out of s. 499 of the Code. There may be cases under this section which do not fall under s. 499 and *vice versa*. It cannot therefore be insisted that the complainant should proceed against the accused in respect of the offence under this section and not under s. 499.⁴

To prosecute a person under this section something false must have been stated by him as a fact and not as a general imputation or as a matter of opinion, in relation to the personal character or conduct of the candidate with intent to affect the result of the election.⁵ The section does not apply to defamatory statements about persons who are not candidates at an election.⁶

It is not a statement of fact relating to the personal character or conduct of a candidate to impute that he was saying that if he were to be elected he would take no part in any proceedings except to nod his head and hold up his hand.⁷ The complainant and the accused contested certain municipal elections and the accused tried to persuade the complainant to withdraw, but the complainant did not withdraw. Then the accused published a statement that the complainant was a leper in the municipal meeting hall at the time of receipt of nomination papers. It was held that the facts alleged did not constitute an offence under this section.⁸

PRACTICE.

Evidence.—Prove (1) that the accused made or published any statement in relation to the personal character or conduct of a candidate.

(2) That such statement was false and the accused either knew or believed it to be false or did not believe it to be true.

(3) That the accused made or published such statement with intent to affect the result of an election.

⁴ *Bhagolelal*, [1942] Nag. 208.

⁵ *Radhakrishna Ayyar*, (1932) 55 Mad. 791; *Narayanaswamy Naicker v. Devaraja Mudaliar*, [1935] M. W. N. 1164, 37 Cr. L. J. 629, [1936] AIR (M) 316.

⁶ *Narayanaswamy Naicker v. Devaraja Mu-*

daliar, [1935] M. W. N. 1164, 37 Cr. L. J. 629, [1936] AIR (M) 316.

⁷ *Ibid.*

⁸ *Hajee Mahomed Kadir Sheriff v. Rahim-tullah*, [1939] M. W. N. 610, 41 Cr. L. J. 577, [1940] AIR (M) 280.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section.⁹

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, with intent to affect the result of the election, to wit—, made (*or published*) a statement in relation to the personal character (*or conduct*) of a candidate, to wit—, which statement is false and which you knew (*or believed*) to be false (*or which you did not believe to be true*) and thereby committed an offence punishable under s. 171G of the Indian Penal Code.

And I hereby direct that you be tried on the said charge.

171H. Whoever without the general or special authority in writing of a candidate incurs or authorizes expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Illegal payments
in connection with
an election.

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

COMMENT.

This section makes it illegal for any one, unless authorized by a candidate, to incur any expenses in connection with the promotion of the candidate's election.

Under the proviso expenses may be incurred without the authority of a candidate up to an amount of ten rupees subject to ratification by the candidate of the action taken within ten days of the date on which the expenses are incurred.

PRACTICE.

Evidence.—Prove (1) that the accused incurred or authorized expenses on account of the holding of any public meeting, or upon any advertisement, circular, or publication, or in any other way.

(2) That he did so for the purpose of promoting or procuring the election of a candidate.

(3) That he incurred or authorized the said expenses without the general or special authority in writing of the candidate.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section.¹⁰

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you without the general (*or special*) authority in writing of——incurred (*or authorized*) expenses on account of the holding of a public meeting at—(*or upon* any advertisement, circular *or* publication, Exhibit—, *or in any other way whatsoever*) for the purpose of promoting (*or procuring*) the election of—and thereby committed an offence punishable under s. 171H of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

⁹ Criminal Procedure Code, s. 196.

¹⁰ Criminal Procedure Code, s. 196.

171I. Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

Failure to keep
election accounts.

COMMENT.

This section punishes failure to keep accounts of expenses incurred at or in connection with an election, if such accounts are required to be kept by any law or rule having the force of law.

PRACTICE.

Evidence.—Prove (1) that the accused was required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election.

(2) That he failed to keep such accounts.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Sanction is necessary for prosecution under this section:¹¹

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you being required by law for the time being in force, to wit—, (*or by any rule having the force of law, to wit—,*) to keep accounts of expenses incurred at (*or in connection with*) the election, to wit—, failed to keep such accounts and thereby committed an offence punishable under s. 171I of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

¹¹ Criminal Procedure Code, s. 196.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

THIS Chapter contains those penal provisions which are intended to enforce obedience to the lawful authority of public servants. Contempts of the lawful authority of Courts of Justice, of officers of Revenue, of officers of police, and of other public servants are punishable under this head. The penalties prescribed in this Chapter for particular offences obstructive of judicial proceedings must not be taken to interfere with other powers possessed by Courts of Justice and public functionaries to enforce their orders. They will not affect other coercive powers of the Courts of Justice to compel performance of their orders and decrees, whether by attachment and sale of property, by imprisonment or otherwise.¹

172. Whoever absconds in order to avoid being served with a summons, notice or order¹ proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,² shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both ;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice,³ with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Object.—The object of this section is to punish an offender for the contempt his conduct indicates of the authority whose process he disregards. The absconding must be with the intention of evading service.

Scope.—This section punishes the evasion of those orders which become binding from the moment they are served. It does not apply to orders which become binding without any kind of special service.

The second clause applies where the summons, notice or order is (1) for attendance in Court ; or (2) for production of a document.

Ingredients.—The section requires two things :—

1. Absconding in order to avoid being served with a summons, notice or order.
2. Such summons, notice or order must proceed from a public servant legally competent to issue it.

1. 'Absconds in order to avoid being served with a summons, notice or order'.—The "term 'abscond' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense are to hide oneself ; and it matters not whether a person departs from a place or remains in it, if he conceals himself ; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so after it has issued, he absconds".²

Refusal to accept a notice, abusing the process-server and walking inside the house do not amount to absconding.³

'In order to avoid.'—"The absconding must be with a purpose. This...implies that the absconder knows, or at least has reason to believe, the process has issued.

¹ M. & M. 143.

² Per Turner, C. J., in *Srinivasa Ayyangar*,

(1881) 4 Mad. 393, 397.

³ *Bhujanga*, (1924) 1 O. W. N. 159.

He may...abscond to avoid the issue of process, and this would not be an offence punishable under s. 172...When he knows, or has reason to believe, that it has issued, he may be unwilling to show contempt of the authority of the Court or officer who has issued it, and may comply with it, or so conduct himself that service may be effected; but he can hardly be said to be guilty of contempt of authority if he does not know, and has not reason to believe the authority has been exercised, nor to be absconding to prevent the service of a process, if he does not know, nor has reason to believe, that it has issued".⁴

'Summons, notice or order'.—For the service of 'summons' see ss. 69-74, Criminal Procedure Code. A warrant addressed to a police-officer is not a 'summons, notice or order';⁵ nor a warrant addressed to a Nazir by a civil Court for the arrest of a defendant in execution of a decree.⁶ Because from the wording of the section it appears that 'the summons, notice or order' therein referred to should be addressed to the same person whose attendance is required and who absconds to avoid being served with such 'summons, notice or order'. A warrant is not an order served on an accused, it is simply an order to the police to arrest him.⁷ This section does not cover the absconding from a warrant of arrest.⁸ But this section is held applicable to a witness who absconds to evade the service of a warrant issued by a Magistrate under ss. 181 to 196 of the Criminal Procedure Code.⁹ This section was also held applicable where the accused who was placed in charge of certain attached property did not produce it for sale and evaded the service of notice to produce it.¹⁰

2. **'Proceeding from any public servant legally competent...to issue such summons, etc.'**—The liability of the accused depends upon the legal competence of the officer to issue the 'summons, etc'.¹¹

3. **'If the summons, etc., is to attend, etc.'**—This shows that existence of a summons, notice or order is necessary to constitute the offence. It is not sufficient to show that a person apprehending that a process will be issued has absconded. He may do so in the hope that his absence will deter the Court or officer from issuing the process, and he would not be guilty of an offence under this section.

See s. 20, *supra*, as to the meaning of 'Court of Justice.'

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order.

- (2) That the same was issued by a public servant.
- (3) That such public servant was legally competent as such to issue it.
- (4) That such process was issued in order to be served on the accused.
- (5) That the accused absconded in order to avoid being served with such process.

For the second clause of the section prove further—

(6) That the process required the attendance of the accused (either personally or by his agent) or required the production of a document by him (either personally or by his agent).

(7) That such attendance or production was to be in a Court of Justice.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.¹²

⁴ Per Turner, C. J., in *Srinivasa Ayyangar*, (1881) 4 Mad. 393, 397-98.

⁵ *Womesh Chunder Ghose*, (1866) 5 W. R. (Cr.) 71; *Amir Jan*, (1875) 7 N. W. P. 302; *Majhi Mamud*, (1905) 2 C. L. J. 625, 3 Cr. L. J. 117; *Annawadin*, (1923) 1 Ran. 218.

⁶ *Zahoor Ali Khan*, (1872) 4 N. W. P. 97; *Alla Baksh*, (1890) P. R. No. 28 of 1890. See *Hira Lal*, (1888) 3 A. W. N. 222.

⁷ *Lakshmi*, (1881) Unrep. Cr. C. 152.

⁸ *Sheo Jangal Prasad*, (1928) 50 All. 666.

⁹ *Hossein Manjee*, (1868) 9 W. R. (Cr.) 70.

¹⁰ *Harnam Singh*, (1918) 16 A. L. J. R. 600, 19 Cr. L. J. 975, [1918] AIR (A) 406.

¹¹ *Purshotam Valji*, (1868) 5 B. H. C. (Cr. C.) 33.

¹² Criminal Procedure Code, s. 195. See also ss. 476-479, 487.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section punishes intentional prevention of the service of summons, notice or order. What is required is some act of opposition offered to the officer serving the summons.¹³ A refusal to sign a summons,¹⁴ a refusal to receive a summons,¹⁵ throwing down of a summons after service,¹⁶ a refusal to accept a citation issued under s. 147 of the United Provinces Land Revenue Act (U. P. Act III of 1901) or to sign the duplicate thereof,¹⁷ and a refusal to take *subpoena* under s. 160 of the Criminal Procedure Code,¹⁸ do not constitute the offence of intentionally preventing the service of a summons. The words "prevents the serving on himself" are not applicable to a case where the summons is tendered and refused, inasmuch as tendering is in itself good service. Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under this section.¹⁹ A person who gets away from the serving officer and shuts himself in his house is intentionally preventing service either by tender or by delivery within the meaning of this section.²⁰

Refusal to serve as special constables.—In a case of dispute regarding the right to the possession of an estate between two parties, one of whom was represented by the Court of Wards, the Magistrate of the District took up the cause of the latter, and alleging that it would be impossible to preserve the peace without employing a special police force, appointed the active men of the opposite party as special constables, and, on the latter refusing to serve as such, proceedings under this section were drawn up against them. It was held that the charge under this section had no relation to the offences alleged, and the proceedings thereunder were quashed.²¹

¹³ *U Thudamawara*, (1923) 1 Ran. 49.

¹⁴ *Kalya Fakir*, (1868) 5 B. H. C. (Cr. C.) 34; *Khushal*, (1869) Cr. R. for 1869, Unrep. Cr. C. 17; *Bhoobuneshwar Dutt*, (1877) 3 Cal. 621; *Krishna Gobinda Das*, (1892) 20 Cal. 358.
¹⁵ *Punamalai Nadan*, (1882) 5 Mad. 199; *Ananta Kernaya*, (1884) 1 Weir 80; *G. Zapantis*, (1920) 3 U. B. R. 202, 21 Cr. L. J. 688, [1920] AIR (UB) 18; *U Thudamawara*, (1923) 1 Ran. 49; *Debigir Tapdhari*, (1924) 23 A. L. J. R. 148, 26 Cr. L. J. 909, [1925] AIR (A) 322; *Banwari*, (1925) 24 A. L. J. R. 216, 27 Cr. L. J. 142.

¹⁶ *Arumuga Nadan*, (1881) 5 Mad. 200 (n), 1 Weir 79.

¹⁷ *Ahmad Husain Khan*, (1909) 31 All. 608.

¹⁸ *Chandika Prasad*, (1918) 21 O. C. 150, 19 Cr. L. J. 801, [1918] AIR (O) 412.

¹⁹ See *Sahdeo Rai*, (1918) 40 All. 577; *Bahadur*, (1925) 24 A. L. J. R. 215, 27 Cr. L. J. 284, [1926] AIR (A) 304.

²⁰ *Budhua*, (1927) 26 A. L. J. R. 107, 29 Cr. L. J. 263, [1928] AIR (A) 118.

²¹ *Gopinath Paryah*, (1886) 10 C. W. N. 82 2 C. L. J. 555, 3 Cr. L. J. 169.

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order, or a direction for a proclamation.

(2) That the same was issued or made by a public servant legally competent to issue such process; or that such public servant was legally competent to direct such proclamation to be made, the same being lawful, and under his authority.

(3) That such summons, notice or order, was issued to be served either upon the accused, or upon some one else; or that such summons, notice or order, had been, or was to be, lawfully affixed to some place; or that such proclamation was about to be made.

(4) That the accused prevented such service of the summons, notice or order; or that he prevented the affixing of such process; or that he removed the same when so affixed; or that he prevented the making of such proclamation.

(5) That the accused did as above intentionally.

For the second clause of the section prove further—

(6) That the process or proclamation required the attendance of the accused (either in person or by agent) or the production of a document; and

(7) That such process or proclamation was to attend or to produce the document in a Court of Justice.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.²²

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant¹ legally competent, as such public servant,² to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,³

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months; or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(a) A, being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpoena issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(b) A, being legally bound to appear before a Zila Judge, as a witness, in obedience to a summons issued by that Zila Judge, intentionally omits to appear. A has committed the offence defined in this section.

COMMENT.

The offence contemplated by this section is an omission to appear at a particular time and at a particular place before a specified public functionary in obedience to a summons, notice or order, or proclamation not defective in form.

Ingredients.—The section requires three essentials—

1. That a summons, notice, order, or proclamation for attendance must be issued by a public servant who was legally competent to issue the same.

²² Criminal Procedure Code, s. 195. See ss. 476-478, 487.

2. That the person summoned must be legally bound to attend at a certain place and time in obedience to the summons, notice, order or proclamation proceeding from the public servant.

3. That the person summoned must have (a) intentionally omitted to attend at that place or time, or (b) departed from the place where he was bound to attend before the time at which it was lawful for him to depart.

1. 'Legally bound to attend in person...at a certain place and time in obedience to a summons, etc., proceeding from any public servant.'—A conviction cannot be had, unless the person summoned was legally bound to attend, and refused or intentionally omitted to attend.²³ Where the presence of a person cannot be compelled, refusal to appear does not amount to an offence under this section. Thus where the presence of a tout could not be compelled under s. 36 of the Legal Practitioners Act to show cause or to receive orders in the case, it was held that no offence under this section was committed.²⁴

'Certain place and time.'—It must be proved that he had notice to appear at a certain place and time and omitted to do so.²⁵ Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, it was held that such person could not be punished under this section.² Disobedience to a summons, directing a person to appear at such place in camp as the Magistrate might be on the date fixed, is not punishable.³ A verbal order not specifying the particular day on which a person is to appear is not a lawful order.³

The place where a person is summoned to attend must be in British India. It is not, therefore, an offence to disobey a summons issued by a British Magistrate directing the person summoned to appear before him at a place outside the British territory.⁴

'Summons.'—A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.⁵ It must be one which could lawfully be issued;⁶ hence, a summons to take away a bundle of leases for distribution is not such a summons.⁷

Where a summons is not sealed as required by Madras Act III of 1869, s. 2, under which it is issued, the conviction is bad.⁸

The issue of a citation to an alleged defaulter under s. 147 of the United Provinces Land Revenue Act, 1901, does not involve him in any legal liability to attend, and non-compliance with it does not render him guilty of an offence under this section.⁹ The Oudh Chief Court has differed from this view.¹⁰

'Order.'—A verbal order given to a witness by a Court to attend on a particular day at a particular hour is an order the disobedience of which is punishable under this section.¹¹ The order should be directed or addressed to the accused.¹²

²³ *Sreenath Ghose*, (1868) 10 W. R. (Cr.) 33; *Sittu Padayachi*, (1897) 1 Weir 81; *Tajumaddi Lahory*, (1868) 1 Beng. L. R. (A. Cr. J.) 1, 10 W. R. (Cr.) 4; *Khota Ram*, (1907) P. R. No. 4 of 1907, 6 Cr. L. J. 107.

²⁴ *P. J. Money*, (1928) 6 Ran. 529.

²⁵ *Shib Pershad Chukerbutty*, (1872) 17 W. R. (Cr.) 38; *Murad*, (1920) 2-L. L. J. 539.

¹ *Ram Saran*, (1882) 5 All. 7; *Bholanath*, (1883) 3 A. W. N. 109; *Hira Lal*, (1890) 10 A. W. N. 1; *Hukum Singh*, (1926) 24 A. L. J. R. 536, 27 Cr. L. J. 697, [1926] AIR (A) 474; (1872) 1 Weir 81; *Narayana Reddi*, (1882) 1 Weir 109; *Ghulam Khan*, (1887) P. R. No. 14 of 1887; *Latoor Mal*, [1947] A. L. J. 584.

² *Jaswant*, (1877) Colm. D. Cr. No. 89.

³ (1870) 6 M. H. C. Appx. 10, 1 Weir 82.

⁴ *Paranga*, (1893) 16 Mad. 463. See *Ram Chand*, (1921) 23 Cr. L. J. 230.

⁵ *Ram Saran*, (1882) 5 All. 7.

⁶ *Behari Lal*, (1920) 22 Cr. L. J. 79, [1920] AIR (A) 304.

⁷ *Chikka Honnappa*, (1882) 1 Weir 97; *Jangama Pattan*, (1883) 1 Weir 93; *Yellappa*, (1883) 1 Weir 93.

⁸ *Narasaiya*, (1882) 1 Weir 100.

⁹ *Bhargu Singh*, (1925) 49 All. 205; *Banwari Lal*, (1926) 49 All. 215; *Himanchal Singh*, (1930) 52 All. 568, F.B. See *Tika Ram*, (1928) 26 A. L. J. R. 1201, 29 Cr. L. J. 910, [1928] AIR (A) 680, F.B.

¹⁰ *Chandrika Singh*, (1927) 4 O. W. N. 1211, 29 Cr. L. J. 94, [1928] AIR (O) 122, following *Ram Baki Singh*, (1916) 13 O. C. 55, 11 Cr. L. J. 250.

¹¹ *Guman*, (1873) Unrep. Cr. C. 75, Cr. R. of 1873; (1870) 5 M. H. C. Appx. 15, (1870) 1 Weir 87; (1872) 7 M. H. C. Appx. 3, 1 Weir 88.

¹² *Firkha*, (1870) P. R. No. 6 of 1870.

Order to attend necessary.—A Munsif called upon a Vakil to show cause why a report should not be made against him to the High Court for gross professional misconduct. The Vakil put in a written explanation and the matter was ordered to be put up on a certain date for orders. On the day fixed he did not appear and a proceeding was drawn up for his prosecution. It was held that as there was no order enjoining upon the Vakil to appear personally before the Munsif the proceeding should be quashed.¹³

In the absence of an order in writing as required by s. 162, Criminal Procedure Code, a person who is asked orally to appear before a police-officer as a witness, does not commit an offence under this section for non-appearance.¹⁴

'Public servant.'—See s. 21, *supra*. A receiver appointed under the Land Registration Act (Beng. Act VII of 1876, s. 56) is not a public servant within the meaning of this section.¹⁵

2. 'Legally competent, as such public servant.'—The public servant must be legally competent to issue summons, etc. If he is not legally competent to issue the summons, notice or order in virtue of which the attendance of the accused is required, no offence is committed.¹⁶ Disobedience to a summons issued by a Village Magistrate who has no jurisdiction over the offence is not punishable under this section.¹⁷ Similarly, disobedience to an order of a police-officer which he is not competent to issue is not punishable under this section.¹⁸ The Chairman of a Municipality, although a public servant, is not legally competent as such to issue an order for attendance before him; and disobedience to such an order is not an offence within the meaning of this section.¹⁹ It was held similarly where a Tahsildar,²⁰ a Mahalkari,²¹ a Mamlatdar,²² and a Receiver²³ having no jurisdiction issued summonses for attendance, where a Collector issued a notice under s. 193 of the Land Revenue Act when there was no investigation, suit or other business before him;²⁴ and where a Sub-Deputy Collector issued a notice under s. 8 of the Chowkeedaree Act (Beng. Act VI of 1820) for attendance.²⁵

The accused were appointed arbitrators in a civil suit. They were summoned to attend the Court on a certain day, but did not obey the summons. It was held that they could not be convicted under this section as the summons in question was a process not provided for by the law.¹

3. 'Intentionally omits to attend at that place or time, or departs... before the time.'—The omission to appear in answer to the summons must be intentional.² If the witness explains his inability to the process-server that he will not be able to attend, he does not "intentionally" disobey the summons.³ It must be proved that the non-attendance was in the nature of a wilful disobedience.⁴ Before conviction the Court is bound to decide whether there was an intentional disobedience to the summons after giving the accused an opportunity of explaining his absence.⁵ If a person is sufficiently incapacitated by illness to have given up his ordinary avocations, this would be sufficient excuse for him not to attend a Court in obedience to a summons. The mere fact that he was not so dangerously ill that he could not be moved or that he did not send a man to inform the Court of his illness, would not render him punishable under this section.⁶ Non-attendance in obedience to a summons issued by a Sub-

¹³ *Prokash Chunder Sarkar*, (1903) 7 C. W. N. 797.

¹⁴ *Virasami Pillai*, (1895) 1 Weir 86.

¹⁵ *Ebrahim Sircar*, (1901) 29 Cal. 236.

¹⁶ *Kashi Ram*, (1871) P. R. No. 2 of 1871.

¹⁷ (1865) 1 Weir 87.

¹⁸ *Chattar Singh*, (1885) 5 A. W. N. 43.

¹⁹ *Purshottam Valji*, (1868) 5 B. H. C. (Cr. C.) 33.

²⁰ *Gopia*, (1904) 24 A. W. N. 122, 1 Cr. L. J. 497; *Khota Ram*, (1907) P. R. No. 4 of 1907, 6 Cr. L. J. 107; *Shiam Lal*, (1914) 12 A. L. J. R. 680, 15 Cr. L. J. 595, [1914] AIR (A) 519.

²¹ *Venkaji Bhaskar*, (1871) 8 B. H. C. (Cr. C.) 19.

²² *Mahomed Ismal*, (1878) Unrep. Cr. C.

²³ *Mahomed Ismal*, (1878) Unrep. Cr. C.

70, Cr. R. of 1873.

²⁴ *Ebrahim Sircar*, (1901) 29 Cal. 236.

²⁵ *Waris Ali*, (1916) 14 A. L. J. R. 1069, 17 Cr. L. J. 471, [1916] AIR (A) 96.

¹ *Basat Ali*, (1899) 3 C. W. N. cclxxi.

² *Kashi Ram*, (1871) P. R. No. 2 of 1871; *Kuria*, (1875) P. R. No. 18 of 1875.

³ *J. R. Das*, (1923) 1 Ran. 549.

⁴ *Ramdhir*, (1880) P. R. No. 22 of 1880.

⁵ *Ungun Lall*, (1869) 1 N. W. P. 303. See *F. Todd*, (1882) 2 A. W. N. 52; *Sreenath Ghose*, (1888) 10 W. R. (Cr.) 33.

⁶ *Ramun*, (1906) P. W. R. (Cr.) No. 27 of 1907.

⁷ *Bohra Birbal*, (1922) 20 A. L. J. R. 192, 23 Cr. L. J. 208, [1922] AIR (A) 82.

Inspector of Police and served personally on an *amin* requiring him to give evidence at a police investigation constitutes an offence under this section.⁷

A man in obedience to a summons attended a Magistrate's Court at 10 A.M., but finding the Magistrate not present in Court at the time mentioned in the summons, departed without waiting for a reasonable time. It was held that he was guilty of an offence under this section.⁸ But a person who departs without permission is not guilty under this section in the absence of a direction that he should not leave without permission.⁹

A witness was summoned by the High Court to give evidence and left the jurisdiction without being discharged as a witness and without the permission of the Court, in order to avoid giving evidence. It was held that such conduct amounted to contempt, and that the High Court had inherent jurisdiction to punish for that contempt, provided that this summary remedy was necessary as where proceedings in the ordinary course of law were not calculated to put a timely and efficient check upon the wrong-doer, and provided further that the specific offence was distinctly stated and the person in contempt had an opportunity of answering the charge.¹⁰

Public servant absent.—Where a public servant is absent on a date fixed in the summons, the person summoned cannot be convicted, though he purposely fails to attend.¹¹

Appearance through lawyer instead of in person.—Where a person did make an appearance, though not a personal appearance, on service of summons, it was held, under the circumstances, not to be an offence under this section.¹² But having regard to Sch. V of the Code of Criminal Procedure, if a summons require appearance in person, the accused is legally bound to attend personally and cannot appear by agent unless exempted under s. 205.

The petitioner, a practising barrister of the High Court, was summoned under the Motor Vehicles Act, but being unable to appear owing to professional work on that day applied for adjournment through counsel, which was granted. He was then prosecuted for failing to attend in answer to the summons and convicted under this section and sentenced to pay a fine of Rs. 5 or to suffer two days' simple imprisonment. It was held, in revision, that there was no intentional omission to appear, that as an officer of the Court it was the duty of the advocate no less to the Bench than to his own client to be ready when the case in which he was briefed was called, and that finding himself unable to abandon his client's interests he had instructed counsel to represent the matter to the Court, and that no offence under this section was committed.¹³

Personal service necessary.—Before the provisions of this section can come into play, personal service of summons must be attempted.¹⁴ Where a summons was shown to a person and taken back, it was held that it had not been served so as to render that person liable under this section for non-attendance.¹⁵ Service of a notice on the pleader of a party is not sufficient in criminal cases.¹⁶ The mere affixing of summons to the house of the person required to attend is not sufficient. It should be proved that it was brought to the knowledge of the accused that he was required to attend.¹⁷

Escape from custody.—The section does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of a civil Court.¹⁸

Madras Regulation IV of 1816.—The provisions of this section are not in conflict with the special provisions of ss. 15 and 16 of Regulation IV of 1816 (Madras). In ordinary cases obedience to the summons of a Village Munsif should be dealt with

⁷ *Gumparthi Venkataramiah*, (1916) 18 Cr. L. J. 733.

⁸ *Kisan Bapu*, (1885) 10 Bom. 93; *Sutherland*, (1870) 14 W. R. (Cr.) 20.

⁹ *Narayanappa*, (1890) 1 Weir 99.

¹⁰ *Ebrahim Mamoojee Parekh*, (1926) 4 Ran. 257.

¹¹ *Krishappa*, (1896) 20 Mad. 31; *Lalu*, (1909) 3 S. L. R. 155, 10 Cr. L. J. 576.

¹² *Durga Das Rakshit v. Umesh Chandra Sen*, (1900) 27 Cal. 985.

¹³ *J. R. Das*, (1923) 1 Ran. 549.

¹⁴ *Hurynath Chowdry*, (1867) 7 W. R. (Cr.)

58; *Firkha*, (1870) P. R. No. 6 of 1870.

¹⁵ *Kuppan*, (1887) 11 Mad. 137; *Karsanlal Danatram*, (1868) 5 B. H. C. (Cr. C.) 20.

¹⁶ *Saraswati Devi v. Maharaja Durga Churn Laha*, (1902) 6 C. W. N. 927.

¹⁷ *Periannamalawaram*, (1884) 1 Weir 84; (1871) 6 M. H. C. Appx. 29, 1 Weir 83; *Ganapathi Aiyar*, (1882) 1 Weir 85.

¹⁸ *Sardar Pathu*, (1863) 1 B. H. C. 38, (1874) 7 M. H. C. Appx. 43, 2 Weir 38; *Dhola*, (1870) P. R. No. 27 of 1870. Contra, *Heera Singh*, (1870) P. R. No. 1 of 1871.

under the Regulation. But if a charge is laid under the Penal Code, the criminal Court must deal with it.¹⁹

Madras Act III of 1869.—There are several cases deciding whether disobedience to a summons issued by a Tahsildar under Act III of 1869 is punishable under this section or not.²⁰

PRACTICE.

Evidence.—Prove (1) that the obligation to attend was in obedience to a summons, etc.

(2) That such summons, etc., was issued by a public servant, legally competent, as such, to issue the same.

(3) That the accused became thereby legally bound to attend, in person or by agent, at a certain place and time.

(4) That he omitted to attend at such place or time; or that he departed from the place before the time at which it was lawful for him to depart.

(5) That he did as above intentionally.

To bring the case within the second clause it must be further proved—

(6) That the summons or notice was to attend in person or by agent in a Court of Justice.

It must be proved that it was brought to the knowledge of the accused that he was required to attend and that he intentionally omitted to do so.²¹ The mere production of the summons to the accused with an endorsement of service is not sufficient proof of service in the absence of the evidence of the officer who is said to have served the summons.²²

A summons directing a person to appear within a certain number of days does not comply with the requirement of this section.²³

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

An offence under this section cannot be tried by a Magistrate in whose Court the accused has failed to appear. The prohibition is absolute and the consent or otherwise of the accused is immaterial.²⁴

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is necessary.²⁵ An offence under this section cannot be tried by the officer whose order is disobeyed.¹

175. Whoever, being legally bound¹ to produce or deliver up any document to any public servant,² as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the document is to be produced or delivered up to a Court of Justice,³ with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATION.

A, being legally bound to produce a document before a Zila Court, intentionally omits to produce the same. A has committed the offence defined in this section.

¹⁹ *Rámchandrappa*, (1888) 6 Mad. 249.

²⁰ (1871) 6 M. H. C. Appx. 44; *Reddi Narasuramayya*, (1889) 1 Weir 95; *Varathappa Chetti*, (1889) 12 Mad. 297; *Veerasami Naidu*, (1897) 1 Weir 95; *Timmoroyan*, (1903) 1 Weir 96; *Reddi Revana Gowd*, (1903) 1 Weir 95; *Karuppana Mudali*, (1903) 1 Weir 96.

²¹ (1871) 1 Weir 88.

²² *Odda Kolanthan*, (1889) 1 Weir 85.

²³ *G. Somannah*, (1894) 1 Weir 82.

²⁴ *Muhammad Din*, (1934) 35 P. L. R. 454, 35 Cr. L. J. 1166, [1934] AIR (L) 316.

²⁵ Criminal Procedure Code, s. 195; *Sheomangan Singh*, [1942] O. W. N. 434, (1942) 43 Cr. L. J. 641, [1942] AIR (O) 425. See also ss. 476-478, 487.

¹ *Deo Saran Tewari*, (1918) 16 A. L. J. R. 432, 19 Cr. L. J. 688, [1918] AIR (A) 320.]

COMMENT.

A witness who having a document does not produce it comes under this section and not under O. XVI, rr. 17-18, of the Civil Procedure Code.²

1. 'Legally bound.'—See s. 43, *supra*.

2. 'Public servant.'—See s. 21, *supra*. The public servant must be legally competent to call for the document.

A receiver appointed under the Land Registration Act (Beng. Act VII of 1876, s. 56) is not a public servant within the meaning of this section.³

A person called upon by a Sub-Registrar to produce the original document, which was registered in his office, to enable him to compare it with the copy of the deed in the Registration Office Register, which, it was suspected, was tampered with, is not legally bound to produce it, and he cannot, on his failure to do so, be convicted under this section.⁴ Where an accused, while on his trial for offences under ss. 471 and 193 of the Penal Code, being directed to produce a certain incriminating document, did not produce the document and in consequence the prosecution against him failed, it was held that he could not be convicted for his omission to produce it.⁵ The amendment of s. 136 of the Civil Procedure Code by O. XI, r. 21, of the present Code, and the omission from r. 21 of all references to s. 188 or other sections of the Penal Code, indicate that a party to a suit, who fails to comply with an order for production or inspection of documents, can be punished only in the manner prescribed by that rule, and is not punishable under this section or any other section of the Code.⁶

3. 'Court of Justice.'—See s. 20, *supra*.

PRACTICE.

Evidence.—Prove (1) that it was a public servant, or a Court of Justice, against whom the offence was committed.

(2) That the accused was legally bound to produce or deliver up the document in question to such public servant, or Court of Justice.

(3) That the accused omitted to produce or deliver up the document.

(4) That the accused did so intentionally.

The prosecution must prove that the accused was in possession of the document required to be produced; when it is doubtful which of the two accused had the document, they could not be convicted.⁷

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Ch. XXXV of the Criminal Procedure Code; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

When any such offence as is described in this section is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody, and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to a fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.⁸

A criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence.⁹

A Court other than the High Court can try persons for offences committed before itself only in cases to which s. 477, or 480 or 485 of the Criminal Procedure Code is applicable, and none of the sections is applicable when the accused is charged under this section.¹⁰

² *Premchand Dowlatram*, (1887) 12 Bom. 68.
See also *Salig Ram*, (1890) 10 A. W. N. 171.

³ *Ebrahim Sircar*, (1901) 29 Cal. 236.

⁴ *Asmatulla Sirdar*, (1905) 2 C. L. J. 621,
3 Cr. L. J. 114.

⁵ *Ishwar Chandra Ghoshal*, (1908) 12 C. W. N. 1016, 8 C. L. J. 320, 8 Cr. L. J. 224.

⁶ *Ram Chand*, (1910) P. R. No. 15 of 1910,

11 Cr. L. J. 386.

⁷ *Damri Ram*, (1917) 4 P. L. W. 65, 19 Cr. L. J. 217, [1918] AIR (P) 590.

⁸ Criminal Procedure Code, s. 480; *Sankara Varma Rajah*, [1940] 1 M. L. J. 272.

⁹ *Panchanada Tambiran*, (1869) 4 M. H. C. 229.

¹⁰ *Seshayya*, (1889) 13 Mad. 24.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.¹¹

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant,¹ as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law,² shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence,³ or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the notice or information required to be given is required by an order passed under sub-section (I) of section 565 of the Code of Criminal Procedure, 1898, with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Scope.—This section applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation,¹² and not where the public servants have already obtained the information from other sources.¹³

When once the information of the fact of the crime has reached the police, the object of the section has been fulfilled and no further duty imposed by it remains.¹⁴ The fact that some persons bound to give information have given that information while other persons who might be bound to give information have omitted to do so is no ground for their prosecution under this section.¹⁵

Ingredients.—This section requires—

1. That a person must be legally bound to give any notice or to furnish information on any subject to a public servant.

2. That he has intentionally omitted to give such notice or information in the manner and at the time required by law.

1. 'Legally bound to give any notice or to furnish information..to any public servant.'—See s. 43, *supra*. To bring home the charge to the accused he must be shown to be legally bound to furnish information. Where a person is not legally bound to furnish information, this section does not apply. Thus where the owner of a house failed to give information to the police of suicide by a member of his family by falling into a well in the compound of his house, it was held that he was not guilty of an offence under this section because s. 45(1) of the Criminal Procedure Code imposes a duty on the owner of land of giving information of an offence and not on the owner of a house.¹⁶ It is submitted that if the house-owner was not the owner of the land on which the house stood, he was surely the occupier of that land and he

¹¹ Criminal Procedure Code, s. 195. See also ss. 476-78, 480-482, 487.

¹² *Phool Chand Brojobassee*, (1871) 16 W. R. (Cr.) 35; *Luchmun Pershad Gorgo*, (1872) 18 W. R. (Cr.) 22; *Kesree*, (1866) 1 Agra 37.

¹³ *Sashi Bhusan Chuckerbutty*, (1878) 4 Cal. 423; *Pandya Nayak*, (1884) 7 Mad. 436; *Gopal Singh*, (1892) 20 Cal. 316; *Sher Singh*,

(1888) P. R. No. 5 of 1889; *Dhara Singh*, (1933) 34 P. L. R. 712.

¹⁴ *Sada*, (1893) Unrep. Cr. C. 674.

¹⁵ *Bhagwantrao*, (1926) 26 Cr. L. J. 1489, [1926] AIR (N) 217.

¹⁶ *Hiru Satua Desla*, (1928) 30 Bom. L. R. 1570, 53 Bom. 184.

was therefore guilty. Mere servants, for instance, who are dependent on their master, do not come within the category of persons legally bound to give information.¹⁷ Several Acts have imposed obligations on persons to give notice or information to public servants, e.g., the Foreigners Act;¹⁸ the Coroners Act;¹⁹ the Criminal Tribes Act;²⁰ the Dramatic Performances Act;²¹ the Indian Succession Act;²² the City of Bombay Municipal Act;²³ the Land Acquisition Act;²⁴ the Code of Criminal Procedure;²⁵ the Indian Registration Act;¹ the Indian Mines Act;² the Indian Works of Defence Act.³

See s. 21, *supra*, as to the meaning of 'public servant.'

Presumption of knowledge of offence.—The refusal by a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence or render him liable under this section.⁴

2. 'Intentionally omits to give such notice...in the manner and at the time required by law.'—Where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them. Where a person failed to give information to the police of the explosion of fireworks, which resulted in the death of a child, as required by a statute, it was held that he was guilty of an offence under this section.⁵ But where one of several persons bound to give information directed the village watchman to the knowledge of the others to make a report at the police-station and he neglected to do so, it was held that no offence was committed as it could not be said that the persons intentionally omitted to give the information.⁶

An act or omission is not an offence as that word is used in s. 40 of the Code if it is only punishable under some other enactment. Reading s. 40 the result follows that one who fails to furnish information, which he is legally bound to furnish, is punishable under this section, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.⁷

3. 'If the notice, etc., respects the commission of an offence, or is required for...preventing the commission of an offence.'—This expression refers to the commission or prevention of some particular offence and not to the commission or prevention of offences generally.⁸

The word 'offence' here denotes a thing punishable under the Code or under any special or local law when punishable under such law with imprisonment for a term of six months or upwards (s. 40).

Amendment.—The third clause to this section was added by Act XXII of 1989.⁹

CASES.

Omission to give information under s. 45, Criminal Procedure Code.—

An omission by an owner of a house to give information of a sudden or unnatural death¹⁰ is not an offence under this section, because owners or occupiers of houses in a village are not owners or occupiers of land under s. 45, Criminal Procedure Code.¹¹ In order to support a conviction under this section against a person for not giving information of an occurrence falling under clause (d) of s. 45, Criminal Procedure Code, it is not necessary to show that the death actually occurred on his land, when the

¹⁷ *Thakri*, (1911) P. W. R. (Cr.) No. 17 of 1911.

¹⁸ Act III of 1864, s. 20.

¹⁹ Act IV of 1871, s. 17.

²⁰ Act XXVII of 1871, s. 9.

²¹ Act XIX of 1876, s. 7.

²² Act XXXIX of 1925, s. 317 (3).

²³ Bom. Act III of 1888, ss. 478, 155 (1), (2), 187.

²⁴ Act I of 1894, s. 10 (2).

²⁵ Act V of 1898, ss. 44 and 45 (a), (b), (d), (f).

¹ Act XVI of 1908, s. 82.

² Act IV of 1923, ss. 12, 31.

³ Act VII of 1923, s. 11.

⁴ *Lahai Mundul*, (1867) 7 W. R. (Cr.) 29.

⁵ *Narayan Nampudripad*, [1915] M. W. N. 276, 16 Cr. L. J. 219.

⁶ *Sher Singh*, (1888) P. R. No. 5 of 1889.

⁷ *Ali Mahomed Adamalli*, (1945) 48 Bom. L. R. 116.

⁸ *Hussain Beg*, (1908) 31 Mad. 548, 550. The point dealing with s. 565 (4) of the Criminal Procedure Code in this decision must be deemed to have been overruled by the amendment of that section and by the addition of cl. (3) to s. 176.

⁹ *Bhola*, (1905) 1 N. L. R. 133, 2 Cr. L. J. 745, must be deemed to have been overruled by this amendment.

¹⁰ Criminal Procedure Code, s. 45 (d).

¹¹ *Mainda*, (1887) 1 Weir 101.

circumstances disclosed show that a body has been found under circumstances denoting that the death was sudden, unnatural, or suspicious; the finding of the body being a fact from which a Court might reasonably infer, in the absence of evidence to the contrary, that the death took place there.¹² A village Magistrate was convicted under this section for omitting to furnish to the police information that a jewel of the daughter of a certain person was either stolen or lost. It was held that as the information did not relate to the commission of the non-bailable offence of theft, which the Village Magistrate was bound to communicate to the Magistrate or police, under s. 45(1)(c) of the Criminal Procedure Code, his conviction was illegal.¹³

Liability of Karnam.—A Karnam is legally bound to furnish true information regarding cultivation in his village.¹⁴ But a Karnam who omits to submit cultivation accounts of his village in obedience to the orders of the Revenue Inspector is not guilty of an offence under this section.¹⁵

Punjab Land Revenue Act.—Accused, a Zaildar, was convicted under this section for failing to give information of two cases of house-breaking, it being his duty under rule 25, framed under s. 28 of the Punjab Land Revenue Act, “to report heinous crimes to the Police and Magistrate.” It was held that, having regard to s. 43 of this Code, though a Zaildar was required by virtue of the rule to report, such rule did not cast upon him a legal duty to report, such as was imposed by a direct and express enactment of the Legislature, so that he could be held merely as a Zaildar to be “legally bound to give information” of the commission of a heinous offence.¹⁶ The accused, who was the *sarbarah* of a Zaildar, was convicted, under this section, of intentionally omitting to give information about a riot which occurred in his village which he was legally bound to furnish. It was held that even assuming that the duties and powers of a Zaildar’s *sarbarah* were co-extensive with those of the Zaildar himself, the conviction could not be sustained, for a breach of the rules drawn up by the local Government in regard to Zaildars, though it might subject the Zaildar to the displeasure of his employer and possibly endanger his emoluments or position, could not be held to amount to a violation of a legal obligation within the meaning of this section, regard being had to the definition of the terms “illegal” and “legally bound to do”, in s. 43 of the Code.¹⁷

N. W. P. and Oudh Land Revenue Act.—A *Jamabandi* prepared under rules made under s. 234 of the N. W. P. and Oudh Land Revenue Act (III of 1901) is a register, and consequently if a Zamindar refuses to give the *patwari* of a village information as to the collection of rent made by him he is liable under this section.¹⁸

The mere fact that a Zamindar realized more than the recorded rent from his tenant for a long time without giving information about it to the officials concerned, did not render him liable to be convicted for an offence under this section read with s. 46 of the U. P. Land Revenue Act inasmuch as under the latter provision he was not legally bound to give the information in the absence of a requisition for such information from a public servant.¹⁹

The Central Provinces Land Revenue Act.—The appointment of a Mukaddum-gumasta under s. 137 of the Central Provinces Land Revenue Act does not absolve the Mukaddum from all responsibility to perform the duties laid on a Mukaddum by s. 141 of the Act. Where a Mukaddum has received information that a non-bailable offence has been committed in a village of which he is Mukaddum, and he is aware that the Mukaddum-gumasta has omitted to make any report, it is his duty to make the report himself and his omission to do so is an offence under the section.²⁰

PRACTICE.

Evidence.—Prove (1) that the accused knew of the circumstance, or had information in question.

¹² *Matuki Misser*, (1885) 11 Cal. 619.

¹³ *Vemi Reddi Lacha Reddi*, (1909) 9 Cr. L. J. 224.

¹⁴ *The Public Prosecutor v. Venkatanarasappa*, (1894) 1 Weir 111.

¹⁵ *Tolupur Bhagavannulu*, (1897) 1 Weir 105.

¹⁶ *Hari Singh*, (1893) P. R. No. 15 of 1894.

¹⁷ *Shah Muhammad*, (1886) P. R. No. 19

of 1886.

¹⁸ *Babu Suraj Baksh Singh*, (1907) 10 O. C. 238, 6 Cr. L. J. 301.

¹⁹ *Budh Singh*, (1926) 27 Cr. L. J. 1367, [1927] AIR (A) 111.

²⁰ *Local Government v. Maniharsingh*, (1911) 7 N. L. R. 101, 12 Cr. L. J. 441.

(2) That he was legally bound to give notice thereof, or to furnish such information.

(3) That such notice should have been given, or such information furnished, to a public servant.

(4) That he omitted to give such notice, or furnish such information, as required by law.

(5) That he omitted to do so intentionally.

For the second clause of the section prove further—

(6) That such notice or information had reference to the commission of the offence, or was required to prevent the commission of an offence, or in order to apprehend an offender.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

The offence under this section being of a different nature and constituted by an entirely different set of facts from one under s. 189, a conviction under s. 189 cannot be altered to one under this section.²¹

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.²²

Charge.—It is not necessary to frame a charge under this section as the offence is a 'summons' case, but if it is necessary to do so the charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.²³

Sentence.—A sentence under this section should commence at once according to the rule contained in r. 464 (2) of the Punjab Jail Manual and should not be postponed till the expiry of the term of imprisonment which the accused is undergoing in default of furnishing security.²⁴

177 Whoever, being legally bound to furnish information on any subject to any public servant,¹ as such, furnishes, **Furnishing false information.** as true, information on the subject which he knows or has reason to believe to be false,² shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the Commission of an offence,³ or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(a) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(b) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound, under clause 5, section VII, Regulation III, 1821,²⁴ of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police-station, wilfully misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in the latter part of this section.

²¹ *Arjan Mal*, (1922) 3 Lah. 440.

²² Criminal Procedure Code, s. 195. See also ss. 476-478, 487.

²³ *Moosubroo*, (1867) 8 W. R. (Cr.) 87.

²⁴ *Chet Singh*, (1918) 19 P. L. R. 330, 20 Cr. L. J. 316.

Explanation.—In section 176 and in this section the word “offence” includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word “offender” includes any person who is alleged to have been guilty of any such act.

COMMENT.

Section 176 deals with the omission to give information; this section, with the giving of false information. Under both the sections the liability depends upon legal obligation to give information. Persons who are not under any legal obligation to furnish information cannot be dealt with under these sections.

Scope.—This section contains two branches. The first branch—‘*whoever being legally bound...or with both*’—deals with the simple case of a person who, being legally bound to furnish true information to a public servant, furnishes false information to him. It, therefore, does not apply to any falsehood told to a public servant, but to such statements only as he is ‘*legally bound*’ (s. 43) to make.²⁵ Under the second branch—‘*or if information...or with both*’—the information which a person is legally bound to give ‘*for the purpose of preventing the commission of an offence*’ relates not to commission of offences generally, but to the commission of some particular offence.¹ The section does not apply to the case of any person who is examined by a police-officer making a false statement, but to cases where, by law, land-holders or village-watchmen are bound to give information, and to other analogous cases of the same description.²

Ingredients.—This section requires—

1. That a person must be legally bound to furnish information on a particular subject to a public servant.

2. That he must furnish, as true, information on that subject which he knows or has reason to believe to be false.

1. ‘**Legally bound to furnish information...to any public servant.**’—

Sections 44 and 45 of the Criminal Procedure Code legally bind persons to give information regarding certain offences. See s. 43, *supra*, as to the meaning of ‘legally bound.’

See s. 21, *supra*, as to the meaning of ‘public servant.’

Offence is committed if there is legal obligation to give information.—**False reports by police-officers.**—A police-officer at a police-station, who, being as such officer bound to enter all reports brought to him of cognizable or non-cognizable offences in the station diary, refused to enter a report made to him concerning the commission of an offence, and entered instead in the diary a totally different and false report as that which was made to him, was held guilty under this section.³ Where a police-officer who was bound to communicate information to his superior officer regarding the commission of a riot and to make an entry thereof in his diary, omitted to give such information, it was held that he was guilty under this section.⁴ Where a constable, whose duty it was to ascertain on his rounds whether certain notoriously bad characters were in their houses or not, falsely reported that they were, it was held that the offence fell within the first branch of this section.⁵

No offence where no legal obligation to give information.—**False return to superior.**—Where the accused submitted to his official superior a false ‘*nil*’ return of lands in his enjoyment and also made a false statement to the same effect in a revenue inquiry, his conviction under this section was not upheld as he was not ‘legally bound’ to furnish true information.⁶

²⁵ *Appayya*, (1891) 14 Mad. 484; *Suraji*, (1873) Unrep. Cr. C. 76; *Parmaya*, (1885) Unrep. Cr. C. 210.

¹ *Panatulla*, (1887) 15 Cal. 386.

² *Luckhee Sing*, (1869) 12 W. R. (Cr.) 23.

³ *Muhammad Ismail Khan*, (1897) 20 All. 351.

⁴ *Syed Futtch Mohamed*, (1874) 21 W. R.

(Cr.) 30.

⁵ *Panatulla*, (1887) 15 Cal. 386.

⁶ *Appayya*, (1891) 14 Mad. 484, dissenting from *Virasami Mudali*, (1881) 4 Mad. 144; (1880) 1 Weir 106; (1871) 6 M. H. C. Appx. 48. See *Mohamed Wasil*, (1908) 13 C. W. N. 191, 11 Cr. L. J. 11.

False information to public servant.—A person attempted to obtain his recruitment in the police of a district by giving certain information which he knew to be false to the District Superintendent of Police. It was held that he did not thereby commit an offence under this section.⁷ Where a purchaser of a stamped paper, not bound by any law to furnish any information to a stamp-vendor, gave a false name, it was held that he committed no offence under this section.⁸

False representation in memorandum of appeal.—It is not an offence to make a false representation in a memorandum of appeal, not required by law to be verified.⁹

False information to Income-Tax Officer.—The provisions of s. 22 (2) of the Indian Income-tax Act are mandatory, and a person who has not been served with a notice under that section is not legally bound to furnish any information about his income to the Income-tax Officer and that a person who furnishes any false information to the Income-tax Officer, without having been served with such a notice, is not guilty of an offence under this section.¹⁰

False information by Municipal doctor.—The accused was a Medical Officer employed by a Municipality. Under an arrangement arrived at between Government and the Municipality, the accused was to carry out post-mortem examination of bodies sent to him by the police and to certify the result of the examination to the police in a form provided for the purpose. For each such examination the accused was paid a fee by Government. Two dead bodies were sent by the police to the accused for post-mortem examination. The accused, without opening either of the bodies, reported in the case of one that it was too decomposed to permit internal examination of organs; and, in the other, he furnished detailed information of the size, condition and weight of the organs. On a prosecution of the accused for furnishing false information, it was held that, in the absence of a contract between Government and the accused, the accused was not legally bound to furnish information and was therefore not guilty of an offence under this section.¹¹

2. 'Furnishes, as true, information on the subject which he knows or has reason to believe to be false.'—It is not necessary to prove an intention to defraud; it is enough to show that the information furnished as true was either known to be false or not believed to be true.¹²

3. 'If the information which he is legally bound to give respects the commission of an offence.'—'Offence' means a thing punishable under the Code or under a special or local law when punishable under such law with imprisonment for a term of six months or upwards (s. 40). Such information must relate not to the commission of offences generally, but to the commission of some particular offence.¹³

4. 'Regulation III of 1821.'—This was repealed by Act XVII of 1862.

Amendment.—The Explanation was added by Act III of 1894, s. 5.

PRACTICE.

Evidence.—Prove (1) that the accused was legally bound to furnish the information in question to a public servant.

(2) That he did furnish certain information in pursuance of such obligation.

(3) That the information so furnished was false.¹⁴

(4) That he furnished it as true although he knew, or had reason to believe it, to be false.

⁷ *Dwarka Prasad*, (1888) 6 All. 97, is now no longer an authority on the point that an offence under s. 182 was also not committed. In a similar case in Oudh the offence under this section was held to have been committed: *Jagat Singh*, (1874) O. S. C. 111, 1 O. D. 37. See s. 182 and the Comment. See also *Muhammad Khalil*, (1887) 7 A. W. N. 268.

⁸ *Parmaya*, (1885) Unrep. Cr. C. 210. Contra, *Raghoji Kanoji*, (1867) 3 B. H. C. (Cr. C.) 42, under the Indian Stamp Act of 1862.

⁹ *Ghanaya*, (1879) P. R. No. 17 of 1879;

Sunt Lal, (1881) P. R. No. 41 of 1881.

¹⁰ *Hari Chand*, (1934) 15 Lah. 832. Where the accused was held guilty of this offence sentence of imprisonment was inflicted in addition to fine to have a deterrent effect: *P. D. Patel*, (1933) 35 Cr. L. J. 131, [1933] AIR (R) 292.

¹¹ *Ganpat*, (1934) 36 Bom. L. R. 373, 58 Bom. 491.

¹² *Weir* (3rd Edn.) 68.

¹³ *Panatulla*, (1887) 15 Cal. 386.

¹⁴ (1880) 1 *Weir* 106.

For the second clause of the section prove further—

(5) That such information was with respect to the commission of an offence.

Procedure.—Not cognisable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class—Summary trial if the offence falls under the first clause.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is necessary.¹⁵

Charge.—If the offence comes under the second clause then a charge must be framed. It should run as follows :—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, being legally bound to furnish information on any subject, to wit—, furnished information which you knew (*or had reason to believe*) to be false [and the information which you were bound to give was in respect of commission (*or prevention*) of an offence (*or apprehension of an offender*)] and thereby committed an offence punishable under s. 177 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

178. Whoever refuses to bind himself by an oath¹ or affirmation to state the truth, when required so to bind himself by a public servant² legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Refusing oath or affirmation when duly required by public servant to make it.

COMMENT.

The refusal to take an oath amounts to contempt of Court. The person refusing may be dealt with under s. 480 of the Criminal Procedure Code summarily or the Court may proceed under s. 195 of the same Code. A witness in a civil case is entitled to payment of his expenses before he gives evidence. If he is not paid he is not bound to appear at all in answer to the summons, and it is no offence to refuse to give evidence on the ground of insufficient payment of expenses before the Judge has decided that the payment made was sufficient.¹⁶

1. 'Oath'.—See s. 51, *supra*. 2. 'Public servant'.—See s. 21, *supra*.

Amendment.—The words "or affirmation" were added by The Indian Oaths Act (X of 1873), s. 15.

PRACTICE.

Evidence.—Prove (1) that the accused was required by a public servant to bind himself by an oath or affirmation to state the truth.

(2) That such public servant was legally competent to require that the accused shall so bind himself.

(3) That the accused refused to bind himself as required.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Code of Criminal Procedure; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.¹⁷

¹⁵ Criminal Procedure Code, s. 195.

¹⁶ *Nga Pyo*, (1907) U.B.R. (P. C.) 9, 7 Cr. L. J. 208.

¹⁷ Criminal Procedure Code, s. 195. See also ss. 476-478, 480-482, 487.

179. Whoever, being legally bound to state the truth¹ on any subject to any public servant², refuses to answer any question³ demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Refusing to answer public servant authorized to question.

COMMENT.

The offence under the section consists in the refusal to answer a question which is relevant to the subject concerning which the public servant is authorized to inquire, or which at least touches that subject. If a person gives false answers then he will be guilty under s. 193 and not under this section.

Whether a person who has once committed an offence under the last section can be held to have committed a further offence under this section when he refuses to answer the questions put to him is undecided.¹⁸

1. 'Legally bound to state the truth'.—A person who is examined by a police-officer under s. 161, Criminal Procedure Code, is not legally bound to state the truth. The legal obligation to speak the truth when so examined existed under the Code of 1882; but the effect of the omission of the word "truly" in s. 161 of the present Code has been to do away with this legal obligation.¹⁹ A person cannot be convicted of this offence for refusing, when required by a police-officer, to look at the hands of a complainant and to answer whether there were any marks of tying with a rope on his hands.²⁰

Sections 121 to 132 of the Indian Evidence Act²¹ enable witnesses to refuse to answer certain questions.

Where, in a murder case, a witness persisted in refusing to answer material and important questions put to him repeatedly by the Court with the result that the Judge's attempt to get at the truth was partially frustrated, it was held that the witness was guilty under this section.²²

2. 'Public servant'.—See s. 21, *supra*.

3. 'Refuses to answer any question'.—If a Judge asks questions with a view to criminal proceedings being taken against a witness, the witness is not bound to answer them, and cannot be punished for not answering them, under this section.²³

This section has nothing to do with the conduct of the accused in Court. It has no application to a refusal to plead to a charge. An accused who, on being charged before a Village Panchayat Court, said that he would not make any reply and remained silent, was held to have committed no offence under this section.²⁴

Complainant.—A complainant is not a witness punishable for refusing to answer.²⁵

PRACTICE.

Evidence.—Prove (1) that the accused was legally bound to state the truth to a public servant on the subject in question.

(2) That such public servant questioned him touching such subject.

(3) That such public servant was exercising his legal powers in putting such questions.

(4) That the accused refused to answer such questions.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter

¹⁸ *Bipin Chandra Pal*, (1907) 35 Cal. 161.

¹⁹ *Sankaralinga Kone*, (1900) 23 Mad. 544; *Savani Virabai*, (1899) 1 Weir 111; *Gul Hassan Shah*, (1906) P. R. No. 27 of 1908, 9 Cr. L.

J. 105; *Mawzanagyi*, (1930) 8 Ran. 514.

²⁰ *Fakira*, (1875) Unrep. Cr. C. 92.

²¹ Act I of 1872.

²² *Har Narain*, (1924) 22 A. L. J. R. 1100, 26 Cr. L. J. 354, [1925] AIR (A) 239.

²³ *Hari Lakshman*, (1885) 10 Bom. 185.

²⁴ *Tirumala Reddi*, (1923) 47 Mad. 396.

²⁵ *Ganesh Narayan Sathe*, (1889) 13 Bom. 600. See *Moti Lal*, [1935] A. L. J. R. 299, 36 Cr. L. J. 446, [1935] AIR (A) 267.

XXXV of the Criminal Procedure Code; or, if not committed in a Court, a Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.¹

180. Whoever refuses to sign any statement¹ made by him, when required to sign that statement by a public servant² legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Refusing to sign statement.

COMMENT.

If a statement made to an officer of justice or other public servant is put into writing and the public servant being "legally competent to require" a person to sign that statement, does make the request, the refusal to sign under such circumstances constitutes the offence hereby made punishable.²

1. 'Statement'.—The statement must be such an one as the accused can be legally required to sign. See ss. 154, 164, 200, 364 of the Criminal Procedure Code, and s. 20 of the Coroners Act.³ An accused person who refuses to sign a statement made at his trial in answer to questions put by the Court, commits no offence under this section.⁴ But, if the accused refuses to sign his statement recorded under s. 364 of the Code of Criminal Procedure, he commits it.⁵ The inquest report is not a 'statement,' and a refusal to sign such a report is not punishable under this section.⁶

Deposition.—A witness is not legally bound to sign his deposition in a Revenue inquiry,⁷ nor is he bound to sign or affix his thumb-mark to his deposition in a civil case,⁸ consequently he cannot be convicted under this section for his refusal to sign it. Where a witness is bound to sign his deposition it is only after the evidence has been read over to him and he has admitted it to be correct and has refused to sign it that he will be guilty under this section.⁹

2. 'Public servant.'—See s. 21, *supra*.

Refusal to sign receipt for summons.—A mere refusal to sign a receipt for summons is not an offence under this section.¹⁰

PRACTICE.

Evidence.—Prove (1) that the accused made the statement.

(2) That he was required to sign such statement by a public servant.

(3) That such public servant was legally competent to require him so to sign it.

(4) That the accused refused to sign that statement.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Criminal Procedure Code; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.¹¹

¹ Section 195, Crim. P. C. See also ss. 476-478, 480-482, 487.

² M. & M. 50.

³ Act IV of 1871.

⁴ *Sirsapa*, (1877) 4 Bom. 15; *Ba Tin*, (1906) 3 L. B. R. 199, 4 Cr. L. J. 205.

⁵ *Umar Khan*, (1917) 39 All. 399.

⁶ *Andi*, [1910] M. W. N. 366, 11 Cr. L. J. 500.

⁷ (1871) 6 M. H. C. Appx. 13; (1871) 1 Weir 112.

⁸ *Fateh Ali*, (1912) P. R. No. 8 of 1912, 13 Cr. L. J. 713.

⁹ *Mabali Ram*, (1881) 1 A. W. N. 43.

¹⁰ *Krishna Gobinda Das*, (1892) 20 Cal. 358.

¹¹ Criminal Procedure Code, s. 105. See also ss. 476-478, 484-485.

181. Whoever, being legally bound by an oath or affirmation to state the truth on any subject to any public servant or other person authorized by law to administer such oath or affirmation,¹ makes, to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true,² shall be punished with imprisonment³ of either description for a term which may extend to three years, and shall also be liable to fine.

False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation.

COMMENT.

This section may be compared with s. 191. Under it a false statement to any public servant is punishable. Section 191 is more general.

Ingredients.—This section requires—

1. That there must be a person legally bound by an oath or affirmation to state the truth on a subject to (a) a public servant, or (b) some other person authorized by law to administer such oath or affirmation.

2. That he must make to such public servant or other person as aforesaid a statement touching that subject which is false, and which he either knows or believes to be false or does not believe to be true.

1. 'Legally bound by an oath or affirmation to state the truth on any subject to any public servant, etc.'—See s. 43, *supra*, as to the meaning of 'legally bound.'

See, s. 51, *supra*, as to the meaning of 'oath.'

See s. 21, *supra*, as to the meaning of 'public servant.'

'Authorized by law to administer such oath, etc.'—This section applies only where the public servant or other person is "authorized by law to administer an oath";¹² it does not apply where the public servant administers the oath in a case wholly beyond his jurisdiction;¹³ and also where he is not competent to take a statement on solemn affirmation.¹⁴ Where three persons, of whom one was a pleader, were tried together and convicted of having made false statements on solemn affirmation, about the same matter, in the course of an inquiry into the conduct of the pleader under the provisions of the Legal Practitioners Act, it was held that the conviction of the pleader was bad as his statement was improperly taken from him on solemn affirmation.¹⁵

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegation in the petition of appeal on solemn affirmation, and he did so. It was held that the appellant committed no offence under this section.¹⁶ After the death of an insured man, a person made a false affidavit about his age before an Honorary Magistrate in connection with the claim for the insurance money. It was held that he committed no offence under this section in the absence of any special stipulation that such an affidavit would be good evidence in any judicial proceeding relating to the claim. The Honorary Magistrate was not a Court or person authorized to administer oaths and affirmations within the meaning of s. 4 of the Indian Oaths Act.¹⁷

2. 'Makes to such public servant...any statement which is false, and which he either knows or believes to be false or does not believe to be true.'—The making of a false statement with no knowledge one way or the other as to its truth constitutes it a false statement since the person making it does not believe it to be true.¹⁸

¹² *Niaz Ali*, (1882) 5 All. 17; *Mooneappa Oodian*, (1870) 5 M. H. C. 326.

¹³ *Andy Chetty*, (1865) 2 M. H. C. 438, 1 Weir 114.

¹⁴ *Kotha Subba Chetti*, (1883) 6 Mad. 252.

¹⁵ *Kotha Subba Chetti*, (1883) 6 Mad. 252.

¹⁶ *Subbaya*, (1889) 12 Mad. 451.

¹⁷ *Kamakhyia Prasad Dalal*, [1889] 2 Cal. 459.

¹⁸ *Echan Meeah*, (1865) 2 W. R. (Cr.) 47.

3. 'Shall be punished with imprisonment.'—The sentence must include a term of imprisonment, however short, to which a fine may be added.¹⁹

Amendment.—The words "or affirmation" were inserted by the Indian Oaths Act (X of 1873), s. 15.

PRACTICE.

Evidence.—Prove (1) that the accused took the oath, or made the affirmation in question.

(2) That the same was legally binding upon him.

(3) That such oath or affirmation was administered by a public servant or by a person authorized by law to administer the same.²⁰

(4) That the accused whilst so bound made the statement in question to such person.

(5) That such statement was made touching the subject on which he was thereby bound to state the truth.

(6) That what he so stated was false.

(7) That he then knew that his statement was false, or had reason to believe it was false, or did not believe it was true.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.²¹

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*), as follows :—

That you, on or about the——day of——, at——, being legally bound by an oath to state the truth, on a certain subject, to wit——, to——, a public servant (*or person authorized by law to administer such oath*) did make to such public servant (*or person as aforesaid*) touching that subject, a statement, which was false, and which you knew (*or believed*) to be false, to wit——, and thereby committed an offence punishable under s. 181 of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

182. Whoever gives to any public servant any information¹ which he knows or believes to be false,² intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

False information with intent to cause public servant to use his lawful power to the injury of another person.

(a) to do or omit anything which such public servant ought not to do or omit³ if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury⁴ or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(a) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

¹⁹ (1869) 4 M. H. C. Appx. 18.

²⁰ *Juggut Chunder Dutt*, (1866) 6 W. R. (Cr.) 81.

²¹ Criminal Procedure Code, s. 195. See also ss. 476, 478, 487.

(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make inquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

COMMENT.

The present section was substituted for the original section by the Indian Criminal Law Amendment Act (III of 1895), s. 1. In the old section clause (b) stood first, and clause (a) second. The present alteration arose out of a case in which, information having been given by a man to the police that he had been robbed at a certain village, the police went down and made inquiries and gave a great deal of trouble and annoyance to the people. It turned out that the information was absolutely false, but on prosecution the High Court of Calcutta held that inasmuch as it was not intended, or could not be shown that it was intended, to injure or annoy any particular person, the case did not fall within the section in question.²² The present section has been introduced to amend that, and to say that if such information is given the person giving it should be punished whether any particular person was aimed at or not. That is to say, it has been made an offence to give false information which misleads a public servant into doing what he ought not to do, whether that can be shown to be intended for the purpose of injuring any particular person or not.²³

Object.—The intention of the Legislature in drawing up this section is that a public servant should not be falsely given information with the intent that he should be misled by a person who believed that information to be false, and was intending to mislead him.

“Suppose a man, knowing the statement to be untrue, but intending the Magistrate to act upon it, informed the Magistrate of the district that a violent fire was raging in a city in the district of which he had charge. Now if the Magistrate believed that statement he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military, if there were any in the neighbourhood. That would be a perfect example of a hoax, and I have not a doubt that it would come within s. 182, whether the Magistrate acted upon the information or not. To take another example of a case which in my opinion would come within the section, although the public servant was not induced to take action or to omit to take action upon the information given to him. Let us say that a man had absconded for an offence from Allahabad, and that it was surmised that he would seek to escape at one of the shipping ports. Information of his having absconded would be communicated to those ports, Calcutta amongst the number. A person who, knowing that that man had not been arrested, and intending, that the authorities at Calcutta should cease to watch the outward-bound shipping, telegraphed to the authorities at Calcutta informing them that the absconder had been arrested elsewhere, would in my opinion have committed an offence under s. 182, although the public servant at Calcutta had not acted on the telegram, but had persisted in his surveillance of the outward-bound shipping.”²⁴

Scope.—This section makes punishable the positive act of giving false information. There is nothing in the section showing that it intends to punish the withholding of information as distinct from the actual giving of information.²⁵ A person can be prosecuted under this section even after the dismissal of his complaint to a Magistrate. A person gave false information to the police and subsequently made a complaint to a Magistrate and the Magistrate issued a summons to the accused to appear but the

²² *Gulam Ahmed Kazi*, (1887) 14 Cal. 314.

²³ The case of *Gulam Ahmed Kazi* is expressly overruled by ill. (c). The case of *Periannar*, (1881) 4 Mad. 241, may also be regarded as overruled.

²⁴ Per Edge, C.J., in *Budh Sen*, (1891) 18 All. 351, 355; *Ganesh Khanderao*, (1889) 18 Bom. 506.

²⁵ *Sher Mohammad*, [1940] Lah. 396.

complainant did not appear at the time of the hearing and the police reported that the complaint was false. After the discharge of the accused the police-officer to whom the complainant had given information laid a complaint and preferred a charge under this section. It was held that the complainant's making a complaint to a Magistrate and then dropping the proceedings was no bar to the police-officer acting under this section.¹

This section makes no distinction between information relating to a cognizable offence and one relating to a non-cognizable offence, nor is there anything in that section to justify the conclusion that it applies only to cases in which the information given to any public servant relates to a cognizable offence. When a false report is made to the police the question in deciding as to whether it amounts to an offence under this section is not whether the report is one of a cognizable crime but whether it is of such a nature as might be supposed to lead the police to make use of their lawful powers to the injury or annoyance of any person.²

Difference between s. 182 and s. 211.—The offence under this section is a distinct offence from that described in s. 211, which relates to an attempt to put the criminal Courts in motion against a person. The circumstances which are necessary to bring a case within this section involve different considerations from those that arise from s. 211. This section does not necessarily impose upon the person giving information to an officer criminal liability for mere want of caution before giving that information. There must be positive and conscious falsehood established.³ To constitute an offence under s. 182, the information given to a public servant should not only be false in fact but it must be false to the knowledge or to the belief of the informant and it is not sufficient that the accused had reasons to believe it to be false; whereas, under s. 211 it is sufficient if the accused makes his complaint without any just grounds and when he acts without due care or caution. See Comment on s. 211 where the difference between this section and s. 211 is further discussed.

When either of the sections 182 and 211 is applicable at the instance of a Police Superintendent or a Magistrate, the discretion or power of one or the other to proceed is not limited in any way whatever by the discretion vested in the other.⁴

Ingredients.—The section requires three essentials—

1. Giving of an information to a public servant.
2. The information must have been known or believed to be false by the giver.
3. The information must have been given with the intention to cause, or knowing it likely that it will cause, such public servant (a) to do or omit anything which he ought not to do or omit to do if the true facts were known to him, or (b) to use his lawful power to the injury or annoyance of any person.

1. **'Gives to any public servant any information.'**—The Bombay High Court has held that any 'false' information given to a public servant, with the intent mentioned in the section, is punishable under it, whether that information is volunteered by the informant, or is given in answer to questions put to him by the public servant.⁵ The Patna High Court has adopted this view. Where the driver of a motor car who was driving without a license when asked for his name by a police-officer gave a fictitious name, it was held that he was guilty of an offence under this section.⁶ The former Chief Court of the Punjab had laid down that the expression 'gives information' means to volunteer information and is not intended to apply to a statement made in answer to questions put by a public servant.⁷ But this view has not been accepted by the Lahore High Court which has held that a person who makes a false statement in a departmental inquiry comes within the purview of this section notwithstanding that it was made in answer to questions.⁸ The former Judicial Commissioner's Court,

¹ *Mulla*, (1918) 17 A. L. J. R. 82, 20 Cr. L. J. 114, [1919] AIR (A) 159; *Bakhshi*, (1923) 46 All. 43.

² *Thakuri*, (1940) 16 Luck. 55, *Ganga Dayal*, (1933) 10 O. W. N. 755, 34 Cr. L. J. 1149, [1933] AIR (O) 374, dissented from; *Kanleshwar Ahir*, [1942] A. L. J. R. 576, (1942) 44 Cr. L. J. 342, [1943] AIR (A) 96.

³ *Ramkrishna*, (1906) 9 Bom. L. R. 33, 37, 31 Bom. 204.

L. C.—28

⁴ *Jang Bahadur Singh*, (1928) 26 A. L. J. R. 533, 30 Cr. L. J. 272, [1928] AIR (A) 342.

⁵ *Ramji Sajabarao*, (1885) 10 Bom. 124; *Bhikaji*, (1877) Unrep. Cr. C. 124.

⁶ *Bishwanath Singh*, (1927) 9 P. L. T. 342, 28 Cr. L. J. 872, [1928] AIR (P) 56; *Lachman Singh*, (1928) 7 Pat. 715.

⁷ *Mangu*, (1914) 15 P. L. R. 803, 15 Cr. L. J. 650, [1914] AIR (L) 360.

⁸ *Panna Lal*, (1920) 1 Lah. 410.

Upper Burma, had ruled that false answers to questions put by a police-officer in the course of investigation of a cognizable offence did not fall under this section.⁹ But the Rangoon High Court has held that the word 'gives' should not be restricted to imply 'volunteers'. A certain building was burnt down and a first information report was lodged. While the inquiry was pending, the accused was examined by the investigating officer, who took down his statement which was not signed by the accused. On the accused being charged with an offence under this section it was held that the statement made by the accused was not an information given to a police-officer but was made under s. 161 of the Criminal Procedure Code.¹⁰ A statement made by a witness to the police under the provisions of s. 161, Criminal Procedure Code, is not an information given to a public servant within the meaning of this section.¹¹ The Patna High Court has held that the meaning of the word 'information' is not so restricted as to refer only to a first information recorded under s. 154, Criminal Procedure Code. The word is used with reference not to a police-officer but to any public servant, and the section is applicable to a statement made during the investigation of a case.¹² Where information has already been given and the law has already been set in motion, the statement made by the informant to a police-officer in the course of investigation cannot be regarded as an information.¹³

If the false information is given to a person who is not a public servant, the offence will be that of defamation.¹⁴

See s. 21, *supra*, as to the definition of 'public servant'.

No offence under this section can be made out in respect of a false information given to a police-officer of a Native State.¹⁵

Statement made by accused in his defence.—Statements made by an accused for the purposes of his defence do not fall under this section.¹⁶ Where the petitioner on being questioned by a Superintendent of Police whether he was the author of certain mischievous articles that appeared in a paper said he was not the author but some one else was when in reality he was the author, it was held that as the statement was given merely in defence or excuse he was not guilty of an offence under this section.¹⁷ In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so. It was held that the appellant had not committed an offence under s. 181 or this section.¹⁸

Statement made by accused in his application for transfer of his case.—In support of an application to transfer a case, a person swore to an affidavit and handed it over to the pleader of the applicant who filed it in Court. The affidavit contained allegations which were subsequently found to be false. The deponent was prosecuted under this section. It was held that the affidavit having been given to the applicant's pleader on his behalf and as it was open to the applicant to instruct his pleader not to file the same there was no information given to a public servant within the meaning of this section.¹⁹ Where the accused, in support of an application for the transfer of the case against him to some other Magistrate, made unfounded and defamatory allegations against the trying Magistrate, the Allahabad High Court held that he could not be prosecuted under this section.²⁰ The Lahore High Court has dissented from this view. It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of

⁹ *Nga Aung Po*, (1904) U. B. R. (P. C.) 13, 2 Cr. L. J. 474.

¹⁰ *Sultan v. Major C. de M. Welborne*, (1925) 3 Ran. 577.

¹¹ *Maung Bo Ni*, (1935) 37 Cr. L. J. 9, [1935] AIR (R) 97; *U Hlaing v. R. P. Abigail*, (1937) 38 Cr. L. J. 980, [1937] AIR (R) 232.

¹² *Bodhan Garain*, (1933) 14 P. L. T. 541, 34 Cr. L. J. 1216, [1933] AIR (P) 555.

¹³ *Sudarsan Barhambhat*, (1946) 48 Cr. L. J. 264, [1947] AIR (P) 64.

¹⁴ *Santaram*, (1887) Unrep. Cr. C. 315, Cr. R. No. 1 of 1887.

¹⁵ *Rambharathi Hirabharthi*, (1923) 25 Bom. L. R. 772, 47 Bom. 907.

¹⁶ *Daria Khan*, (1870) 2 N. W. P. 128.

¹⁷ *S. A. Gordon*, Criminal Appeal No. 22 of 1910. Per Batchelor and Davar, JJ., decided on the 10th March, 1910 (Unrep. Bom.)

¹⁸ *Subbayya*, (1889) 12 Mad. 451.

¹⁹ *The Public Prosecutor v. Katta Prakasam*, (1924) 47 M. L. J. 658, [1925] M. W. N. 146, 20 L. W. 624, 25 Cr. L. J. 1883, [1925] AIR (M) 123.

²⁰ *Matan*, (1910) 33 All. 163.

an application for transfer do not enjoy the immunity conferred by s. 342 of the Criminal Procedure Code upon answers to questions put to the accused by the Court.²¹

Mere belief is not 'information' under this section.—Where a person falsely informed a Collector that certain Zamindars had usurped possession of certain land belonging to Government, with the intent "to give trouble to such Zamindars, and waste the time of the public authorities", it was held that as the information was no more than an expression of a private person's belief or opinion that the Collector might, if he chose, sustain a civil action against them, this was not the information contemplated by this section.²² Where a person in whose house theft took place informed the police that he suspected two persons whom he named as the perpetrators of the crime, it was held that that did not amount to giving false information.²³

Information must be given by accused.—When the information on which proceedings are taken is not given by the accused, a conviction under this section cannot stand. One S made a report at a police-station. On inquiry the investigating police-officer came to the conclusion that the report was false and that it had been made at the instance of one U. The Sub-Inspector sent a report to the Assistant Superintendent of Police asking that action should be taken under this section against S and U. The Assistant Superintendent of Police declined to take action, but sent the report to the Sub-divisional Magistrate, who took cognizance of an offence against S and U under this section. It was held that the Sub-divisional Magistrate had no jurisdiction to take any action under this section. Report of a police-officer was not a complaint under s. 195 (1), Criminal Procedure Code. U, not having given the information himself, could not be prosecuted under this section.²⁴ Where one person makes a report false to his knowledge that certain persons had collected in a suspicious manner, with the object of causing the police authorities to commence criminal proceedings against them in respect of an offence which they had not committed, and another person corroborates him, the report is made jointly by them and they both are guilty of an offence under this section.²⁵

2. 'Knows or believes to be false'.—The information given should be information which the accused knew or believed to be false.¹ There must be positive knowledge or belief that it is false.² The accused cannot be convicted if he shows that he had reasonable grounds for believing the information to be true. He is not bound to show that it was in fact true.³

Where the accused falsely telegraphed to a District Magistrate that a town was attacked by a gang of 200 robbers, and the Magistrate put no faith in the telegram and took no action, it was held that the accused were guilty of the offence under this section.⁴ An offence, constituted by a false complaint against unknown persons, falls under this section and not s. 211. It is, therefore, within the competence of the police authorities to complain of that offence and within the competence of the Magistrate to issue summons under this section.⁵ Where the accused got enlisted in the police force calling himself *jat* being an *ahir*, a caste whose enlistment was prohibited, it was held that this offence was committed.⁶

Where a person made a report of theft in the police station and named six persons as suspects, and the investigating officer treated it as false, it was held that he could not be convicted under this section, because the opinion of the officer was not legal evidence and could not be made the basis of a finding.⁷

²¹ *Ghulam Muhammad*, (1922) 3 Lah. 46; *Allah Wasai*, (1925) 1 Lah. C. 524, 26 Cr. L. J. 1869, [1926] AIR (L) 12.

²² *Madho*, (1882) 4 All. 498. See *Santaram*, (1887) Unrep. Cr. C. 315, Cr. R. No. 1 of 1887.

²³ *Ananga Mohan Dutta*, (1917) 22 C. W. N. 478, 27 C. L. J. 230, 19 Cr. L. J. 836, [1919] AIR (C) 501.

²⁴ *Umrao Singh*, (1909) 6 A. L. J. R. 236, 9 Cr. L. J. 518, dissented from in *Ram Jiawan*; [1926] 27 Cr. L. J. 822, 3 O. W. N. 96 (Sup.), [1926] AIR (O) 448.

²⁵ *Ram Jiawan*, (1926) 3 O. W. N. 96 (Sup.), 27 Cr. L. J. 822, [1926] AIR (O) 448.

¹ *Hingam Khan*, (1884) P. R. No. 32 of 1884; *Moulvy Abdul Lutef*, (1868) 9 W. R. (Cr.) 31; *K. Gopala Kristnayya*, (1902) 1 Weir 121.

² *Sardar Khan*, (1929) 30 P. L. R. 655, 30 Cr. L. J. 1008, [1930] AIR (L) 54.

³ *Fateh Khan*, (1890) P. R. No. 35 of 1890.

⁴ *Budh Sen*, (1891) 18 All. 351.

⁵ *Ram Renu Chatteraj*, (1940) 42 Cr. L. J. 624, [1941] AIR (C) 288.

⁶ *Buddha*, (1880) P. R. No. 14 of 1880. See *Dwarka Prasad*, (1883) 6 All. 97, which is now no longer an authority.

⁷ *Rogi*, [1935] A. L. J. R. 1145, 37 Cr. L. J. 44, [1935] AIR (A) 981.

3. 'To do or omit anything which such public servant ought to do or omit'.—It is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information.⁸ The public servant must be legally competent to act on the information given. Asking a public servant to do an act which would be an illegal act, even if true facts were stated to him, would not come within the purview of this section. The information must be information regarding a fact which would induce the public servant to do something which he would be legally competent to do if he had been cognizant of the true facts.⁹ Where a person gave a false information to a Village Magistrate with the view to it being passed on to another officer (Station-house officer) charging another with having committed an offence, he was held guilty under this section.¹⁰ Information given to A (the Village Magistrate) for the purpose of being passed on to B (the Station-house officer) and which it was his bounden duty so to pass on must be considered as having been given to B so as to justify his taking the complaint in writing from the accused under s. 154, Criminal Procedure Code.¹¹ A false report to the police regarding the commission of a non-cognizable offence does not come under this section.¹² Under this clause it is not necessary to show that the act done will be to the injury or annoyance of any third person.¹³

The words "ought not to do or omit" imply duty and exclude personal choice. The word 'omit' indicates an operation on the mind of the officer which has a result of making that officer give up a purpose which he otherwise would have pursued. It does not indicate placing an obstacle in the way of the officer performing his duty and thus preventing or making it more difficult for him to carry out an intention which was in his mind.¹⁴

4. 'To use the lawful power . . . to the injury'.—See s. 44, *supra*, as to the meaning of 'injury'. Where a person gives false information to an officer who can exercise his power to the direct and immediate prejudice of another against whom the information is levelled, this offence is complete.¹⁵ When a false report is made to the police, it is not necessary that the report should be of a cognizable crime, the report should be of such a nature as might be supposed to lead the police to make use of their lawful powers to the injury or annoyance of any person.¹⁶

Using lawful powers of public servant to the injury of another.—Where a person made a petition to the police falsely stating that he suspected another person of having committed an offence and prayed for an inquiry, it was held that he would come within the purview of this section as he had given false information with intent to cause a public servant to use his lawful powers to the injury of another person.¹⁷ P appeared before a District Magistrate and made a statement in which he accused a certain police-officer of having beaten him, demanded a bribe of him, and locked him up in the police cell. He stated, however, that he did not wish to make a complaint, but only desired that an inquiry should be made. Nevertheless the Magistrate examined P on oath, and, subsequently, the charge having been found to be baseless, P was convicted under this section and s. 198. It was held that, inasmuch as P had expressly stated that he did not wish to make a complaint, the statement must be taken to have

⁸ *Budh Sen*, (1891) 18 All. 351; *Raghu Tiwari*, (1893) 15 All. 386; *Lachman Singh*, (1928) 7 Pat. 715.

⁹ *Manohar*, (1918) 16 A. L. J. R. 614, 19 Cr. L. J. 895, [1918] AIR (A) 85. This case has been dissented from by the Peshawar Judicial Commissioner's Court which has held that when a person gives false information to a public servant deliberately asking that public servant to take certain action, he is punishable under this section even though the public servant was not legally entitled to take the action requested: *Sant Ram v. Diwan Chand*,

(1922) 24 Cr. L. J. 918.

¹⁰ *Jonnalagadda Venkatrayudu*, (1905) 28 Mad. 565.

¹¹ *Ibid.*

¹² *Algoo Lal*, (1920) 18 A. L. J. R. 636, 21 Cr. L. J. 576, [1920] AIR (A) 196.

¹³ *Ganesh Khanderao*, (1889) 13 Bom. 506.

¹⁴ *Lachman Singh*, (1928) 7 Pat. 715.

¹⁵ *Shripati bin Waman*, (1897) Unrep. Cr. C. 946.

¹⁶ *Fariduddin Khan*, [1936] A. L. J. R. 253, 37 Cr. L. J. 562, [1936] AIR (A) 313.

¹⁷ *Gopal Bhikaji*, (1878) Unrep. Cr. C. 72.

been made to the District Magistrate, not as a Magistrate, but as head of the district police, and the conviction under s. 193 could not be upheld.¹⁸

A person stated to a police-officer—“I find there has been a theft: I suspect the persons named, and I want an inquiry to be made.” It was held that, if the statement was false, the offence committed fell under this section.¹⁹ Where a person falsely gave information to the police that a horse belonging to him had strayed, when in fact he had sold it some time previously, and did this with the intention that a charge should be brought against the purchaser, it was held that he was guilty under this section.²⁰

Where the accused had presented a petition to the District Magistrate, giving certain information against A, and praying that A should be proceeded against under s. 110, Criminal Procedure Code, and the District Magistrate considered such information to be false, it was held that the District Magistrate was right in granting sanction to prosecute the accused under this section, notwithstanding the fact that the petition containing the information was not signed by the accused.²¹

CASES.

Personation.—A personated B at an examination called the Vernacular Sixth Standard Examination. A passed the examination and obtained a certificate from the Educational authorities in B's name. B, thereupon, applied to the Assistant Collector to have his name entered in the list of candidates for Government service. He attached to this application the certificate issued in his name, and his name was ordered to be entered in the list of candidates. It was held that he was guilty under this section.²² B appeared before a Village Registrar and falsely personated W, and, in such assumed character, expressed a desire to execute a lease in favour of A, who was present and assented to take the lease. When B made some mistakes in giving the area of the land, C corrected him. E identified B as W before the Village Registrar and E and D assured the attesting witnesses that B was W. It was held that C, D and E could not be convicted under s. 82(d) of the Registration Act, 1877, but that they were guilty of an offence under this section.²³ A person signed a notice of transfer of survey numbers in the character of his father who was dead; and the declaration to the notice was signed by the accused who confirmed the assumed character. It was held that the accused was guilty of giving false information to a public servant.²⁴ By reporting falsely that his father had died the accused induced a Revenue Surveyor to enter his name in the Revenue Registers as owner of certain gardens and paddy lands in succession to his father. It was held that he had committed an offence under this section.²⁵

False statement in petition.—An accused who has made a false statement in a petition of appeal cannot be held to have committed an offence under this section, even assuming that the false statement was made with the object of inducing and it did induce the Appellate Court to send for the record of the case, as it cannot be said that the Court was thereby induced to do what it ought not to have done.¹ It was held similarly where the false statement was made in a memorandum of appeal.² Where a person submitted a petition of resignation to a Collector as the officer in charge of the Court of Wards and such petition contained an untrue account of an affray and defamatory statements and the Collector as District Magistrate ordered the petitioner's prosecution for giving false information under this section, it was held that no offence under it was committed.³

Income-tax return.—Where a person does not sign the declaration in his income-tax return as to his 'other sources of income', the mere mention of some source of income alone in a previous part of the return which was signed will not make the return 'false' within the meaning of this section.⁴

¹⁸ *Phulel*, (1912) 35 All. 102.

¹⁹ *Mathura Prasad*, (1917) 39 All. 715.

²⁰ *Incha Ram*, (1922) 44 All. 647.

²¹ *Gokal*, (1909) 3 S. L. R. 132, 11 Cr. L. J. 3.

²² *Ganesh Khanderao*, (1889) 13 Bom. 506.

²³ *Bala Kashaba*, (1895) Unrep. Cr. C. 761, Cr. R. No. 22 of 1895.

²⁴ *Mulharji*, (1882) Unrep. Cr. C. 182.

²⁵ *Ismail*, (1914) 15 Cr. L. J. 608.

¹ *Sunt Lal*, (1881) P. R. No. 41 of 1881; *Gokal*, (1879) P. R. No. 34 of 1879; *Amir Ali v. Dukhan Momin*, (1928) 29 Cr. L. J. 618, [1928] AIR (P) 574.

² *Ghanaya*, (1879) P. R. No. 17 of 1879.

³ *Debi*, (1918) 16 A. L. J. R. 105, 19 Cr. L. J. 257.

⁴ (1907) 17 M. L. J. 25 (n).

PRACTICE.

Evidence.—Prove (1) that the person to whom the information was given was a public servant.

(2) That the accused gave the information in question to that public servant.

(3) That such information was false.

(4) That the accused knew or believed such information to be false when giving it.⁵ The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false.⁶

(5) That the accused intended thereby to cause, or knew that it was likely that he would thereby cause, such public servant to do or omit anything which such public servant ought not to do or omit if the true state of facts were known to him; or that he intended thereby to cause or knew that it was likely that he would thereby cause such public servant to use his lawful powers to the injury or annoyance of any person.

A decision in a previous case is not admissible to prove the falsity of the information given by the accused. Evidence must be adduced in their presence.⁷

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Where as the result of a police investigation it appears that a complaint made to the police of the commission of an offence is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of his allegation before his prosecution under this section.⁸ There is no provision in law that before a Magistrate can inquire into a case under this section on the complaint of a police-officer, the accused person must have an opportunity of proving his case; he would have an ample opportunity of proving it when he would be called on to enter upon his defence. A prosecution under this section for laying a false charge at the police-station, which on investigation is found to be unfounded, is maintainable, though the Magistrate refuses the informant's petition for examining his witnesses and for judicial inquiry into the charge laid by him on the ground that he might prove his case and adduce the defence evidence at the trial.⁹

Before proceeding under this section, a Magistrate should inquire into and dispose of the original complaint or information.¹⁰ The Magistrate has no jurisdiction to order a prosecution for making a false complaint, till that complaint is finally determined.¹¹

An acquittal under this section is no bar to a subsequent prosecution under s. 500.¹²

Complaint.—Complaint in writing of the public servant concerned, or some other public servant to whom he is subordinate, is necessary.¹³

The essence of an offence under this section is not the falseness of the information as it is the essence of an offence under s. 211 but the contempt of the lawful authority of the public servant and unless and until the public servant concerned chooses to move in the matter the Court has no authority to do so *suo motu*, by whatever process it reaches that result.¹⁴ A complaint under this section should contain the ingredients

⁵ *Moulky Abdool Luteef*, (1868) 9 W. R. (Cr.) 31. See *Chandra Kumar De*, (1926) 44 C. L. J. 230, 28 Cr. L. J. 25, [1927] AIR (C) 78.

⁶ *Rayan Kutti*, (1908) 26 Mad. 640; *Nga Lu Po*, (1908) 1 U. B. R. (P. C.) (1907-1909) 19, 10 Cr. L. J. 122; *Kartar Singh*, (1928) 29 Cr. L. J. 758; *Sakhichand*, [1937] P. W. N. 69, 38 Cr. L. J. 289, [1937] AIR (P) 6.

⁷ *Ram Dass Boistub*, (1869) 11 W. R. (Cr.) 85.

⁸ *Raghu Tiwari*, (1893) 15 All. 336.

⁹ *Baharali Biswas*, (1930) 58 Cal. 1065.

¹⁰ *Jamni*, (1888) 5 All. 387; *Thangappa Pallavarayan*, [1928] M. W. N. 678; *Bhagabati Chandra Mandal*, (1938) 40 Cr. L. J. 644, [1939] AIR (C) 271; *Kangali Molla*, [1939] 1 Cal. 322.

¹¹ *Gati Mandal*, (1905) 4 C. L. J. 88, 4 Cr. L.

J. 68; *Gunamony Sapui*, (1899) 3 C. W. N. 758.

¹² *Ramsebak Lal v. Muneswar Singh*, (1910) 37 Cal. 604.

¹³ Criminal Procedure Code, s. 195. See also ss. 476-478, 487; *Jugal Kishore*, (1886) 8 All. 382; *Poonit Singh v. Madho Bhot*, (1886) 13 Cal. 270; *N. Mukherjee v. Ramkinkar Palit*, (1938) 67 C. L. J. 583; *Ramaswami Konar v. Nachiar Ammal*, [1940] 2 M. L. J. 491; *Ram Prasad Dube*, [1940] O. W. N. 917, (1940) 41 Cr. L. J. 787, [1940] AIR (O) 424; *China Rangiah*, [1942] 2 M. L. J. 615, (1942) 55 L. W. 745, [1942] M. W. N. 819, (1942) 44 Cr. L. J. 326, [1943] AIR (M) 170.

¹⁴ *Muthu Gounden*, [1925] M. W. N. 108, 21 L. W. 661, 26 Cr. L. J. 962, [1925] AIR (M) 400.

of the offence, for it is essential that the information given by the accused must have been known or believed to be false by him at the time when he gave it.¹⁵

Where an information to the police is followed by a complaint to the Court, then the Court must file a complaint even for the prosecution of the informant in respect of the false charge made to the police.¹⁶

A Deputy Magistrate has no power to question an order made by his superior.¹⁷

A complaint should not be instituted against a person without hearing the objection of that person.¹⁸

A person who lays information to the police is entitled to have his case judicially determined before he is called upon to answer the charge of giving false information under this section.¹⁹

Separate conviction for one statement.—An information was given to a police-officer in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered: on complaint, the information was found to be false, and the accused was convicted and punished for two offences under this section as affecting two different persons. It was held that he could be charged with having made only one false statement, and punished for one offence.²⁰

Venue.—Where the accused posted at Kumbakonam a letter, alleged to contain false information, to the District Superintendent of Police, Tanjore, which reached the addressee at Tanjore, it was held that the offence was completed only when the information reached the public servant and the offence should be taken to have been committed at Tanjore, and the Sub-Magistrate of Kumbakonam had no jurisdiction to try the case.²¹ But the Allahabad High Court has held that the Magistrate of the place where such letter is posted has jurisdiction to try the case.²²

183. Whoever offers any resistance to the taking of any property¹ by the lawful authority² of any public servant,³ knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Resistance to the taking of property by the lawful authority of a public servant.

COMMENT.

The Bombay High Court has held that this section applies to resistance to the taking of property by lawful authority of a public servant, and there are no words in this section, as there are in s. 99, extending the operation of the section to acts which are not strictly justifiable by law. Resistance to an act of a public officer acting bona fide though in excess of his authority may give rise to some charge, in the nature of assault, but it cannot afford any foundation for a prosecution under this section.²³ The Madras High Court has held that in construing this section, "...the language of section 99, as well as that of other sections concerning resistance to the acts of public servants, must be borne in mind. Section 99 declares that the protection afforded by the Penal Code to public servants acting in good faith under colour of their office is not lost to them, by reason of any mistake on their part in their exercise of their proper functions. A public servant may do an act of a kind which he has no authority to do. In such case, he could not be acting in discharge of his public functions (sections

¹⁵ *Maung Bo Ni*, (1935) 37 Cr L. J. 9, [1935] AIR (R) 97.

¹⁶ *Tayebulla*, (1916) 43 Cal. 1152; *Brown v. Ananda Lal Mullick*, (1916) 44 Cal. 650; *Sheikh Samir v. Sajidar Rahman*, (1926) 53 Cal. 824; *Shaikh Muhammad Yassin*, (1924) 4 Pat. 323; *Perianna Muthirian v. Vengu Ayyar*, (1928) 28 L. W. 687, 56 M. L. J. 208, [1929] M. W. N. 196, 30 Cr. L. J. 322, [1929] AIR (M) 21; *Dholiah*, (1931) 54 Mad. 1018; *Daroga Gope*, (1925) 5 Pat. 33; *Prag Datt*, (1928) 51 All. 382; *Ma Pao*, (1930) 8 Ran. 499.

¹⁷ *Irad Ally*, (1879) 4 Cal. 869; *Chuharmal*, (1929) 23 S. L. R. 285, 30 Cr. L. J. 732, [1929]

AIR (S) 132.

¹⁸ *Kala Khan*, (1908) 9 P. L. R. 672, 9 Cr. L. J. 190.

¹⁹ *Munshi Isser*, (1910) 14 C. W. N. 765, 11 Cr. L. J. 354.

²⁰ *Poonit Singh v. Madho Bhot*, (1886) 13 Cal. 270.

²¹ *Rathinam Pillai*, [1932] M. W. N. 451, 35 L. W. 451, 33 Cr. L. J. 452, [1932] AIR (M) 427.

²² *Narain Das*, [1936] A. L. J. R. 416, 37 Cr. L. J. 157, [1936] AIR (A) 105.

²³ *Sakharam Pawar*, (1935) 37 Bom. L. R. 362, 59 Bom. 545, dissenting from *Tiruchitambala Pathan*, (1896) 21 Mad. 78, 79.

186-353) and the lawful authority required by section 188 would be clearly wanting... If, on the other hand, the act of the public servant is an act of the kind which the public servant is authorized to do, it is clear that no miscarriage on his part, due to an honest mistake of fact, could render him liable to a prosecution. Section 79 would afford him protection. Furthermore, resistance to such an act... is made punishable under section 188.²⁴

1. 'Offers any resistance to the taking of any property'.—See s. 22, *supra*, as to the definition of 'property'.

A decree having been passed against the assets of a deceased debtor, execution was taken out and an officer of the Court proceeded to seize certain goods. The accused successfully resisted the seizure asserting that the goods seized were his own. He was held guilty under this section.²⁵

Refusal is not resistance.—A mere refusal by any accused person to hand over to a bailiff money alleged to be in his pocket does not amount to a resistance to the taking of that money within the meaning of this section.¹ A mere objection to the seizure of certain articles does not amount to resistance.² A mere oral statement by a person claiming to be the owner of certain articles attached by a bailiff, to the effect that he would not permit the bailiff to take away the articles unless the bailiff entered them as his property does not amount to an offence under this section.³ But, where a person not only refused to give up the property but threatened to do harm to the police-officer if he ventured to carry out the warrant, it was held that he committed an offence under this section, since the threat was an overt act sufficient in law to constitute 'voluntary obstruction'.⁴ In the absence of a contract to the contrary, factors may, under s. 171, Indian Contract Act, retain, as security for a general balance of account, any goods bailed to them, and, therefore, where goods were entrusted to a certain firm for sale and subsequently the Court of Wards took over the management of the estate of the owner of the goods, the refusal on the part of the proprietor of the firm to deliver the goods to the Court of Wards until the general balance of his account was settled, was held not to render him liable to a criminal prosecution* for offering resistance to the taking of any property by the lawful authority of any public servant or for voluntarily obstructing a public servant in the discharge of his public functions.⁵

Obstruction to order of distraint.—A Village Munsiff has jurisdiction to distrain the property of a defaulter outside his jurisdiction for arrears of revenue in respect of land within his jurisdiction, though, in the demand notice authorizing him to distrain, he be not referred to by his name but by his office. Obstruction to such distraint outside the local limits of his jurisdiction is, therefore, punishable under this section.⁶ If the distraint is not bona fide a conviction under this section will not lie.⁷

2. 'Lawful authority'.—This expression does not necessitate that the cases in which the person charged may have a civil action against the public officer must be excluded from the operation of the section.⁸ "Taking the two [ss. 99 and this section] together, the reasonable construction to be put is that, if the officer acted in good faith under colour of his office, the mere circumstance that his 'act may not be strictly justifiable by law' cannot affect the lawfulness of his authority. And the chief reasons for this view are that the likelihood of serious injury resulting from such acts (excepting those tending to cause apprehension of death or grievous hurt) of persons clothed with public authority and subject to public responsibility is so small that the parties, whose rights are thus invaded, would be sufficiently protected by their being left to obtain redress solely by appealing to the constituted authorities in due course and that, in such cases, to secure an easy and peaceful execution of legal processes,

²⁴ Per Shephard, J., in *Tiruchittambala Pathan*, (1896) 21 Mad. 78, 79.

²⁵ *Ibid.*

¹ *Alibhai*, (1888) Cr. R. No. 78 of 1888; Unrep. Cr. C. 412.

² *Rengaswami Goundani*, [1943] M. W. N. 711, (1943) 56 L. W. 599, 45 Cr. L. J. 240, [1944] AIR (M) 45.

³ *Hussain Tajbhai*, (1890) 15 Bom. 564.

⁴ *Pundlick Krishna Pai*, (1904) 6 Bom. L.

R. 254, 1 Cr. L. J. 262; *Alibhai*, (1888) Unrep. Cr. C. 412, Cr. R. No. 78 of 1888, distinguished as "it was a mere case of refusal."

⁵ *E. H. Parakh*, (1925) 1 Luck. 133.

⁶ *Iyyemperumal Naiken*, (1902) 1 Weir 127.

⁷ *The Public Prosecutor v. Soosaikannu Chetti*, (1898) 1 Weir 126.

⁸ *Tiruchittambala Pathan*, (1896) 21 Mad. 78, 79.

it is necessary that recourse to self-help on the part of the persons affected should be disallowed".⁹

Lawful authority wanted.—Where a person resisted a peon in attaching property under a warrant, the term of which had already expired;¹⁰ where the warrant directing the attachment of property was not signed by the Judge or such officer as the Court might appoint;¹¹ where a Sheriff was resisted in attaching property under a defective warrant issued by a civil Court;¹² where a village watchman without the requisite written authority attached some property for levying the amount of arrears and resistance was offered to such attachment;¹³ and where a bailiff distrained some sheep and goats not belonging to the judgment-debtor but belonging to the person who resisted the distraint and who had a bona fide claim of right,¹⁴ it was held that the person resisting was not guilty of an offence under this section.

Where a Court peon removed movable property without giving any option to the judgment-debtor to provide safe custody for the property as required by High Court Circular Orders, it was held that the subsequent taking back of the said property by the judgment-debtor did not constitute an offence under this section.¹⁵ If a bailiff breaks the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turns out that the person or goods of the debtor are not in the house; and, under such circumstances, the owner of the house does not, by obstructing the bailiff, render himself punishable under this section or s. 186.¹⁶ A cultivator of land was in arrears with his irrigation dues, which became recoverable as arrears of land revenue. He had grown sugar-cane on the land which he sold to a trader. The accused was employed by the trader to crush the sugar-cane and prepare jaggery. To recover the irrigation dues, the Talati of the place, acting under the orders of the Mamlatdar, attached the jaggery while it was being conveyed from the fields to a village. The accused delivered the jaggery to a shop-keeper on the way instead of taking it to the Mamlatdar's office, and for this act he was convicted of an offence under this section. It was held that the accused was not guilty of an offence under this section as the order of attachment was not valid and the property attached having been sold by the occupant it was no longer his property, and the accused was entitled to resist peacefully the wrongful act of the Talati in seizing the jaggery.¹⁷

Resistance to taking of property without warrant lawful.—It is the intention of the law that when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful.¹⁸

3. 'Public servant'.—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the person resisted was a public servant.

(2) That the property was being taken by his authority.

(3) That such authority to take the property was lawful.

(4) That the accused offered resistance to such taking.

(5) That the accused at the time knew that it was a public servant who authorized such taking.

Procedure.—Same as that for s. 182, *supra*.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.¹⁹

⁹ Per Subramania Ayyar, J., in *Tiruwhittambala Pathan*, (1896) 21 Mad. 78, 80, 81.

¹⁰ *Anand Lall Bera*, (1883) 10 Cal. 18; *Rama Goundan*, (1891) 1 Weir 134.

¹¹ *Karamatullah*, (1920) 18 A. L. J. R. 284, 21 Cr. L. J. 372, [1920] AIR (A) 521.

¹² *Prabh Dyal*, (1905) P. R. No. 49 of 1905, 6 P. L. R. 655, 3 Cr. L. J. 131. It was also held that he was not guilty under s. 186.

¹³ *Durga Charan Mali v. Nobin Chandra Sil*, (1897) 25 Cal. 274; *Yeshwant*, (1887) Unrep.

Cr. C. 325, Cr. R. No. 13 of 1887.

¹⁴ *Nachiappa Goundan*, [1932] M. W. N. 247.

¹⁵ *Ahammad Sheikh*, (1928) 56 Cal. 460.

¹⁶ *Gazi Aba Dore*, (1870) 7 B. H. C. (Cr. C.) 83; *John Anderson v. J. McQueen*, (1867) 7 W. R. (Cr.) 12.

¹⁷ *Sakharam Pawar*, (1935) 37 Bom. L. R. 362, 59 Bom. 545.

¹⁸ *Ganesh Lal*, (1904) 27 All. 258.

¹⁹ Criminal Procedure Code, s. 195.

184. Whoever intentionally obstructs¹ any sale of property² offered for sale by the lawful authority of any public servant,³ as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Obstructing sale of property offered for sale by authority of public servant.

COMMENT.

This section punishes intentional obstruction of the sale of any property conducted under the lawful authority of a public servant. Notices given at public sales by persons having, or claiming, in good faith to have an interest in the property, will not be deemed an obstruction. But it will be otherwise if they are not given bona fide and merely for the purpose of injuring the sale.

1. 'Obstructs'.—The former Chief Court of the Punjab laid down that there must be something physical to constitute obstruction. Where during the sale of some land by a public servant the accused posted up placards asserting title to the land and warning bidders not to go in for it, it was held that the conduct of the accused did not amount to an obstruction within the meaning of this section as the obstruction was not physical.²⁰ But the Nagpur High Court has dissented from this view and held that this section does not deal with obstruction of any public servant or of any person, but with the obstruction of a proceeding conducted by a public servant, and a proceeding can be obstructed by measures other than physical taken against the person who is conducting it. No physical obstruction is necessary in order to complete an offence under this section. The use of abusive language by a person at an auction-sale conducted by a public servant makes him liable under this section.²¹ Where one person executed and another accepted a deed of sale of some property which was ordered to be sold in execution of a decree of a revenue Court, it was held that there was no obstruction to the sale within the meaning of this section.²² Because no effect whatever was produced on the sale by the existence of the deed.

2. 'Property'.—See s. 22, *supra*. **3. 'Public servant'.—**See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property was offered for sale.

(2) That such sale was by the authority of a public servant.²³

(3) That such authority was lawful.

(4) That the accused obstructed such sale.

(5) That he did so intentionally.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.²⁴

185. Whoever, at any sale of property¹ held by the lawful authority of a public servant,² as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity³ to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may ex-

Illegal purchase or bid for property offered for sale by authority of public servant.

²⁰ *Gopal Rai*, (1904) P. R. No. 7 of 1905, 2 Cr. L. J. 44.

²¹ *Provl. Govt., C. P. & Berar v. Balaram*, [1939] Nag. 139.

²² *Badam Singh*, (1888) 3 A. W. N. 197.

²³ *Tara Singh*, (1905) 27 All. 480.

²⁴ Criminal Procedure Code, s. 195.

tend to one month, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Object.—This section “makes it penal to bid at a public sale for property on account of a party who is under a legal incapacity to purchase it, or to bid for it not intending to complete the purchase, or as it is expressed to perform the obligations under which the bidder lays himself by such ‘bidding’ ”.²⁵

A person who bids for the lease of a ferry sold at a public auction and fails to complete the sale is guilty of contempt under this section.¹

1. ‘Any sale of property’.—Any kind of property whether corporeal or not is contemplated by the section.² A person who bid at an auction of the right to sell drugs within a certain area under a false name, and when the sale was confirmed in his favour, denied that he had ever made any bids at all, was held to have committed an offence under this section.³

2. ‘Public servant’.—See s. 21, *supra*.

3. ‘Legal incapacity’.—See s. 169, *supra*. If the accused at the time of making the bid brings a large sum of money for deposit as earnest money, but owing to circumstances over which he had no control is unable to deposit the earnest money and there is nothing to show that at the time he made his bid he was not a bona fide bidder and had no intention of performing the obligations under which he laid himself by such bidding, then his subsequent failure to deposit the earnest money cannot be made a penal offence punishable under this section.⁴

PRACTICE.

Evidence.—Prove (1) the holding of the sale.

(2) That such holding of the sale was by authority of a public servant.

(3) That such authority was lawful.

(4) That the accused bid for, or purchased such property, either for himself or for some other person.

(5) That the person for whom he bid or purchased (whether for himself or some one else) was under a legal incapacity to purchase at the sale in question.

(6) That the accused then knew of such incapacity.

It will also be sufficient to prove (1), (2) and (3) as above; and further

(4) That the accused bid for such property.

(5) That, when bidding, he intended not to perform the obligations under which such bidding placed him.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.⁵

186. Whoever voluntarily obstructs any public servant¹ in the discharge of his public functions,² shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Obstructing public servant in discharge of public functions.

COMMENT.

This is a general section and is applicable in every case where a public servant is obstructed in the discharge of his functions. Where the public servant is a judicial officer the procedure laid down in s. 480 of the Criminal Procedure Code may be followed.

²⁵ 2nd Rep., s. 110, p. 374.

¹ *Reazooddeen*, (1865) 3 W. R. (Cr.) 33.

² *Ibid*.

³ *Bishan Prasad*, (1914) 37 All. 128.

⁴ *Kali Charan*, (1934) 9 Luck. 594.

⁵ See s. 195, Criminal Procedure Code.

This section does not deal with obstruction of any public servant or of any person but with the obstruction of a proceeding conducted by a public servant.⁶

The obstruction which is punishable by this section may be by an act voluntarily done or omitted in order to hinder the public servant in executing his duty. This section does not contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions, even when they are of a quasi-executive character or when the proceedings before him are in execution.⁷

Ingredients.—This section requires two essentials—

1. Voluntary obstruction to a public servant.
2. Such obstruction must be in the discharge of public functions of such public servant.

1. 'Voluntarily obstructs any public servant'.—The use of the word 'voluntarily' indicates that the legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct.⁸ The word 'obstruction' means actual obstruction, i.e. actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force and mere threats or threatening language⁹ or mere abuse¹⁰ are not sufficient. The Nagpur High Court has held that there is an essential difference in the obstruction contemplated in s. 184 and this section. This section postulates some show of physical force whereas s. 184 does not.¹¹ During the execution of a warrant of possession the judgment-debtor and his men were drawn up and showed every intention of resisting by force. The judgment-debtor paraded the place in a defiant and angry mood. It was held that the act of the judgment-debtor constituted physical obstruction even though no physical force was actually brought into play at the time. It was not necessary for them actually to come to blows.¹²

The Allahabad High Court is of the opinion that the word 'obstruction' is not confined to physical obstruction and mere threats or threatening language is sufficient to constitute the offence under this section.¹³ Threats of violence made in such a way as to prevent a public servant from carrying out his duty might easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the person uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hands must be taken to be just as much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him from executing his duty.¹⁴

In a Bombay case, a Circle Inspector entered into the compound of the accused with a panch and a village servant, to remove a portion of the hedge which was an encroachment. When the servant employed his scythe to the hedge to cut it, the accused caught hold of the scythe and threatened him. The Circle Inspector, apprehending mischief, withdrew. It was held that the accused had committed an offence under this section, since his act in laying hold of the scythe was an act of physical obstruction, and the obstruction offered to the servant was tantamount to obstruction to the Circle Inspector under whose orders he was acting. The Court observed: "There is a difference between a case like this and one where a person merely dissuades other people from rendering certain services to a public servant, or spreads false reports so as to prevent parents bringing children for vaccination, and so on, in regard to which there are authorities for saying that there is no obstruction within the meaning of s. 186".¹⁵

⁶ *Provl. Govt., C. P. & Berar v. Balaram*, [1939] Nag. 139.

⁷ *Thakur Prasad*, (1935) 16 P. L. T. 808, 37 Cr. L. J. 104, [1936] AIR (P) 104.

⁸ *Sommanna*, (1892) 15 Mad. 221. See *Pundlik Krishna Pai*, (1904) 6 Bom. L. R. 254, 1 Cr. L. J. 262.

⁹ *Durkan*, (1928) 29 Cr. L. J. 645, [1928] AIR (L) 827.

¹⁰ *Sooraparazu Singayya*, (1894) 1 Weir 621.

¹¹ *Provl. Govt., C. P. & Berar v. Balaram*,

[1939] Nag. 139.

¹² *Kisan Krishnaji v. Nagpur Conference of Society*, [1943] N. L. J. 505, 45 Cr. L. J. 407, [1944] AIR (N) 334.

¹³ *Nanhua*, [1937] A. L. J. R. 1344, 39 Cr. L. J. 363, [1938] AIR (A) 118.

¹⁴ *Tohfa*, (1933) A. L. J. R. 952, 34 Cr. L. J. 1211, [1933] AIR (A) 759; *Nafar Sardar*, (1932) 60 Cal. 149.

¹⁵ *Bhaga Mana*, (1927) 30 Bom. L. R. 364, 365, 52 Bom. 286.

A District Judge ordered that the house of the defendant, in a suit pending before him, be searched and certain property brought to the Court, and appointed a commissioner to carry out that order. The commissioner went to the house, but the defendant shut the doors and would not admit him. A crowd collected and the commissioner felt it would be unsafe to proceed to carry out the order by force and was unable to do so otherwise. It was held that the defendant committed no offence under this section.¹⁶ In a subsequent case the same High Court has held that shutting the door in an officer's face amounts to obstructing him in the performance of his duty.¹⁷

See s. 39, *supra*, as to the meaning of 'voluntarily'.

'Public servant'.—A vaccinator,¹⁸ a process-server,¹⁹ a union *karnam*,²⁰ a peon to whom execution of a warrant is delegated,²¹ and a Sanitary Inspector,²² are public servants within the meaning of this section; but not a person nominated by the Collector under the Bengal Tenancy Act for the purpose of making a division of crops between a landlord and tenant,²³ nor a receiver appointed under the Land Registration Act,²⁴ nor a Local Board Sircar.²⁵ See s. 21, *supra*, for the definition of the term 'public servant'.

2. 'In the discharge of his public functions'.—According to the Calcutta and the Lahore High Courts the 'public functions' contemplated by this section mean legal or legitimately authorized public functions, and are not intended to cover any act, that a public functionary may choose to take upon himself to perform.¹ It must be shown that the obstruction or resistance was offered to a public servant in the discharge of his duties or public functions, as authorized by law. The mere fact of a public servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence.²

It has, however, been held by the Madras and the Allahabad High Courts that even though the act of the public servant is not strictly legal yet any obstruction caused to him when he is discharging his functions in good faith would come under this section.³ The Patna High Court has held in a case that although it is improper for a Nazir to depute one of his assistants to execute a warrant for the delivery of possession which is directed to the Nazir himself, yet the assistant is sufficiently clothed with authority to execute the warrant, and any person offering resistance or obstruction to its execution is guilty of an offence under this section.⁴ It has further held that if a public officer does no more than act upon the official instructions he has received and if those official instructions are not of such a kind as to be obviously and patently illegal then he acts properly in carrying out orders and resistance to a public officer carrying out orders which upon the face of them are not open to objection and are in proper form is an offence against the statute. A Court should look at the warrant of attachment and see whether the officer was doing something which was not contained in the writ of attachment which would have justified reasonable resistance and only such reasonable resistance as was necessary for the purpose of resisting an unlawful act. Where a bailiff who got a process of attachment under Order XXI, r. 43, of the Civil Procedure Code, for seizure of certain property failed to comply with the instructions contained

¹⁶ *Sommanna*, (1892) 15 Mad. 221. See *Nishi Kanta Pal*, (1916) 20 C. W. N. 857, 18 Cr. L. J. 62, [1917] AIR (C) 180.

¹⁷ *Thimakka*, [1942] 1 M. L. J. 583, [1942] M. W. N. 875, 55 L. W. 368, (1941) 43 Cr. L. J. 757, [1942] AIR (M) 552 (2).

¹⁸ (1881) 1 Weir 129.

¹⁹ *Bhagai Dafadar*, (1868) 2 Beng. L. R. 21, 10 W. R. (Cr.) 43, F.B.

²⁰ *Gopalasaminatha Aiyen*, (1898) 1 Weir 128.

²¹ *Dharam Chand Lal*, (1895) 22 Cal. 596.

²² *Shaileshchandra Lahiri v. Nehalchand Marwari*, (1931) 59 Cal 284.

²³ *Chatter Lal v. Thacoor Pershad*, (1891) 18 Cal. 518.

²⁴ Beng. Act VIII of 1876, s. 56; *Ebrahim Sircar*, (1901) 29 Cal. 286.

²⁵ *Addaita Bhuia v. Kali Das De*, (1907) 12 C. W. N. 96, 6 Cr. L. J. 398.

¹ *Lilla Singh*, (1894) 22 Cal. 286; *Abdul Gafur*, (1896) 23 Cal. 896; *Himayat Ali*, (1904)

P. R. No. 10 of 1905, 2 Cr. L. J. 64; *Jaswant Singh*, (1924) 1 Lah. C. 429, 25 Cr. L. J. 721, [1925] AIR (L) 139.

² *Barada Kanto Pramanik*, (1896) 1 C. W. N. 74.

³ *Pukot Kotu*, (1896) 19 Mad. 349; *Poomalai Udayan*, (1898) 21 Mad. 296; *Public Prosecutor v. Madhava Bhonjo Santos*, (1916) 31 M. L. J. 305, [1916] 2 M. W. N. 183, 4 L. W. 377, 17 Cr. L. J. 481, [1917] AIR (M) 889; *Tadela Simhadri Naidu*, [1936] M. W. N. 211; *Peer Masthan Rowther*, (1938) 47 L. W. 673, [1938] M. W. N. 418, 39 Cr. L. J. 879, dissenting from *Murugappa Naicker*, (1924) 48 M. L. J. 97, 21 L. W. 82, 26 Cr. L. J. 750, [1925] AIR (M) 613, and *Suryanarayana v. Thota Simhadri*, [1934] M. W. N. 1220, 67 M. L. J. 510, 40 L. W. 594, 36 Cr. L. J. 111, [1934] AIR (M) 664; *Janki Prasad*, (1886) 8 All. 293.

⁴ *Doman Mahto*, (1919) 21 Cr. L. J. 193, [1920] AIR (P) 482.

in the High Court General Rules, and he was obstructed by the judgment-debtors in effecting his seizure and removing the attached property, it was held that the judgment-debtors were guilty under this section.⁵ Where an officer is entrusted with a warrant to attach the property of certain persons, his first duty is to ascertain by all means possible what property belongs to that person which is liable to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised which raises in his mind a reasonable doubt that the property does not belong to the person against whom the warrant has been issued.⁶

The decisions of the Bombay High Court are not unanimous on the point. It has held in two cases that if a public servant bona fide believed that he was discharging his public functions within the scope of his authority, even though he was mistaken as to the extent of his powers, an obstruction caused to him would be punishable under this section.⁷ Where an officer, subordinate to an officer in charge of a police-station, was deputed by the latter to make an inquiry under s. 135, Criminal Procedure Code, attempted without a search-warrant to enter into a house in search of property alleged to have been stolen, and was obstructed and resisted, it was held (applying s. 99 of the Indian Penal Code) that, even though the police-officer was not strictly justified in searching the house without a warrant, the person resisting and obstructing could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that the officer was acting otherwise than in good faith and without malice.⁸ But in subsequent cases it has held that even though a public servant is acting in good faith, if the order under which he acts is illegal or *ultra vires*, any obstruction caused to him would not be punishable under this section.⁹ The public servant's intentions may have been perfectly honest, but if in fact and in law the functions in the discharge of which he is obstructed are not public functions, then no offence is committed. The functions will not be public functions if they fall wholly outside the jurisdiction of authority which he as a public officer possesses.¹⁰ The accused, a timber merchant, purchased certain timber in the Central Provinces and brought it into East Khandesh. The merchant from whom he purchased had brought it from the Indore State. A Forest Ranger of East Khandesh being of opinion that the timber was liable to duty under a notification which levied duty on all timber brought into East Khandesh from the Indore State went to the accused's timber yard, demanded the payment of duty, and proceeded to search for the dutiable timber in the yard. The accused refused to pay the duty and did not allow the Ranger to search for or remove the timber. On a prosecution of the accused for an offence under this section it was held that, as neither s. 39 of the Forest Act nor the notification thereunder sufficed to make any duty leviable in respect of the timber which the accused had purchased bona fide in the Central Provinces, the Ranger was acting wholly outside his jurisdiction or authority and the accused was not guilty of an offence under this section.¹¹ The Court of the Judicial Commissioner of Sind has held likewise.¹²

The order or a warrant under which a public servant acts must be a lawful one and the public servant who executes the order or warrant must be clothed with lawful authority under the order or warrant to execute it. See cases noted below.

Civil process.—The resistance to a process of a civil Court is punishable under this section.¹³ By obstructing the execution of a process of law the offender commits two offences; one is the alleged obstruction and the other is the contempt of Court, the offender being deemed to have undermined the authority of that Court. The first offence is covered by the Penal Code, while the second one is not.¹⁴

⁵ *Birdhi Chand Jaipuria v. Darbari Jayaswal*, (1932) 13 P. L. T. 480, 34 Cr. L. J. 263, [1932] AIR (P) 276; *Dakshan Sahu*, [1937] P. W. N. 771, 18 P. L. T. 788, 39 Cr. L. J. 100, [1937] AIR (P) 633.

⁶ *Ram Singh*, (1935) 16 P. L. T. 295, 36 Cr. L. J. 714, [1935] AIR (P) 214, s.b.

⁷ *Vyankatray Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Bhawoo Jiwaji v. Mulji Dayal*, (1888) 12 Bom. 377.

⁸ *Vyankatray Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Padarath*, (1882) 2 A. W. N. 233; *F. Todd*, (1882) 2 A. W. N. 52.

⁹ *Tulsiram*, (1888) 13 Bom. 168.

¹⁰ *Shivdas Omkar*, (1912) 15 Bom. L. R. 315, 14 Cr. L. J. 251; *Kadarbhai*, (1927) 29 Bom. L. R. 987, 51 Bom. 896.

¹¹ *Kadarbhai*, *ibid*.

¹² *Badraddin v. Balcho*, [1940] Kar. 110.

¹³ *Bhagat Dafadar*, (1869) 2 Beng. L. R. (F. B.) 21, 10 W. R. (Cr.) 43, F.B., overruling *Chunder Kant Chuckerbutty*, (1868) 9 W. R. (Cr.) 63; *Mani Chandra Das*, (1896) 2 Beng. L. R. (A. Cr. J.) 188, 11 W. R. (Cr.) 62.

¹⁴ *Jnanendra Prasad Bose v. Gopal Prasad Sen*, (1932) 12 Pat. 172.

CASES.

Obstruction in discharge of public functions.—The accused's son strayed away from his home. He was found at a police out-post, some distance from a *thana*, and was sent into the *thana* under the charge of a watchman. Near the *thana* the accused met the watchman and claimed his son. The watchman told him that he would get his son when the *thana* was reached. The accused accompanied the watchman remonstrating and quarrelling with him for not giving up his son. On reaching the *thana* the accused refused to allow his son to be taken inside, and said that his son was not a thief that he should be taken into the *thana*. He took away his son and used bad language. It was held that he had committed an offence under this section as he had obstructed the police in the discharge of their duty.¹⁵ Whilst the complainants, a Sub-Inspector and a constable in the Abkari Department, were proceeding to search a man whom they suspected of possessing cocaine, the accused assaulted first the constable and then the Sub-Inspector, as a result of which the man escaped and the complainants could not search him. The accused was convicted of two offences punishable under s. 353 and one offence under this section. It was held that the accused was rightly convicted.¹⁶

Where the accused in whose room stolen articles were found by a police constable immediately caused the room to be shut and threatened to kill the constable if he removed the articles;¹⁷ where the accused seriously obstructed, insulted and jostled a process-server in the execution of his duty;¹⁸ where the accused caught hold of a scythe and threatened the man who was cutting a portion of his hedge, which was an encroachment, under the orders of a Circle Inspector;¹⁹ where the accused snatched away a copper pot which was attached by a revenue peon for recovery of arrears of assessment;²⁰ and where the accused resisted a Sanitary Inspector, authorized by the Chairman of a municipality, in his attempt to inspect and examine food,²¹ it was held that the accused were guilty of an offence under this section.

Where a cadastral surveyor, in effecting partition of lands under an order passed by a civil Court under O. XXVI, r. 13, of the Civil Procedure Code, much beyond the period stated in the order, was obstructed and assaulted when proceeding to take measurements, the persons obstructing were held guilty of offences punishable under ss. 186 and 353 of the Indian Penal Code. The Court observed that "a clear distinction can be drawn between the case where a public servant acts wholly without jurisdiction or on an entirely illegal authority and the case where he may be said under s. 99, I. P. C., to be acting in good faith under colour of his office though that act may not be strictly justifiable by law. Of the former class of cases the decisions in 13 Bom. 168, 15 Bom. L. R. 315, 29 Bom. L. R. 987, 22 Cal. 286, 23 Cal. 896, 24 Cal. 320 and 28 All. 481 are illustrations. Illustrations of the latter kind of cases are to be found in 29 Cal. 417 and 19 Mad. 349."²²

A search-warrant was addressed to a police-station and was endorsed by the officer in charge of the police-station to a constable who, when executing the warrant, was obstructed by the accused. The latter were tried for an offence under this section, and were convicted. Neither at the time of the search nor during their trial did they take any objection to the legality of the warrant. In revision it was urged that the warrant was illegal inasmuch as it was addressed to a police-station and not to any police-officer by name or by description. It was held that no objection to the legality of the warrant having been taken at the time of the search or at the trial, the conviction could not be set aside on that ground, which was merely an *ex post facto* attempt at justification.²³

¹⁵ *Cheda Lal*, (1888) 3 A. W. N. 170; *Thavar Issaji Boree*, (1911) 13 Bom. L. R. 635, 12 Cr. L. J. 457.

¹⁶ *Thavar Issaji Boree*, *ibid*.

¹⁷ *Narayanaraju*, (1924) 20 L. W. 717, [1924] M. W. N. 438, 26 Cr. L. J. 97, [1924] AIR (M) 760.

¹⁸ *Jatto*, (1915) 16 Cr. L. J. 700, (1915) P. W. R. (Cr.) No. 30 of 1915, [1915] AIR (L) 456.

¹⁹ *Bhaga Mana*, (1927) 30 Bom. L. R. 864, 52

Bom. 286.

²⁰ *Moresbwar Janardan*, (1928) 30 Bom. L. R. 1255, 30 Cr. L. J. 353, [1928] AIR (B) 497.

²¹ *Shatleshchandra Lahiri v. Nehalchand Marwari*, (1931) 59 Cal. 284.

²² *Samsuddin Chandasaheb Peerjude*, Criminal Appeal No. 562 of 1928, decided by Kemp and Baker, JJ., on May 10, 1929 (Unrep. Bom.).

²³ *Ma Kin*, (1924) 3 B. L. J. 182, 26 Cr. L. J. 845, [1924] AIR (R) 383.

An assessee having failed to pay the amount demanded from him on account of income-tax a certificate was issued and a distress warrant was served through a peon who attached a bullock belonging to the assessee. This was left in the custody of a surety. Later, a second peon was directed to realize the tax due by sale of the bullock previously attached, and, if the amount realized proved insufficient, by attachment and sale of other properties of the assessee. The surety having denied that he had received charge of the bullock or stood surety, the peon attached two other bullocks belonging to the assessee who, however, prevented their removal. The assessee having been convicted under this section, contended that the second peon was not justified in attaching the two bullocks until the bullock first attached had been sold. It was held that the warrant issued to the second peon amounted to a direction for the sale of other properties of the assessee if, for any cause whatever, the peon found it impossible to realize the tax by sale of the attached property, and, therefore, the conviction was legal.²⁴ Where the Nazir of a Court went with a party to give possession of certain land and after allowing a substantial time for the auction-purchaser to come to terms with the judgment-debtors, ordered the judgment-debtors to remove the huts that existed on the property but on their objecting on the ground that the writ was not to give delivery of possession of the house, the Nazir asked the decree-holder's men to remove the huts; it was held that in giving directions that the huts should be taken down the Nazir acted in good faith and that there was no question of private defence available to the accused judgment-debtors and their men who chased the Nazir and the decree-holder's men with *lathis* thereby not only committing assault but obstructing further processes of the Court and that the accused were guilty under this section.²⁵

A very curious case came before the High Court in England. Certain constables were on duty observing and timing the speed of motor cars driven along a certain road with a view to the prosecution of the drivers of such cars as should be travelling at an illegal speed. For that purpose they had measured a certain distance along the road. The accused warned the drivers of cars which were approaching the measured distance of the presence of the constables and the purpose for which they were there. There was evidence that at the time the warning was given the cars were being driven at an illegal speed, and the drivers upon receipt of the warning slackened their speed and proceeded over the measured distance at a lawful speed, whereby the constables, as the accused intended, were prevented from obtaining such evidence as would be accepted as sufficient in a police Court that the drivers of the cars were committing an offence. It was held that the accused had wilfully obstructed the constables in the execution of their duty within the meaning of the Prevention of Crimes Amendment Acts.¹ This decision has been followed in a Bombay case. The accused, a licensed motor driver, in order to evade payment of toll, drove a motor bus for six days on a side track before reaching the toll bar, and after driving on that side track for about three furlongs again took the main road. There was a checking bar further up the road but the accused did not stop the bus there to pay the toll although he was signalled to do so. The accused having been convicted under this section for obstructing a public servant in the discharge of his public functions, it was held that the accused prevented the toll contractor or his servant from collecting the dues under the provisions of the Tolls on Roads and Bridges Act, and thus obstructed him in the discharge of his duty.²

Rescuing from custody.—Where two peons of a Court arrested the accused and while they were bringing him towards the Court, he called for help and four persons came and rescued him from the custody of the peons, it was held that they were guilty of an offence under this section, and the accused, of abetting the same.³

Illegal attachments.—Where a person resisted an officer who attached a spade and a bucket, protected from attachment by s. 94 of the Local Boards Act (Mad. Act V of 1884), it was held that that circumstance did not justify the resistance. The act, however irregular or illegal it might have been, was the act of a public servant acting in good faith under colour of his office, and against such an act the accused

²⁴ *Pichit Lal Misser*, (1929) 9 Pat. 344.

²⁵ *Government of Bengal v. Alimuddin*, (1932)

57 C. L. J. 41, 34 Cr. L. J. 826, [1933] AIR (C)

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¹ *Betts v. Stevens*, [1910] 1 K. B. 1.

² *Suleman*, (1934) 36 Bom. L. R. 1124, 36 Cr. L. J. 516, [1935] AIR (B) 24.

³ *Sheo Prakash Tewari v. Bhoop Narain Prasad Pathak*, (1895) 22 Cal. 759; *Dharam Chand Lal*, (1895) 22 Cal. 596.

had no right of self-defence.⁴ Where the accused was prosecuted under this section for releasing certain buffaloes attached by civil Court peons under defective warrants, it was held that they were not guilty under this section as the peons were not lawfully executing the warrants.⁵ An attachment made under a writ which does not bear the seal of the Court as required by O. XXI, r. 24(2), Civil Procedure Code, is an invalid and illegal attachment. Persons rescuing the attached property are not guilty of any offence.⁶ Where a civil Court peon, in execution of an unsealed writ of attachment, attached a bullock and calf belonging to the judgment-debtor, the latter being absent at the time, and the judgment-debtor subsequently followed and obstructed the peon and others who were with him, and rescued the cattle after attacking the identifier, it was held that he was not guilty of an offence under this section.⁷ When the date fixed in a warrant of attachment has expired, the warrant is no longer in force and capable of execution, and if any person offers resistance to execution purporting to be made under the time-expired warrant, he is not guilty of this offence.⁸ Resistance by a judgment-debtor to attachment process issued for service at a place beyond the jurisdiction of the Court is not punishable under this section.⁹ Where the writ of attachment directed the officer to attach the goods belonging to the judgment-debtor and the attaching officer having found the goods in the possession of the accused proceeded to seal up the ware-house containing the goods, and was obstructed by the accused whose actual physical resistance to the officer was not more than he was justified in using in resisting an unlawful proceeding, it was held that the accused was not guilty of an offence under this section.¹⁰ Where certain goods were distrained from a provision shop and the weight, by approximation only, of the goods was entered in the inventory and the copy thereof, and the owner obstructed the removal of the goods on the ground that the goods should be actually weighed and the correct weight entered, it was held that no offence had been committed by the owner and he could not be convicted under this section.¹¹

Mere non-compliance with the procedure for effecting an attachment prescribed by High Court Rules does not vitiate a warrant of attachment, and legalise obstruction by the judgment-debtor to the officer attaching. In cases of obstruction and resistance to legal process the Court should look at the warrant of attachment and see whether the officer was doing something, which was not contained in the writ of attachment which would have justified reasonable resistance and only such reasonable resistance as was necessary for the purpose of resisting an unlawful act.¹²

No obstruction if no overt act done or physical means used.—Persuasion, addressed to a tenant, not to pay rents to a receiver in the absence of such receiver was held not to constitute an obstruction to the receiver within the meaning of this section.¹³ The taking away of a child to the vaccination depot of which no consent was given by the parent, with the use of such force as was necessary for the purpose, was held not punishable under this section.¹⁴

A person refusing to accompany a measuring clerk, employed in the Revenue Survey Department, to his house, and permit it to be measured;¹⁵ a person forbidding a Survey Measurer to measure land in a particular manner without using or threatening to use force to prevent him from so doing;¹⁶ a person chaining from within the door of his house at the approach of a clerk charged with the execution of a warrant to attach his movable property;¹⁷ a person escaping from lawful custody;¹⁸ a person escaping from the custody of a process-server and shutting himself up in a room;¹⁹ a

⁴ *Poomalai Udayan*, (1898) 21 Mad. 296; *Ramayya*, (1889) 13 Mad. 148; *Pukot Kotu*, (1896) 19 Mad. 349.

⁵ *Sheikh Nasur*, (1909) 37 Cal. 122.

⁶ *Khidir Bux*, [1918] 3 P. L. J. 636, 20 Cr. L. J. 139, [1919] AIR (P) 404.

⁷ *Badri Gope*, (1925) 5 Pat. 216.

⁸ *Mahadeo*, (1926) 2 Luck. 40.

⁹ *Sarbeswar Nath Nath*, (1922) 39 C. L. J. 33, [1924] AIR (C) 501. But see *Durga Kumar De v. Samedur Raza Chaudhuri*, (1921) 22 Cr. L. J. 343.

¹⁰ *Nagarmal Marwari*, (1931) 11 Pat. 493.

¹¹ *Muhammad Shafi*, [1941] All. 639.

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¹² *Birdhi Chand v. Darbari Jayaswal*, (1932) 13 P. L. T. 480, 34 Cr. L. J. 263, [1932] AIR (P) 276.

¹³ *Ebrahim Sircar*, (1901) 29 Cal. 236.

¹⁴ *M. Jogabathudu*, (1898) 1 Weir 132.

¹⁵ *Bhagidas Bhagoandas*, (1868) 5 B. H. C. (Cr. C.) 51.

¹⁶ *Ravji*, (1888) Cr. R. No. 27 of 1888, Unrep. Cr. C. 377.

¹⁷ *Maina*, (1888) Cr. R. No. 70 of 1888, Unrep. Cr. C. 407.

¹⁸ *Poshu bin Dhambaji Patil*, (1865) 2 B. H. C. 128.

¹⁹ *Jamna Das*, (1927) 9 Lah. 214.

cart-owner refusing to give his cart on hire to a Government officer;²⁰ a person spreading a false report and thereby preventing persons from bringing their children for vaccination;²¹ a person preventing a vaccinator from taking lymph from the arm of his child;²² a person falsely informing a vaccinator that he would get no children to vaccinate in the village;²³ a person, between whom and a Municipality there was a bona fide dispute as to the ownership of a road, and who pulled up pegs and cut strings put down to mark out the road in the assertion of his right;²⁴ a person obstructing municipal servants from removing bales from a strip of land regarding which there was a bona fide dispute of ownership;²⁵ a person merely posting up placards asserting a title to property about to be auctioned by a public servant;¹ a person objecting to the search of his house, without using force or threatening language;² and a person standing by a staircase and, without any threat or obstruction at the passage, verbally objecting to a police search party going upstairs,³ were held to have committed no offence under this section.

A Magistrate, being deputed to reorganize a certain village *panchayat*, proposed, in obedience to orders of the Government, to include thereon a member of the depressed classes. This was resented by one of the *panchas*, who behaved in a very rude manner towards the Magistrate, refused to serve on the *panchayat*, and did his best to dissuade other people from serving on it. It was held that however reprehensible the conduct of the accused might have been, he was at liberty to refuse to serve himself and was within his rights in trying to induce others to refuse to serve, and that he could not be convicted of an offence under this section.⁴ Where a *patwari* refused to allow a *kanungo* to go through his books and to check them, it was held that it was only an act of insubordination and was not a criminal act falling within the purview of this section.⁵ Where certain goods were distrained from a provision shop and the weight, by approximation only, of the goods was entered in the inventory and the copy thereof, and the owner obstructed the removal of the goods on the ground that the goods should be actually weighed and the correct weight entered, it was held that no offence had been committed by the owner and he could not be convicted under this section.⁶

No obstruction if order or warrant under which public servant acts not legal.—A constable was sent to fetch some persons. The order to attend was not in writing. While the constable was taking two persons with him, P came up and threatened both of them and the constable with the chief constable's vengeance and in consequence the two persons refused to accompany the constable who had to go without them. P was convicted of offences under this section and s. 189. It was held that as the order did not conform to the provisions of s. 160 of the Criminal Procedure Code, P was not guilty under this section; but he was guilty of an offence under s. 506 and that there was no reason for interfering with his conviction under s. 189.⁷ Where a District Magistrate issued a warrant for the arrest and production of a witness for the purpose of giving evidence at an investigation held by the police, and in attempting to execute such warrant the police arrested the wrong person, and were assaulted in the attempt, it was held that as the District Magistrate had no authority to issue such warrant the accused were justified in their resistance and that no offence under s. 143 or this section was committed.⁸ Resistance or obstruction to the execution of an illegal warrant is not an offence under this section.⁹ A person obstructing a public servant executing a warrant of arrest which was not signed by the Magistrate but only

²⁰ *Dhori Kullari*, (1872) 9 B. H. C. 165.

²¹ *Thimmachi*, (1891) 15 Mad. 93; *Thulukana Chetti*, (1881) 1 Weir 129; *Byloor Lingah*, (1883) 1 Weir 130.

²² *Komati Ramannah*, (1882) 1 Weir 181; *Chitta Konaiya*, (1884) 1 Weir 132.

²³ *Anandappa Nadan*, (1884) 1 Weir 130.

²⁴ *Sagan*, (1888) Cr. R. No. 18 of 1888, Unrep. Cr. C. 366, followed in *Shivdas Omkar*, (1912) 15 Bom. L. R. 315, 14 Cr. L. J. 251; *Agora Matstri*, (1885) 1 Weir 132.

²⁵ *Shivdas Omkar Marwadi*, (1912) 15 Bom. L. R. 315, 14 Cr. L. J. 251.

¹ *Gopal Rai*, (1904) P. R. No. 7 of 1905, 2 Cr. L. J. 44.

² *Gavagappa*, (1900) 2 Bom. L. R. 541.

³ *Ah Choung*, (1931) 9 Ran. 601.

⁴ *Ram Ghulam Singh*, (1925) 47 All. 579.

⁵ *Keshori Lal*, (1924) 26 Cr. L. J. 597, [1925] AIR (A) 409.

⁶ *Muhammad Shafi*, [1941] All. 639.

⁷ *Purshotam Vannahi*, (1896) Cr. R. No. 18 of 1896, Unrep. Cr. C. 850.

⁸ *Jogendra Nath Mukerjee*, (1897) 24 Cal. 320.

⁹ *Tohfa*, [1938] AIR (A) 759; *Pragh Dyal*, (1905) J. 1211, [1938] AIR (A) 759; *Pragh Dyal*, (1905) P. R. No. 49 of 1905, 3 Cr. L. J. 131; *Hari Saran Maitra*, (1900) 5 C. W. N. 398; *Gopal Mahton*, (1940) 21 P. L. T. 716, 41 Cr. L. J. 819, [1941] AIR (P) 161.

bore his initials and the substance of which was not notified to him;¹⁰ a person obstructing an *amin* in the measurement of certain lands for partition, when the *amin* was not acting under the Collector's authority;¹¹ a person obstructing a public servant executing a warrant which did not bear a date on or before which it was to be executed;¹² a person obstructing a public servant executing a writ of attachment after the date fixed in the writ;¹³ and a person resisting a warrant which the Court issuing it had no jurisdiction to issue it,¹⁴ were held to have committed no offence under this section.

In a suit filed in a Mamlatdar's Court the plaintiff obtained a decree against the accused for possession of a certain piece of land. When the Mamlatdar proceeded to execute the decree he found that there was no land corresponding to the boundaries set forth in the plaint, and that the parties were joint owners and in joint occupation of the land in dispute. The Mamlatdar referred the matter to the Collector who ordered a surveyor to execute the decree by dividing the land in dispute and putting the decree-holder in possession of his share. The surveyor, in attempting to execute the decree, was obstructed by the accused, who was thereupon tried and convicted under this section. It was held that as the Collector had no legal authority to issue the order to the surveyor, the surveyor was not discharging a public function and the accused therefore had not committed any offence under this section.¹⁵ In execution of a decree for restitution of conjugal rights a warrant was issued directing the executing peon to seize the wife and deliver her bodily to her husband failing which to bring her under arrest before the executing Court. The peon seized the woman in execution of the warrant but he was resisted and the woman was snatched away. It was held that the warrant, the execution of which was resisted, was illegal and therefore no offence was committed under this section.¹⁶ An Income-tax Officer visited the village of the accused where he was told by the village officials that the accused kept several shops and ought to be assessed to income-tax. A dispute, thereupon, took place between them and the accused and in the course of the quarrel the latter assaulted and beat the former who, as a result, declined to render any help to the Income-tax Officer in his investigation. It was held that the action of the accused did not amount to obstructing the Income-tax Officer in the discharge of his public functions within the meaning of this section.¹⁷

PRACTICE.

Evidence.—Prove (1) that the person obstructed is a public servant.

(2) That at the time of obstruction he was discharging his public functions.

(3) That the accused obstructed him in the same.

(4) That he did so voluntarily.

Proof of *mala fides* of the person obstructing the public servant is not necessary to sustain a conviction under this section.¹⁸

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

The offence under this section is included in the offence under s. 353, Indian Penal Code, and an accused cannot be convicted under this section in addition to s. 353.¹⁹

Complaint.—Complaint in writing of the public servant concerned, or of some

¹⁰ *Abdul Gafur*, (1896) 23 Cal. 896; *Satish Chandra Rai v. Jodu Nandan Singh*, (1899) 26 Cal. 748. Where the warrant of attachment was signed by the Sheristadar "by order" of the Court, it was held to be a good warrant: *Wali Muhammad*, (1920) 3 U. P. L. R. (P) 41, 22 Cr. L. J. 300, [1920] AIR (P) 805.

¹¹ *Lilla Singh*, (1894) 22 Cal. 286.

¹² *Mokini Mohan Banerji*, (1916) P. L. W. 64, 1 P. L. J. 550, 18 Cr. L. J. 89, [1916] AIR (P) 272.

¹³ *Tannakal Mandar*, (1920) 1 P. L. T. 654, 22 Cr. L. J. 222, [1920] AIR (P) 449.

¹⁴ *Bechan Mahlon*, (1935) 37 Cr. L. J. 819,

[1936] P. W. N. 283, [1936] AIR (P) 37; *Dharani Dhar Jana*, [1944] 1 Cal. 309.

¹⁵ *Tulsiram*, (1888) 13 Bom. 168. See, to the same effect, *Lilla Singh*, (1894) 22 Cal. 286.

¹⁶ *Gahar Mahamed Sarkar v. Pitambar Das*, (1918) 22 C. W. N. 814, 19 Cr. L. J. 968, [1918] AIR (C) 4.

¹⁷ *Matu Ram*, (1922) 24 Cr. L. J. 594, [1924] AIR (L) 238.

¹⁸ *Karuman*, (1894) 1 Weir 134.

¹⁹ *Peer Masthan Rowther*, (1938) 47 L. W. 673, [1938] M. W. N. 418, 39 Cr. L. J. 879, [1938] AIR (M) 659.

other public servant to whom he is subordinate, is required.²⁰ It should satisfy the provision of law.²¹

Punishment.—Defiance of the process of law is a serious offence as it hampers the administration of justice. If allowed to be committed with impunity, the prestige of the Court is lost and hence the sentence should not be lenient.²²

Omission to assist public servant when bound by law to give assistance. 187. Whoever, being bound by law to render or furnish assistance¹ to any public servant² in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees or with both;

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice,³ or of preventing the commission of an offence,⁴ or of suppressing a riot,⁵ or affray,⁶ or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

Scope.—This section provides, first, in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the execution of his public duty intentionally omits to assist; secondly, it provides for the punishment when the assistance is demanded for certain specified purposes.²³

Persons bound to furnish information to public servants are punished under ss. 176 and 177. Persons bound to assist public servants come within the purview of this section. In all these cases a breach of legal obligation on the part of the accused is necessary. For instance, if a person required to attend a search fail to do so without reasonable excuse, he will be guilty under this section.²⁴

1. 'Bound by law to render or furnish assistance.'—The word 'assistance' referred to in the former part of the section is *ejusdem generis* with the various forms of assistance specified in the latter half. The assistance must have some direct personal relation to the execution of the duty by the public officer. The word 'assistance' as used here implies that the party who assists is doing something which, in ordinary circumstances, the party assisted can do for himself.²⁵ The assistance which a private person is bound to render to a public servant in the execution of his duty, must be something definite and specific. See ss. 42, 77 and 128 of the Code of Criminal Procedure as to the assistance which a person is bound to render to a public servant. It would be a good defence (1) that there was no reasonable necessity to call upon the accused to render assistance, or (2) that the accused refused on account of some physical impossibility or lawful excuse.¹ But if the refusal to assist is contrary to any provisions of a statute then the person refusing will be liable under this section. Where a person who was called upon by a Salt Inspector to assist in a search held under s. 103 of the Code of Criminal Procedure refused to do so, it was held that he had committed an offence under this section.² Similarly, a person who refused to help a police-officer to remove an arrested person who lay down on the ground and refused to move, was

²⁰ Criminal Procedure Code, s. 195; *Ram Singh*, (1935) 16 P. L. T. 295, 36 Cr. L. J. 714, [1935] AIR (P) 214, s.b.; *China Rangiah*, [1942] 2 M. L. J. 615, (1942) 55 L. W. 745, [1942] M. W. N. 817, (1942) 44 Cr. L. J. 326, [1943] AIR (M) 170.

²¹ *Darkan*, (1928) 29 Cr. L. J. 645, [1928] AIR (L) 827.

²² *Sheo Ahir*, (1938) 17 Pat. 680, 687.

²³ *Ramaya Naika*, (1903) 26 Mad. 419, 420, F.B.

²⁴ *Nga Hat*, (1898) P. J. L. B. 406.

²⁵ *Ramaya Naika*, (1903) 26 Mad. 419, 420, F.B.; *Ram Prasad*, (1938) 17 Pat. 682.

¹ *Brown*, (1841) Car. & M. 814.

² *Ippli Magatha*, [1920] M. W. N. 110, 38 M. L. J. 27, 11 L. W. 58, 21 Cr. L. J. 33.

held liable under this section.³ Refusal to attend and witness a search when called upon to do so in writing, under s. 103 of the Criminal Procedure Code, is an offence under this section. But refusal to sign the search list by a witness who attends the search is not an offence under this section, as it is not made penal under it.⁴

No offence if not legally bound to assist.—A person was convicted under this section for refusing, when called by a Forest Guard, to serve as one of a *punch* for the purpose of drawing up a *punchanama* with reference to certain wood alleged to have been illegally cut in a reserved forest. It was held that the conviction was illegal, as he was not legally bound to assist the Forest Guard under the Indian Forests Act (VII of 1878), s. 78.⁵ A Magistrate directed a landholder to find a clue in a case of theft within fifteen days and to assist the police. It was held that as such order was not authorized under ss. 90 and 91 of the Criminal Procedure Code (Act X of 1872), the landholder could not be convicted under this section.⁶

The accused refused to assist a police constable, who wished to bury the dead body of a man who had died of cholera leaving no relations, and threatened to punish any one who did so. It was held that as they were not bound to assist the constable they were not liable.⁷

Unreasonable demand for assistance.—Where a police-officer called upon the accused to assist him in arresting certain persons who were supposed to be dacoits and hiding in a forest tract in his district and whose whereabouts were not known and the accused declined to help him, it was held that the accused were not guilty of an offence under this section.⁸

2. 'Public servant'.—See s. 21, *supra*. 3. 'Court of Justice'.—See s. 20, *supra*.

4. 'Offence'.—Anything punishable under the Code or any special or local law (s. 40).

5. 'Riot'.—See s. 146, *supra*. 6. 'Affray'.—See s. 159, *supra*.

PRACTICE.

Evidence.—Prove (1) that the person requiring assistance is a public servant.

(2) That he was then in the execution of his duties.

(3) That the accused was legally bound to render or furnish assistance to him.

(4) That the accused omitted to give assistance.

(5) That he did so intentionally.

Or prove (1), (2) and (3) as above, and further

(4) That such assistance was required (a) for the purpose of executing the process (lawfully issued) of a Court of Justice; or (b) to prevent a riot or an affray; or (c) to apprehend a person, such person having been charged with an offence or being guilty thereof, or such person having escaped from lawful custody.

(5) That such assistance was demanded of the accused by such public servant who was legally competent to make such demand.

(6) That the accused omitted to give assistance.

(7) That he omitted to do so intentionally.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.⁹

188. Whoever, knowing that,¹ by an order promulgated by a public servant² lawfully empowered to promulgate such order,³ he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,⁴

Disobedience to order duly promulgated by public servant.

³ *Ambika Prasad*, (1932) 33 Cr. L. J. 736, [1932] AIR (A) 506.

⁴ *Ram Prasad*, (1938) 17 Pat. 632.

⁵ *Babaji*, (1897) 22 Bom. 769.

⁶ *Bakshi Ram*, (1880) 3 All. 201. See *Kali*

Prosunna Ghose, (1881) 7 C. L. R. 575.

⁷ *Daulatsing v. Bapu*, (1882) 6 C. P. L. R. (Cr.) 5.

⁸ *Joti Prasad*, (1920) 42 All. 314.

⁹ Criminal Procedure Code, s. 195.

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed,⁵ be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both ;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

ILLUSTRATION.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

COMMENT.

The authors of the Code say :—“ We have, to the best of our ability, framed laws against acts which ought to be repressed at all times and places, or at times and places which it is in our power to define. But there are acts which at one time and place are perfectly innocent, and which at another time or place are proper subjects of punishment ; nor is it always possible for the legislator to say at what time or at what place such acts ought to be punishable.

“ Thus it may happen that a religious procession which is in itself perfectly legal, and which, while it passes through many quarters of a town, is perfectly harmless, cannot without great risk of tumult and outrage be suffered to turn down a particular street inhabited by persons who hold the ceremony in abhorrence, and whose passions are excited by being forced to witness it. Again, there are many Hindoo rites which in Hindoo temples and religious assemblies the law tolerates, but which could not with propriety be exhibited in a place which English gentlemen and ladies were in the habit of frequenting for purposes of exercise. Again, at a particular season hydrophobia may be common among the dogs at a particular place, and it may be highly advisable that all people at that place should keep their dogs strictly confined. Again, there may be a particular place in a town which the people are in the habit of using as a receptacle for filth. In general this practice may do no harm, but an unhealthy season may arrive, when it may be dangerous to the health of the population, and under such circumstances it is evidently desirable that no person should be allowed to add to the nuisance. It is evident that it is utterly impossible for the legislature to mark out the route of all the religious processions in India, to specify all the public walks frequented by English ladies and gentlemen, to foresee in what months and in what places hydrophobia will be common among dogs, or when a particular dunghill may become dangerous to the health of a town. It is equally evident that it would be unjust to punish a person who cannot be proved to have acted with bad intentions for doing today what yesterday was a perfectly innocent act, or for doing in one street what it would be perfectly innocent to do in another street, without giving him some notice.

“ What we propose, therefore, is to empower the local authorities to forbid acts which these authorities consider as dangerous to the public tranquillity, health, safety or convenience, and to make it an offence in a person to do any thing which that per-

son knows to be so forbidden, and which may endanger the public tranquillity, health, safety or convenience. It will be observed that we do not give to the local authorities the power of arbitrarily making any thing an offence; for unless the Court before which the person who disobeys the order is tried shall be of opinion that he has done something tending to endanger the public tranquillity, health, safety or convenience, he will be liable to no punishment. The effect of the order of the local authority will be merely to deprive the person who knowingly disobeys the order of the plea that he had no bad intentions. He will not be permitted to allege that if he has caused harm, or risk of harm, it was without his knowledge.

"Thus, if in a town where no order for the chaining up of dogs has been made, A suffers his dog to run about loose, A will be liable to no punishment for any mischief which the animal may do, unless it can be shown that A knew the animal to be dangerous. But if an order for confining dogs has been issued, and if A knew of that order, it will be no defence for him to allege, and even to prove, that he believed his dog to be perfectly harmless. If the Court think that A's disobedience has caused harm, or risk of harm, A will be liable to punishment. On the other hand, if the Court think that there was no danger, and that the local order was a foolish one, A will not be liable to punishment.

"We see some objections to the way in which we have framed this part of the law; but we are unable to frame it better. On the one hand, it is, as we have shown, absolutely necessary to have some local rules which shall not require the sanction of the legislature. On the other hand, we are sensible that there is the greatest reason to apprehend much petty tyranny and vexation from such rules; and this although the framers of those rules may be very excellent and able men. There is scarcely any disposition in a ruler more prejudicial to the happiness of the people than a meddling disposition. Yet, experience shows us that it is a disposition which is often found in company with the best intentions, with great activity and energy, and with a sincere regard for the interest of the community. A public servant of more than ordinary zeal and industry, unless he have very much more than ordinary judgment, is the very man who is likely to harass the people under his care with needless restrictions. We have, therefore, thought it necessary to provide that no person should be punished merely for disobeying a local order, unless it be made to appear that the disobedience has been attended with evil, or risk of evil. Thus no person will be punished for disobeying an idle and vexatious order."¹⁰

Ingredients.—The section requires—

1. That there must be an order promulgated by a public servant.
2. That the public servant must have been lawfully empowered to promulgate such order.
3. That a person having knowledge of such order and directed by such order (a) to abstain from a certain act, or (b) to take certain order with certain property in his possession or under his management, has disobeyed such direction.
4. That such disobedience causes or tends to cause (i) obstruction, annoyance, or injury, or risk of it, to any person lawfully employed, or (ii) danger to human life, health or safety, or (iii) a riot or affray.¹¹

1. 'Whoever, knowing that'.—There must be evidence that the accused had knowledge of the order with the disobedience of which he is charged.¹² The question of knowledge must generally be a matter of inference and an inference of knowledge can be made from circumstances where they are such as to entitle a Court to make the inference.¹³

2. 'Order promulgated by a public servant'.—Where an order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be af-

¹⁰ Note F, pp. 128, 129.

¹¹ *Madan Kishore and Badri Lal*, (1940) 21 P. L. T. 231, 41 Cr. L. J. 414, [1940] AIR (P) 446.

¹² *Ramdas Singh*, (1926) 54 Cal. 152; *Sheikh Abdul*, (1926) 31 C. W. N. 340, 45 C. L. J. 202,

28 Cr. L. J. 350, [1927] AIR (C) 306; *Sundara Mudaliar*, [1937] 1 M. L. J. 473, 38 Cr. L. J. 620, [1937] AIR (M) 535.

¹³ *Madan Kishore and Badri Lal*, (1940) 21 P. L. T. 231, 41 Cr. L. J. 414, [1940] A.I.R. (P) 446.

fected by it, that is sufficient to bring the case under the section.¹⁴ It is necessary that the order should be in writing and duly promulgated and directed to the accused.¹⁵ But a general order also is quite sufficient.¹⁶ Mere proof of a general notification promulgating the order does not satisfy the requirements of this section. It is open to the Magistrate, in determining the question of such knowledge, to take into consideration the facts and circumstances of the case including the fact that the accused lived at a place where the order was duly promulgated.¹⁷

If an order is intended to have a temporary operation only, and has expired by efflux of time, and has not been again promulgated, no conviction can be had for disobedience to it.¹⁸ Similarly, disobedience to an invalid order is not punishable.¹⁹

An order under s. 267 of the Indian Succession Act;²⁰ ss. 133, 136 and 144 of the Code of Criminal Procedure;²¹ s. 473 of the City of Bombay Municipal Act,²² etc. are orders under this section.

Orders contemplated by this section are orders made by public functionaries in the public interest.²³

'Public servant.'—The section only applies when the order has been issued by a public servant.²⁴ A Receiver appointed under the Land Registration Act (Beng. Act VII of 1876, s. 56) is not such a public servant.²⁵

See s. 21 as to the meaning of 'public servant.'

3. 'Lawfully empowered to promulgate such order.'—If the public servant in question is not lawfully empowered to promulgate the order no conviction can stand.¹ The order must be a proper order and not merely a notice.² If the order is both in substance and in its manner of publication illegal, as being beyond the powers conferred by law, the accused will not be liable.³

4. 'Directed to abstain from a certain act, or to take certain order with certain property in his possession, etc.'—The section applies where a person 'knowing' that an order has been promulgated by proper authorities to do or not to do certain acts disobeys such order.⁴

5. 'Such disobedience causes or tends to cause obstruction, annoyance or injury,.....etc.'—Mere disobedience of an order does not constitute an offence in itself, it must be shown that the disobedience has or tends to a certain consequence.⁵ In *Empress v. Habibullah*⁶ Mahmood, J., observed: "It is necessary to establish that the disobedience 'causes, or tends to cause, obstruction, annoyance, or injury to any person lawfully employed'; and to make the offence graver, it must be established that 'such disobedience causes, or tends to cause, danger to human life, health, or safety; or causes, or tends to cause, a riot or affray'; and it is clear that if none of these conditions are satisfied the conviction is illegal, and must be set aside. Now,

¹⁴ *Parbutty Charan Aich*, (1888) 16 Cal. 9.
¹⁵ *Mul Raj*, (1904) P. R. No. 36 of 1905, 2 Cr. L. J. 365; *Nobo Kishore Chuckerbutty*, (1880) 7 C. L. R. 291; *Gopal Burnawar*, (1869) 3 Beng. L. R. (A. Cr. J.) 13; *Komul Kisto Bonick*, (1883) 12 C. L. R. 231; *Sukar Budhia*, (1870) Unrep. Cr. C. 30; *Manekchand*, (1887) Unrep. Cr. C. 342, Cr. R. No. 33 of 1887.

¹⁶ *Goluck Chandra Pal v. Kali Charan De*, (1886) 13 Cal. 175. But see *Abdullah*, (1921) 22 Cr. L. J. 705.

¹⁷ *Ramdas Singh*, (1926) 54 Cal. 152.

¹⁸ *Sheodin*, (1887) 10 All. 115.

¹⁹ *Bhoirub Chunder Datta*, (1881) 10 C. L. R. 193; *Bishambar Lal*, (1891) 13 All. 577; *Narayana*, (1889) 12 Mad. 475; *Tekait Kunj Behari Narain Deo v. Bhiko Singh*, (1900) 5 C. W. N. 329.

²⁰ XXXIX of 1925.

²¹ Act V of 1898.

²² Bom. Act III of 1888.

²³ *Bishan Datt*, [1947] A. L. J. 304.

²⁴ *Weir* (3rd Edn.) 78.

²⁵ *Ebrahim Sircar*, (1901) 29 Cal. 236.

¹ *Khandoji Tanaji*, (1868) 5 B. H. C. (Cr. C.) 21; *Bhau bin Vitha*, (1867) 3 B. H. C. (Cr. C.) 53; *Tatya*, (1871) Unrep. Cr. C. 50; *Bapuji Bechar*, (1874) Unrep. Cr. C. 81; *Amiraddi*,

(1869) 3 Beng. L. R. (A. Cr. J.) 45, 12 W. R. (Cr.) 36; *Oomra*, (1869) P. R. No. 17 of 1869, *Prosunno Coomarr Chatterjee*, (1881) 8 C. L. R. 231; *Ebrahim Sircar*, (1901) 29 Cal. 236; *Bakshi Ram*, (1880) 3 All. 201; *Jodhi*, (1883) 1 O. D. 108; *Kalian Singh*, (1904) 24 A. W. N. 233, 1 Cr. L. J. 916; *Dhan Singh*, (1904) 1 A. L. J. R. 615, 1 Cr. L. J. 987; *Nagappa Thevan*, (1913) 38 Mad. 602; *Ba Nyum*, (1913) 7 L. B. R. 75, 15 Cr. L. J. 22, [1914] AIR (LB) 134. See *Raghumath Venaik Dhulekar*, (1924) 47 All. 205, where the Judges differed on the point whether the police had power to promulgate a verbal order to disperse a procession.

² *Kandhaiya Lal*, (1883) 1 O. D. 115.

³ *Lakshmidas Makandas*, (1889) 14 Bom. 165; *Jasoda Nand*, (1898) 20 All. 501; *Udnir*, (1873) P. R. No. 8 of 1873; *Harilal*, (1889) 14 Bom. 180; *Nga Po Tum*, (1895) 1 U. B. R. (1892-1896) 178; *Ba Nyum*, (1913) 7 L. B. R. 75, 15 Cr. L. J. 22.

⁴ *Nandkumar Bose*, (1869) 3 Beng. L. R. Appx. 149; *Anant Shitaram*, (1899) 1 Bom. L. R. 524.

⁵ *Lachmi Devi*, (1930) 58 Cal. 971.

⁶ (1886) 6 A. W. N. 251, 252;

in the first place, it seems clear to me that the 'obstruction, annoyance, or injury on the one hand, and the 'danger to human life, health, or safety' on the other hand, are intended by the section to be applicable to cases in which the injurious results therein contemplated arise in the ordinary course of lawful employment to persons who, in the exercise of their rights as ordinary citizens, may incur such evil consequences on account of any act or omission of the accused, which act or omission occurs in disobedience of a lawful order. In the next place, I am of the opinion that the section has no application to cases in which a person simply neglects his property, and by allowing a wall or a gate-way to remain in a dilapidated condition, renders theft or other crime more easy of commission than would otherwise be the case. The law does not contemplate that the physical barrier of a wall or a gate is the means of restraining persons from crime, and no order of this nature can be made on the mere ground of any such apprehension". In this case the accused were in possession of an inn where travellers put up. The Magistrate passed an order directing them to repair the gate of the inn within a month as it was apprehended that travellers' property would otherwise be stolen. The repairs required by the order were not made till after the expiry of the month and the accused were therefore convicted under this section. It was held that the conviction was wrong.⁷ A conviction in the absence of evidence as to the likely result of the disobedience of an order is bad in law.⁸ Thus disobedience to an order under s. 144 of the Criminal Procedure Code, prohibiting a person from holding a market on certain specified days was held not to be punishable in the absence of evidence showing that the disobedience was likely to lead to a breach of the peace.⁹ The Explanation to the section says that it is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces or is likely to produce harm.¹⁰ The accused were directed not to make any disturbance over a certain person's rights of a ferry and thereafter they being found plying another ferry at the site in question but not causing any disturbance were ordered to be prosecuted under this section. It was held that the order for prosecution was infructuous.¹¹ Where proclamation and attachment were issued against an absconder attaching some undivided land of the joint family to which the absconder belonged, and one of the other members of the family cultivated the lands in spite of the order, it was held that he could not be convicted under this section.¹² But if the act of disobedience hastened to cause annoyance it is sufficient under this section. Objectionable language near a liquor shop, such as "if you drink, you will be drinking the blood of your children", speaks for itself and no more evidence than the words used is required.¹³ The accused sold drinks in his shop during a festival day in contravention of an order promulgated by the District Magistrate and he was convicted under this section. It was held that the conviction was illegal as there was no question or proof of causing or tending to cause obstruction, annoyance or injury, to any one and as it does not follow as a matter of course that selling drinks will lead to riots or disturbance.¹⁴ Mere refusal to disperse when ordered to do so under s. 144, Criminal Procedure Code, does not amount to an offence under this section.¹⁵

⁷ *Habibulla*, (1886) 6 A. W. N. 251.

⁸ *Brojo Nath Ghose*, (1900) 4 C. W. N. 226. In this case it was said that although the establishment of a rival *hat* (bazaar) at a place near to an old *hat* (bazaar) and held on the same day might lead to the breach of the peace, but that should not alone form a sufficient ground for a conviction. The decision seems to give the go-by to the words 'tends to cause'.

⁹ *Shyammanand Das Paharaj*, (1904) 31 Cal. 990; *Ram Gopal Daw*, (1905) 32 Cal. 793; *Parmeshwar Rai*, (1922) 3 P. L. T. 268, 23 Cr. L. J. 381, [1922] AIR (P) 84. See *Nandkumar Bose*, (1869) 3 Beng. L. R. Appx. 149, in which a conviction for disobeying an order prohibiting the carrying of fire-arms was set aside in the absence of evidence to show that the disobedience would cause or tend to cause annoyance, obstruction, or injury to human life, health or safety; *Shabuckram Bukolee*, (1865) 2 W. R. (Cr.) 32, where the conviction was set

aside for refusal to remove and reconstruct roof drains; *Harilal*, (1889) Unrep. Cr. C. 433, where a man held a caste feast contrary to orders of Municipality when cholera was raging in the city.

¹⁰ See *Niazoo Khan*, (1934) 9 Luck. 543, dissenting from *Ram Gopal Daw*, (1905) 32 Cal. 793.

¹¹ *Sujal Btsuas v. Samiruddin Mandal*, (1917) 22 C. W. N. 599, 19 Cr. L. J. 739, [1919] AIR (C) 996.

¹² *Bisi Bihara*, (1917) 2 P. L. W. 179, 18 Cr. L. J. 1037, [1917] AIR (P) 505.

¹³ *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047, 8 Cr. L. J. 431.

¹⁴ *Venkanna*, [1925] M. W. N. 396, 48 M. L. J. 605, 22 L. W. 98, 26 Cr. L. J. 1556, [1925] AIR (M) 856.

¹⁵ *Din Mahammad*, (1928) 10 Lah. 231; *Paramasiva Moopan*, (1927) 29 Cr. L. J. 590, [1928] M. W. N. 70, [1928] AIR (M) 591.

Section not applicable to orders made in civil suits.—The section applies to orders made by public functionaries for public purposes and not to an order made in a civil suit between party and party.¹⁶ The operation of the section is limited to the promulgation by public servants of orders relating to safety, health, or convenience of the public. Thus, disobedience to an order issued under O. XXI, r. 46, Civil Procedure Code, 1908, is not punishable under this section.¹⁷ The proper remedy for disobedience to an order of injunction passed by a civil Court is a committal for contempt.¹⁸

Orders issued under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885) are not of a civil nature as the primary purpose of orders made under s. 69 is to prevent breaches of the peace. Disobedience to such orders is punishable under this section.¹⁹ Disobedience to an order of summary ejectment issued under s. 219 of the Central Provinces Land Revenue Act (II of 1917) is punishable likewise on the ground that it is an order made by a public functionary for a public purpose.²⁰

CASES.

Valid orders.—An order issued by a Magistrate prohibiting a zemindar from holding a new market on his estate close to an old-established one belonging to a neighbouring zemindar, on the ground that it had caused unlawful assemblies and raised apprehension of a breach of the peace;²¹ an order to the priests of a temple, much frequented by pilgrims, to widen and heighten the doorway so as to obviate the dangers arising from overcrowding, and improve the ventilation;²² an order prohibiting a person from plying a boat for hire at or in the immediate vicinity of a public ferry;²³ an order commanding an assembly of five or more persons to disperse;²⁴ an order directing rival owners of two markets not to hold them on certain days, in order to prevent any likelihood of a breach of the peace;²⁵ and an order not to slaughter cows or bullocks on particular days,¹ are held to be valid orders under this section.

An order was issued by a Magistrate prohibiting shouting against drink near liquor shops, and a person shouted from the verandah of a private house abutting on a public place, it was held that he had disobeyed the order, for if a man standing on a private place adjoining a public road shouted into the road words deliberately meant for persons using that road he was as much shouting in a public place as if he stood on the road itself and shouted.²

Invalid orders.—An order issued by a Magistrate, warning owners of cattle to take proper care of them;³ an order preventing a house-holder from building a wall to his own house, because it might result in a breach of the peace;⁴ an order to remove the banks of a tank in a dry river because they obstructed the current in rainy season;⁵ an order to cut down trees because they impeded ventilation;⁶ a verbal order under s. 187, Criminal Procedure Code;⁷ an order under s. 144, Criminal Procedure Code, prohibiting a person from collecting rents from tenants;⁸ a general order

¹⁶ *Chandrakanta De*, (1880) 6 Cal. 445; *Ulwappagoda*, (1896) Unrep. Cr. C. 864, Cr. R. No. 27 of 1896; *Harman Chingalrao*, per Aston and Heaton, JJ., in Cr. Rev. No. 157 of 1906, decided on September 10, 1906 (Unrep. Bom.); *Mallapa Tawargi*, (1915) 17 Bom. L. R. 676, 16 Cr. L. J. 668, [1915] AIR (B) 22; *Nanabhai Sadanand v. Dwarkadas Dharamsi*, (1904) 8 Bom. L. R. 639 (n); *Mammali v. Kutti Ammu*, (1915) 39 Mad. 548. See, however, *Krishnashet bin Narayanshet*, (1868) 5 B. H. C. (Cr. C.) 46; *Raghubir Singh*, (1901) 14 C. P. L. R. 174; *Hira Lal*, (1920) 24 O. C. 18, 22 Cr. L. J. 881, [1921] AIR (O) 123.
¹⁷ *Young Hon*, (1909) 2 U. B. R. (P.C.) 23, 11 Cr. L. J. 56.

¹⁸ See, however, *Ravji Khandu v. Fraser*, (1906) 8 Bom. L. R. 638. See also *Dulhin Janak Kumbhari v. Kedar Narain Singh*, [1941] All. 295, 298.

¹⁹ *Lahshan Bor v. Nara Narain Hazrah*, (1921) 48 Cal. 1086.

²⁰ *Hiraringh*, (1920) 17 N. L. R. 88, 28 Cr. L. J. 19, [1922] AIR (N) 209.

²¹ *Bykuntram Shaha Roy*, (1872) 10 Beng. L. R. 434, 18 W. R. (Cr.) 47, F.B.

²² *Ramchandra Eknath*, (1869) 6 B. H. C. (Cr. C.) 36.

²³ *Muthra v. Jawahir*, (1877) 1 All. 527.

²⁴ *Tucker*, (1882) 7 Bom. 42.

²⁵ *Lalla Mitterjeet Singh v. Rajcoomar Sircar*, (1872) 18 W. R. (Cr.) 22.

¹ *Abdul Ghafur*, (1914) 18 O. C. 70, 16 Cr. L. J. 190.

² *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047, 8 Cr. L. J. 431.

³ *Amiraddi*, (1869) 3 Beng. L. R. (A. Cr. J.) 45, 12 W. R. (Cr.) 36.

⁴ *Kashichunder Doss*, (1873) 10 Beng. L. R. 441, 19 W. R. (Cr.) 47.

⁵ *Gholam Durbesh*, (1868) 10 W. R. (Cr.) 36.

⁶ *Uttam Chunder Chatterjee v. Ram Chunder Chatterjee*, (1870) 18 W. R. (Cr.) 72.

⁷ *Janaki Nath Chakravarti v. Jnanendra Nath Chakravarti*, (1914) 16 Cr. L. J. 24.

⁸ *Prem Chand Singh Roy v. Dharmadas Singh Roy*, (1905) 9 C. W. N. 392, 2 Cr. L. J. 166.

under s. 144, Criminal Procedure Code, restraining the holding of a *hat* or market;⁹ a notice under Mad. Act V of 1884 calling upon a person to remove certain encroachments on a public road;¹⁰ an order directing that all music should cease when any procession is passing a certain place of worship;¹¹ an order not to place stake nets in a river;¹² an order issued by a revenue officer directing certain persons to pay their assessment to a specified individual;¹³ a notice issued under s. 98 (2) of the Madras Local Boards Act (V of 1884) as amended by Act VI of 1900;¹⁴ a permit to cut and transport timber issued under ss. 26 and 35 of the Forest Act;¹⁵ an order under s. 146 of the Criminal Procedure Code;¹⁶ an order under s. 147, Criminal Procedure Code, directing a person to remove a fence so as to allow of the use of an alleged right of way;¹⁷ an order prohibiting the use of public roads between 9 p.m. and sunrise;¹⁸ an order which declared that, as between parties to a contention, certain land in dispute did not belong to the public;¹⁹ an order forbidding the slaughter of cattle or sale of meat within a radius of three miles of a licensed slaughter-house;²⁰ an order directing a landowner to find out a clue in a case of theft within fifteen days;²¹ an order forbidding persons to enter a railway station except for bona fide purposes of travelling;²² and an order directing a station-master to detain certain logs suspected to be stolen property,²³ are held to be not valid orders under this section.

Order should be directed to accused.—Where the accused was convicted of disobeying an order posted at a certain place by a Magistrate prohibiting people from burying and burning corpses there, it was held that the order, not having been served individually upon the accused, the conviction was illegal.²⁴ The proprietor of a theatre, not in actual possession or management of the theatre at a time when a lawful order promulgated by a public servant was disobeyed, was held to have committed no offence under this section.²⁵

PRACTICE.

Evidence.—Prove (1) the promulgation of the order.*

(2) That it was promulgated by a public servant.

(3) That such public servant was lawfully empowered to promulgate the same.¹

(4) That such order directed the accused to abstain from a certain act, or to take certain order, etc.

(5) That the accused knew of such direction to him.²

(6) That he disobeyed such direction.

(7) That such disobedience caused, or tended to cause, obstruction, annoyance or injury, or risk of the same to a person lawfully employed; or that such disobedience caused, or tended to cause, danger to human life, health, or safety; or that such disobedience caused, or tended to cause, a riot or an affray.³

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

⁹ *Parmeshwar Rai*, (1922) 3 P. L. T. 268, 23 Cr. L. J. 381, [1922] AIR (P) 84.

¹⁰ *Subramanian*, (1896) 20 Mad. 1.

¹¹ *Muthialu Chetti v. Bapun Saib*, (1880) 2 Mad. 140; *Sundram Ponnusami*, (1883) 6 Mad. 203, F.B.

¹² (1878) 1 Weir 138.

¹³ *Ramchandra Nayako*, (1884) 1 Weir 139.

¹⁴ *Shunmugam Pillai*, (1902) 1 Weir 140.

¹⁵ *Vemuri Pichayya*, (1896) 1 Weir 140.

¹⁶ *Nagoji Ramachandra*, (1898) 1 Weir 143.

¹⁷ *Lutchmiah Maistry*, (1893) 1 Weir 143.

¹⁸ *Komul Kisto Bonick*, (1883) 12 C. L. R. 231.

¹⁹ *Unnoda Proshad Dutt v. Ranee Shama Soonduree*, (1875) 24 W. R. (Cr.) 20.

²⁰ *Nga Po Naing*, (1896) 1 U. B. R. (1892-1896) 179.

²¹ *Bakshi Ram*, (1880) 3 All. 201.

²² *Rama*, (1913) 35 All. 136.

²³ *Bithal Nath*, (1913) 16 O. C. 371, 15 Cr. L. J. 177, [1914] AIR (O) 230.

²⁴ *Sukar Budhia*, (1870) Unrep. Cr. C. 30.

²⁵ *Krishna Shet*, (1890) Cr. R. No. 59 of 1890, Unrep. Cr. C. 527.

¹ *Suban Singh*, (1875) 23 W. R. (Cr.) 57; *Nagappa Thevan*, (1913) 38 Mad. 602.

² *Ramtonoo Singh*, (1869) 12 W. R. (Cr.) 40; *Abelakh Lall v. Sirnam Singh*, (1871) 15 W. R. (Cr.) 50.

³ (1868) 4 M. H. C. Appx. 5; *Anant Shitaram*, (1899) 1 Bom. L. R. 524; *Nandkumar Bosc*, (1869) 3 Beng. L. R. Appx. 149; *Shabuckram Bukoollee*, (1865) 2 W. R. (Cr.) 32; *Ramtonoo Singh*, (1869) 12 W. R. (Cr.) 49; *Harilal*, (1889) Unrep. Cr. C. 433; *Brojo Nath Ghose*, (1900) 4 C. W. N. 226; *Shyamanand Das Paharaj*, (1904) 31 Cal. 900; *Ram Gopal Daw*, (1905) 32 Cal. 793.

Where an executive officer makes an order or issues a notification it is not within the province of judicial authority to question the propriety or legality of such order or notification, until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.⁴ A Magistrate is not competent to try and convict a person under this section of disobedience to an order issued by himself as Magistrate under s. 144, Criminal Procedure Code.⁵

Order under appeal.—A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order the legality of which is then under the consideration of an appellate Court.⁶

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.⁷ A prosecution launched without such complaint is illegal and nugatory.⁸ A prosecution under this section should not be launched unless all the elements necessary for a conviction are present.⁹ The complaint for an alleged disobedience of an order under s. 144, Criminal Procedure Code, must show that the disobedience caused, or tended to cause, obstruction, annoyance or injury or a riot. Whether a complaint in writing is necessary where an order is promulgated by Government is open to question. Under the old s. 195 of the Criminal Procedure Code, it was held that where the order was not promulgated by any public servant but by Government, no sanction was required as a condition precedent to prosecution for disobeying the order.¹⁰

It is not possible to say that, merely by making the class of offence contemplated by this section cognizable and non-bailable, the necessity of having a complaint in such a case is dispensed with.¹¹

No appeal lies against the refusal of a public servant to file a complaint.¹²

Punishment.—Rigorous imprisonment can only be inflicted if the case comes within the latter part of the section.¹³

189. Whoever holds out any threat of injury¹ to any public servant,² or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Threat of injury
to public servant.

COMMENT.

Section 503 defines criminal intimidation. That section is general in its character: whereas this section deals with criminal intimidation of a public servant.

Under this section there must be “a threat of injury”, to either the public servant or to any one in whom he (the accused) believes that public servant to be interested”. “What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself or to some one in whom the accused believes he has an interest. It is not the commission of the offence against the public order so much as the threat and corresponding apprehension of personal injury which are supposed to be inducements to the public servant to alter his course. If a man went to a Magistrate in his Court or to a public office at the *thana* and said, ‘Unless you stop the Hindu procession I will commit a theft’ or ‘I will commit a riot’, the mere fact that such offences often result in injury

⁴ *Surjanarain Dass*, (1880) 6 Cal. 88.

⁵ *Langadaya Bahu Koli*, (1897) Unrep. Cr. C. 904, Cr. R. No. 14 of 1897.

⁶ *Dalsukram Haribhai*, (1866) 2 B. H. C. 384.

⁷ Criminal Procedure Code, s. 195.

⁸ *Babu*, (1939) 15 Luck. 344.

⁹ *Parmeshwar Rai*, (1922) 3 P. L. T. 268, 23

Cr. L. J. 381, [1922] AIR (P) 84.

¹⁰ *South*, (1900) 24 Mad. 70;

¹¹ *Lachmi Devi*, (1930) 53 Cal. 971.

¹² *Maruda Pillai v. Narayanswami Pillai*, (1938) 40 Cr. L. J. 568, [1939] AIR (M) 336.

¹³ *Ratanrav bin Mahadevray*, (1866) 3 B. H. C. (Cr. C.) 82.

to persons, would not, I think, bring the language within the section 189. If however instead of merely stating an intention to commit the offence, he added words threatening personal injury, such as 'Unless you stop the Hindu procession I will commit theft of your property' or 'I will cause a riot and attack you or your police force', the words of the section would be satisfied".¹⁴ Where the accused more than once, and in a loud tone, said to the Magistrate and other police-officers that he and others would obstruct the carrying of a Hindu God along the road, even though a riot and bloodshed might take place, it was held that he was guilty of an offence under this section.¹⁵ It is essential to prove the words used by the accused in threatening the public servant in order to enable the Court to ascertain whether in fact a threat of injury to the public servant was really made by the accused.¹⁶ Where the witnesses in a case differed as to the exact words used by the accused in threatening the public servant, though they agreed as to the general effect of those words, it was held that it was most material that those words should be before the Court to enable it to ascertain whether in fact a threat of injury to the public servant was really made by the accused.¹⁷

Mere empty threats, which are often effusions of passion unattended with any formal intention of wrong, should be distinguished from threats really calculated to cause the person to whom they are held out to be in fear of the injury threatened.¹⁸ Where the endorsement on a summons was to the effect that after tender of the summons to the witness, the accused, the son of the witness, and the owner of the house came up, abused the process-server and asked him to get out of the house, and that the witness immediately after received the summons and *batta* and signed his name, it was held that no offence was committed.¹⁹ Where a person arrested in execution of a decree refused to follow the peon who arrested him, and threatened to use violence, it was held that he was guilty of an offence under this section.²⁰

1. 'Injury'.—See s. 44, *supra*. "Injury" implies an illegal harm and the mere threat to bring a legal complaint either before a Court or before a public servant's superior is no "injury". A police constable stopped a motor car travelling at night without lights. During an altercation which took place between the driver and the constable the accused came up and told the driver to bring a complaint against the constable, in which he himself would be pleased to give evidence on behalf of the driver. It was held that the accused was not guilty of an offence under this section.²¹

2. 'Public servant'.—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused held out the threat.

(2) That such threat was of injury.

(3) That the person threatened was a public servant; or some person in whom the accused believed such public servant was interested.

(4) That the purpose for which such threat was held out was to induce such public servant to do, or to forbear, or delay to do any act, connected with the exercise of his public functions.²²

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That you, on or about the——day of——, at——, held out a threat of injury to a public servant, to wit——, [or to——in whom you believed that a public servant, to wit——, was interested] for the purpose of inducing that public servant to do an act, to wit——, [or to forbear or delay to do——], connected

¹⁴ Per Jardine, J., in *Amirkhan*, (1886) Unrep. Cr. C. 273, 274; *Projapat Jha*, (1909) 14 C. W. N. 234, 11 Cr. L. J. 49; *Kuppusami Aiyar*, (1915) 28 M. L. J. 505, 2 L. W. 463, [1915] M. W. N. 365, 16 Cr. L. J. 477.

¹⁵ *Amirkhan*: *ibid.*; *Projapat Jha*, *ibid.*

¹⁶ *Maheshri Bakhsh Singh*, (1886) 8 All. 380.

¹⁷ *Ibid.*

¹⁸ 2nd Rep., s. 123, p. 378; *Mohammad Ahmad Khan*, [1936] A. L. J. R. 195, 37 Cr. L.

J. 212, [1936] AIR (A) 171.

¹⁹ *Kuppusami Aiyar*, (1915) 28 M. L. J. 505, 2 L. W. 463, [1915] M. W. N. 365, 16 Cr. L. J. 477.

²⁰ *Jagarnath Singh*, (1924) 25 Cr. L. J. 1237, [1925] AIR (P) 183.

²¹ *Shahdad Khan*, (1925) 6 Lah. 558.

²² *Mohammad Ahmad Khan*, [1936] A. L. J. R. 195, 37 Cr. L. J. 212, [1936] AIR (A) 171.

with the exercise of the public functions of such public servant and thereby committed an offence punishable under s. 189 of the Indian Penal Code and within my cognizance. And I hereby direct that you be tried on the said charge.

Punishment.—A Court, in passing sentence, should inflict such sentence as the gravity or otherwise of the crime of which the accused has been convicted warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not, even although the accused may pray for an appealable sentence.²³

190. Whoever holds out any threat¹ of injury² to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant³ legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Threat of injury to induce person to refrain from applying for protection to public servant.

COMMENT.

This section provides for the punishment of a person holding out a threat of injury to any person to prevent him seeking protection from a public servant empowered as such to give him protection.²⁴

The object of this section is to prevent persons from terrorising others with a view to induce them to desist from seeking the protection of public servants for any injury. Where a clergyman knowing that a civil suit was pending against a person for the possession of certain church property, excommunicated him for withholding it, it was held that the clergyman had committed an offence under this section.²⁵

1. 'Threat.'—See s. 189, *supra*.

2. 'Injury.'—See s. 44, *supra*. A threat of institution of a civil suit for a mere declaration of right against any person who was objecting to that right was held to be not harm illegally caused to that person in body, mind, reputation or property.¹

3. 'Public servant.'—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused held out the threat.

(2) That such threat was of an injury.

(3) That the purpose for which such threat was held out was to induce the person threatened to refrain or desist from making a legal application for protection against some injury.

(4) That the person to whom such legal application was about to be made was a public servant.

(5) That such public servant was legally empowered, as such, to give the protection, or to cause the same to be given.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That you, on or about the _____ day of _____, at _____, held out a threat of injury, to wit _____, to _____, for the purpose of inducing him to refrain or desist from making a legal application for protection against such injury to a public servant legally empowered to give such protection (or to cause such protection to be given), and thereby committed an offence punishable under s. 190 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

²³ *Yar Muhammad*, (1930) 58 Cal. 392.

²⁴ 2nd Rep., s. 123, p. 378.

²⁵ *De Cruz*, (1884) 8 Mad. 140.

¹ *Mulai Rai*, (1925) 24 A. L. J. R. 314, 27 Cr. L. J. 351, [1926] AIR (A) 277.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

THE Code treats the giving and the fabricating of false evidence in exactly the same way, and marks the grades of those offences on the principle that the law ought to make a distinction between the kind of false evidence which produces great evils and the kind of false evidence which produces comparatively slight evils. As plaints and written statements are verified by the civil suitors who present them, the Code renders punishable the deliberate assertions of falsehoods in pleadings.¹

191. Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a déclaration upon any subject,² makes any statement which is false,³ and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

ILLUSTRATIONS.

(a) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(c) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(e) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

COMMENT.

The offence of giving false evidence is known as 'perjury' under the English law.

Scope.—The words of this section are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in

¹ Stokes' Anglo-Indian Codes, Vol. I, p. 30.

issue. It is sufficient if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court, and of leading it to be supposed that that which he states is true.²

English law.—According to common law a statement on oath or affirmation, to amount to perjury, must be—(1) taken in a judicial proceeding; (2) taken before a competent tribunal; (3) material to the question; (4) false; (5) known by the witness to be false or not known to be true. The law relating to perjury is consolidated by 1 & 2 Geo. V, c. 6.

Difference between English and Indian law.—(1) According to common law the false statement must have reference to some judicial proceeding; and the false evidence must be given before a competent tribunal. In the Code this distinction only exists in reference to the degree of punishment imposed.³

(2) According to common law perjury must be proved by two witnesses, or by one witness with proof of other material and relevant facts substantially confirming his testimony. Under the Penal Code no particular number of witnesses in any case is required to prove any fact.

(3) The common law requires that the matter sworn to must be material to the cause depending in the Court. According to the Penal Code it is not necessary that the statement should be material, but that would be considered in awarding punishment.⁴

(4) In England, an oath, or an affirmation rendered equivalent to it by law, is an essential element of the offence. It is immaterial whether the fact which is sworn to is in itself true or false. In India, an oath is merely one of the forms by which a party may be bound to speak the truth. Even if an oath were improperly administered by an incompetent person, still the offence would be committed, if the party giving the false evidence were bound by an 'express provision of law to state the truth.'

Ingredients.—The offence under this section involves three ingredients :—

1. A person must be legally bound (a) by an oath, or any express provision of law, to state the truth, or (b) to make a declaration upon any subject;
2. He must make a false statement; and
3. He must know or believe it to be false, or must not believe it to be true.

1. 'Legally bound by an oath or by an express provision of law to state the truth...or...to make a declaration upon any subject'.—It is necessary that the accused should be legally bound by an oath before a competent authority. If the Court has no authority to administer an oath to a witness the proceeding will be *coram non jure* and a prosecution for false evidence will not stand.⁵ Section 4 of the Indian Oaths Act (X of 1873) specifies the Courts and persons who have authority to administer oaths and affirmations. Section 5 enumerates the persons by whom oaths or affirmations must be made.

'By an oath.'—An oath or solemn affirmation is not a *sine qua non* to the offence of giving false evidence.⁶ The offence may be committed although the person giving evidence has neither been sworn nor affirmed.⁷ By s. 14 of the Oaths Act⁸ every person giving evidence on any subject, before any Court, is bound to state the truth.

² *Mahomed Hossain*, (1871) 16 W. R. (Cr.) 87.

³ See per Jenkins, C. J., in *Bal Gangadhar Tilak*, (1904) 6 Bom. L. R. 324, 326, 28 Bom. 479.

⁴ See *Babu Ram*, (1904) 26 All. 509.

⁵ *Abdul Majid v. Krishna Lal Nag*, (1893) 20 Cal. 724; *Iswar Chunder Guho*, (1887) 14 Cal. 653; *Radhika Mohan Kuri v. Lal Mohan Sha*, (1893) 20 Cal. 719; *Mata Dayal*, (1897) 24 Cal. 755; *Chota Jadub Chunder Biswas*, (1864) W. R. (Gap No.) (Cr.) 15; *Niaz Ali*, (1882) 5 All. 17; *Kandhaiya Lal*, (1899) 19

A. W. N. 87; *Lachhmandas*, (1869) Unrep. Cr. C. 25; *Jibhai Vaja*, (1874) 11 B. H. C. 11; *Fatteh Ali*, (1894) P. R. No. 15 of 1894; *Daya Ram*, (1934) 57 All. 407.

⁶ (1865) 2 W. R. (Cr. L.) 9.

⁷ *Gobind Chandra Seal*, (1892) 19 Cal. 355; *Sewa Bhogta*, (1874) 14 Beng. L. R. 294, 23 W. R. (Cr.) 12, F.B.; *Shava*, (1891) 16 Bom. 359. Contra, *Maru*, (1888) 10 All. 207. See *Lal Sahai*, (1888) 11 All. 183; *Kunhiamma v. Kunhinni*, (1892) 16 Mad. 140; *Viraperumal*, (1892) 16 Mad. 105.

⁸ Act X of 1873.

The idea of the oath, namely, that the person swearing renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth, the idea of binding the conscience of the witness, which still prevails in England, and which in former time led to the swearing of Hindus on the Tulsi and Ganges water, and of Mahomedans on the Koran, finds no place in the Oaths Act. The superstitious or religious sanction has been disregarded and the legal sanction alone is relied upon. See s. 51, *supra*, for the definition of 'oath.'

Oath under foreign law.—Perjury cannot be assigned on a foreign affidavit taken before a person not authorized to administer an oath by English law.⁹ There is no provision in the Penal Code which constitutes it an offence to give false evidence before a Court in a Native State where the oath is not administered under the provisions of law in force in British India, but under the law of that State in relation to proceedings before that Court.¹⁰

Want of jurisdiction.—If the Court administering the oath is acting beyond its jurisdiction a conviction will not be sustained.¹¹ The test of jurisdiction is whether or not the Court had power to enter upon the inquiry.¹² If the Court has no jurisdiction to entertain the proceedings in the course of which a false statement is made, no offence is committed.¹³

A pleader giving a false explanation on solemn affirmation, when asked to explain his conduct under the Legal Practitioners' Act;¹⁴ an heir of an employee in the Telegraph Department supporting his claim before the District Judge by false witnesses, under an oath, the Judge having no authority to administer it;¹⁵ a Native Christian giving false evidence, though solemnly affirmed under Act V of 1840, the Act not being applicable to him, but only to Hindus and Mahomedans;¹⁶ a person making a false statement before a person purporting to act under the Registration Act but not legally authorized to do so;¹⁷ a person making a false statement in an application for a new trial;¹⁸ or in a verified petition presented under s. 19 of the Income-tax Act (IX of 1869) to a Tahsildar, who was not an officer competent to receive such a petition;¹⁹ and a person making false accounts with the intention of producing them before a Forest Officer not empowered by law to hold an investigation,²⁰ were held to have committed no offence under this section.

Criminal Procedure Code, s. 164.—A Magistrate acting under this section has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting.²¹

'An express provision of law.'—Under this clause sanction of an oath is not necessary, but there must be a specific provision of law compelling a person to state the truth. It must be proved that the false statement was made under the sanction of law.²² Where the accused is not bound by an express provision of law to state the truth he cannot be charged with giving false evidence. Thus, where a person after acquittal was examined on oath to enable the Court to take cognizance of an offence under s. 190 (c), Criminal Procedure Code, it was held that though the Magistrate might examine the person for that purpose, yet he could not examine him on oath under the Oaths Act, as he was not a witness in any case at the time, and that he was not legally bound to state the truth.²³ The law does not require a petition for substitution of parties to be verified, and, therefore, the person who presents to a

⁹ *Musgrave v. Medex*, (1816) 19 Ves. Jun. 652.

¹⁰ *Rambharathi Hirabharthi*, (1928) 47 Bom. 907, 25 Bom. L. R. 772.

¹¹ *Chait Ram*, (1883) 6 All. 103; *Bharma bin Ningappa*, (1886) 11 Bom. 702, F.B.; *Shettepa Satapa Mudenavar*, (1912) 14 Bom. L. R. 753, 13 Cr. L. J. 709; *Nallasivan Pillai v. Ramalingam Pillai*, (1917) 32 M. L. J. 402, 6 L. W. 364, [1917] M. W. N. 303, 18 Cr. L. J. 785.

¹² *Bolton*, (1841) 1 Q. B. 66; *Pakiri*, (1904) 2 L. B. R. 272, 1 Cr. L. J. 1604, F.B.; *Sakhi Rai*, (1918) 20 Cr. L. J. 245, [1919] AIR (P) 266; *Khushi Khan*, (1870) P. R. No. 24 of 1870.

¹³ *Sumat Prasad*, [1942] All. 42; *Abdul Rahman*, (1909) 32 All. 30.

¹⁴ *Kotha Subba Chetti*, (1883) 6 Mad. 252.

¹⁵ *Chait Ram*, (1883) 6 All. 103.

¹⁶ *A. Vedomuttu*, (1868) 4 M. H. C. 185, 1 Weir 159.

¹⁷ *Radhika Mohan Kuri v. Lal Mohan Sha*, (1893) 20 Cal. 719.

¹⁸ *Haran Mandal*, (1868) 2 Beng. L. R. (A. Cr. J.) 1, 10 W. R. (Cr.) 31.

¹⁹ *Mooneappa Oodian*, (1870) 5 M. H. C. 326.

²⁰ *Ramajirav Jiobajirav*, (1875) 12 B. H. C. 1.

²¹ *Alagu Kone*, (1892) 16 Mad. 421; *Khem*, (1899) 22 All. 115; *Suppa Tevan*, (1905) 29 Mad.

89; *Vishwanath*, (1906) 8 Bom. L. R. 589, 4 Cr.

L. J. 183; *Parma Nand*, (1938) 14 Jan. 507.

²² *Audheen Roy*, (1870) 14 W. R. (Cr.) 24.

²³ *Hari Charan Singh*, (1900) 27 Cal. 455.

Court a verified petition for substitution containing a false statement of the death of the defendant, is not guilty of giving false evidence.²⁴ Intentional omission to make statements required by s. 235 of the Code of Civil Procedure amounts to an offence under s. 193.²⁵

Criminal Procedure Code, s. 161.—Under s. 161, cl. (2), of the Criminal Procedure Code, 1898, which reverts to the language of the Code of 1872, a person is no longer bound by law to tell the truth when questioned by a police-officer, and he will not be liable to be prosecuted for giving false evidence.¹ The Code of 1882 contained the word 'truly' after the word 'question' in this clause, but this word has been omitted in the present Code.²

A statement made to an investigating police-officer under s. 161 and recorded by him under the provisions of s. 162 of the Criminal Procedure Code cannot be made the foundation of an order for prosecution under s. 193 of the Penal Code of the person making it.³ But it is submitted that a person making such a statement may come within s. 203 of the Penal Code.

'Declaration upon any subject.'—In certain cases the law requires a declaration from a person of verification in a pleading—and if such declaration is made falsely it will come under this clause. The words "any subject" denote that the declaration must be in connection with a subject regarding which it was to be made. If a judgment-creditor knowing that something has been paid on his decree verifies an execution application for the full amount, he intentionally declares that to be true which he knows to be false and has committed an offence under s. 193. It is immaterial whether the accused does or does not intend to defraud the judgment-debtor, for the offence is one against public justice and it is with a view to secure more orderly administration of justice that the law makes penal the deliberate assertions of falsehood in pleadings.⁴ A person falsely verifying his plaint⁵ or written statement⁶ is guilty of giving false evidence.

Where a person swore an affidavit all the paragraphs of which he certified on "personal knowledge and belief" there being no specification as to which of the paragraphs were based on personal knowledge and which on belief. It was held that it was open to the person to contend that the mischievous paragraphs in the affidavit were based not on his personal knowledge, but on belief and he had good grounds to entertain a belief that they were true and consequently it could not be held that the person made deliberately false statements when he swore the affidavit.⁷

2. 'Makes any statement which is false.'—It is not necessary that the false evidence should be material to the case in which it is given so long as it was made by a person who was bound by an oath to state the truth.⁸ The framers of the Code "used the word 'material', where it was intended to be an essential of the offence, and advisedly omitted it when such was not their intention... I do not say that the question of materiality may not be matter for the consideration of the jury. For the giving of false evidence, to come within section 193, must be an intentional giving; and in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner."⁹ Where the act giving rise to the indictment occurs out of Court then materiality is made essen-

²⁴ *Purendar Jha v. Nunulal Jha*, (1926) 6 Pat. 184.

²⁵ *Bapuji Dayaram*, (1886) 10 Bom. 288; *Paupayya Narasannah*, (1880) 2 Mad. 216.

¹ *Kassim Khan*, (1881) 7 Cal. 121, F.B.

² The following cases decided when the Code of 1882 was in force are no longer of any authority: *Parshram Raysing*, (1883) 8 Bom. 216; *Ismael valad Fataru*, (1887) 11 Bom. 659; *Nathu Sheikh*, (1884) 10 Cal. 405; *Baikanta Bauri*, (1889) 16 Cal. 349; *Bhagwantia*, (1892) 19 All. 11; *Bhajan*, (1893) 13 A. W. N. 124.

³ *Muhammad Usman*, (1907) 4 A. L. J. R. 811, 7 Cr. L. J. 3.

⁴ *Hakikatsing*, (1913) 7 S. L. R. 25, 14 Cr.

L. J. 456; *Stokes*, Vol. I, p. 30.

⁵ *Bapuji Dyaram*, (1886) 10 Bom. 288.

⁶ *Padam Singh*, (1930) 52 All. 856; *Lakhu Shah*, (1893) P. R. No. 27 of 1894.

⁷ *Lachmi Narain*, [1947] All. 155.

⁸ *Parbatty Churn Sircar*, (1866) 6 W. R. (Cr.) 84; *Shib Prosad Giri*, (1873) 19 W. R. (Cr.) 69; *Damodhar Ramchandra Kulkarni*, (1868) 5 B. H. C. (Cr. C.) 68; *Durga Prasad*, (1931) 34 Cr. L. J. 686, [1933] AIR (A) 318; *Behari Lal Sud*, (1938) 41 P. L. R. 652, 41 Cr. L. J. 204, [1939] AIR (L) 529.

⁹ Per Scotland, C. J., in *Aidrus Sahib*, (1862) 1 M. H. C. 38, 41, 42, 1 Weir 145.

tial to the offence, and must accordingly be averred in the indictment, e.g., ss. 197, 198, 199 and 200. If the act occurs in the face of the Court, then materiality is not made essential, and need not therefore be averred. Cases may arise in which materiality may not be essential to the offence, but it must be taken into consideration in arriving at the intention with which the false statement was made.¹⁰

'Which is false.'—It must be shown that the statement said to have been false, could not but be false. It is not sufficient to show that the probabilities are that the statement was false.¹¹ The accused stated on oath that he wrote a certain document. Another person swore that he and not the accused had written the document. The handwriting expert gave his opinion that the handwriting on the document was not similar to the acknowledged handwriting of the accused and the trial Court after comparing the various handwritings had come to the conclusion that the handwriting on the document resembled that of the other person and not of the accused. It was held that a conviction under s. 198 could not stand.¹² Where the accused was prosecuted for having falsely stated in a civil suit that certain promissory notes which had been executed by him were without consideration, it was held that the rule of law enacted by s. 118 of the Negotiable Instruments Act and creating a presumption that a promissory note was for consideration would not necessarily apply to a criminal trial, and that it was necessary for the prosecution to prove that the promissory notes were for consideration, and not for the accused to prove the contrary.¹³ Where, in a suit based upon a promissory note and a receipt, the accused in the written statement filed and verified by him denied execution of the promissory note and receipt and also denied having owed any sum at all, and it was found that the promissory note and receipt were genuine, it was held that the accused could be rightly convicted of giving false evidence, if the denial was also to his knowledge.¹⁴

Direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged, although not made on oath. Such a statement, when satisfactorily proved, is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence and on precisely the same ground,—that it is an admission of the accused person inconsistent with his innocence.¹⁵

See the heading 'Nature of proof' in the Commentary on s. 198.

3. 'Which he either knows or believes to be false or does not believe to be true.'—The false evidence must be intentionally false to the knowledge or belief of the person giving it.¹⁶ Intention is an essential ingredient in the constitution of this offence. The matter sworn to must be either false in fact, or, if true, the accused must not have known it to be so.¹⁷ A man may be guilty of this offence if he swear that he believes or thinks a fact to be true when it is not.¹⁸ The false statement for which the accused is charged must be literally false. If the statement of fact is literally true but, owing to suppression of certain other facts, leads to a wrong inference, the accused cannot be convicted.¹⁹

It is a false statement made under a verification that constitutes an offence and not a verification on oath or by solemn affirmation.²⁰

'Does not believe to be true.'—The making of a false statement, without knowledge as to whether the subject-matter of the statement is false or not, is legally a giving of false evidence.²¹ Where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much a perjury as if he knew the fact to be false, and equally indictable.²² But a man cannot be convicted of perjury for having acted rashly and credulously and having failed to make reasonable inquiry

¹⁰ *Tookaram*, (1862) Unrep. Cr. C. 2; *Brahmdeo Singh*, (1920) 2 P. L. T. 380, 21 Cr. L. J. 33.

¹¹ *Hira Nand Ojha*, (1906) 10 C. W. N. 1099, 4 C. L. J. 558, 4 Cr. L. J. 227; *Lalmoni Nontia*, (1922) 4 P. L. T. 683, 24 Cr. L. J. 321.

¹² *S. C. Gupta*, (1923) 1 Ran. 290.

¹³ *Sakhawat Haider*, (1920) 18 A. L. J. R. 1151, 22 Cr. L. J. 54, (1920) AIR (A.) 242 (1).

¹⁴ *Padam Singh*, (1930) 52 All. 856.

¹⁵ *Ross*, (1871) 6 M. H. C. 342, 1 Weir 161.

¹⁶ *Tookaram*, (1862) Unrep. Cr. C. 2.

¹⁷ 1 Hawk. P. C. 69. s. 6.

¹⁸ *Schlesinger*, (1847) 10 Q. B. 670.

¹⁹ *Ratanji*, (1915) 9 S. L. R. 170, 17 Cr. L. J. 96, [1916] AIR (S) 70 (2).

²⁰ *Durga Das Rukhit*, (1900) 27 Cal. 820.

²¹ *Echan Meeah*, (1865) 2 W. R. (Cr.) 47.

²² *Mawbey*, (1796) 6 T. R. 619, 687.

with regard to the facts alleged by him to be true. It must be found that he made some statement which he knew or believed to be false or which he did not believe to be true.²³ Where an affidavit prepared for a person and read out to him while he is drunk is signed by him, its contents cannot be said to have been properly understood by him and he cannot be prosecuted for perjury for giving evidence contrary to the allegations in the affidavit.²⁴

False verification of pleadings.—False verification of a plaint would be an offence under this section.²⁵ A person filing a written statement in a suit is bound by law to state the truth and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence.¹ A mere assertion in a pleading contrary to fact, but merely made for the purpose of putting a plaintiff to proof of his case, cannot be made the subject of a prosecution in a criminal Court. But a litigant in making allegations as to material and substantial facts which go to support his claim as a plaintiff, on the one hand, or to meet a claim against him as a defendant on the other, is bound to truly state them, and if he does not do so, and if it can be shown that he has intentionally asserted things which are false to his knowledge, he is within the scope of this section. The very essence of crimes of this kind is not how they may injure this or that party to the litigation, but how they may deceive and mislead the Courts, and thus produce the most mischievous consequences to the administration of civil and criminal justice.² A written statement being a pleading it is competent to the defendants to a suit to raise such pleas in their written statements as they think fit or to abstain from raising things which appear to the defendants not to be of advantage to them.³

Verifying application not requiring verification.—The verification of an application, in which the applicant makes a false statement, does not subject him to punishment for this offence, if such application does not require verification.⁴

Criminating statement is no justification.—When a party makes a false statement while legally bound by solemn affirmation, the fact that the statement was one tending to criminate himself will not justify his acquittal on a charge of giving false evidence.⁵

Illegality of trial does not purge perjury.—The fact that the trial in which false evidence is given is to be commenced *de novo* owing to irregularity does not exonerate the person giving false evidence in that trial from the obligation to speak the truth, and he is liable for giving false evidence.⁶ But in a Bombay case the proceedings in the trial at which false evidence was given were subsequently annulled in consequence of the sanction for the prosecution being insufficient and the High Court held that the conviction of the accused must be reversed as the false statement was not made in a stage of a judicial proceeding.⁷

Liability of accused for fabricating false evidence.—The Criminal Procedure Code provides that the accused shall not render himself liable to punishment by refusing to answer questions put by the Court or by giving false answers to them.⁸ It has been pointed out by the Calcutta High Court that this section applies to an act done by an offender to screen himself from punishment.⁹ The Court dissented from the view taken by the Allahābad High Court that an accused person cannot be charged either with giving or fabricating false evidence with the sole object of diverting suspicion from himself and concealing his guilt in regard to a crime with which he is charged.¹⁰ The

²³ *Muhammad Ishaq*, (1914) 36 All. 362.

²⁴ *U-Aung Myin v. District and Sessions Judge*, (1939) 41 Cr. L. J. 687, [1940] AIR (R) 148.

²⁵ *Luxumandas*, (1869) Unrep. Cr. C. 25; *Gurusayya v. Siddalingappa*, [1940] 1 M. L. J. 689, [1940] M. W. N. 392, (1940) 51 L. W. 491, 41 Cr. L. J. 906, [1940] AIR (M) 677; *Ramaswami Konar v. Nachiar Ammal*, [1940] 2 M. L. J. 491, (1939) 52 L. W. 350.

¹ *Mehrban Singh*, (1884) 6 All. 626; *Murughandi*, (1891) 1 Weir 154; *Padam Singh*, (1930) 52 All. 856.

² *Mehrban Singh*, *ibid.*, p. 629.

³ *Rash Behary Ray*, (1930) 32 Cr. L. J. 238,

[1930] AIR (C) 639.

⁴ *Kartick Chunder Holdar*, (1868) 9 W. R. (Cr.) 58; *Haran Mundul*, (1868) 10 W. R. Cr. 31; *Kasi Chunder Mozumdar*, (1880) 6 Cal. 440; *Ganeshi*, (1905) 2 A. L. J. R. 203, 2 Cr. L. J. 100.

⁵ (1867) 3 M. H. C. Appx. xxix.

⁶ *Virasami*, (1896) 19 Mad. 375; *Batesar Mandal*, (1884) 10 Cal. 604.

⁷ *Ravji Taju*, (1871) 8 B. H. C. (Cr. C.) 37.

⁸ Criminal Procedure Code, s. 342 (2).

⁹ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Taraknath Chatterji*, (1935) 62 Cal. 666.

¹⁰ *Ram Khilwan*, (1906) 28 All. 705.

Allahabad view has also not been followed by the Bombay High Court.¹¹ Subsequently the Allahabad High Court has held that s. 192 applies to an accused person who fabricates false evidence in order to defend himself, and that there is no warrant for the conclusion that there is an absolute protection or privilege in favour of an accused person who can escape from the penalty imposed by s. 193 by reason of being an accused person.¹²

Abetment.—There can be no offence of abetment of giving false evidence unless the person charged with abetment intended, not only that the statement should be made, but that the statement should be made falsely.¹³

Where an accused person asked a witness to suppress certain facts in giving his evidence against him (accused), it was held that he was guilty of abetment of giving false evidence in a stage of a judicial proceeding.¹⁴ Similarly, where a person instigated the complainant and witness in a case to make statements which he himself knew to be false, he was held guilty under ss. 109 and 193.¹⁵ Where C falsely represented himself to be U, and the writer of a document signed by U and T, knowing that C was not U, and had not written such document, adduced C as U and as the writer of that document, it was held that T was guilty of abetment of giving false evidence.¹⁶

CASES.

False statements.—A person making a false statement before a Police Patel acting under s. 13 of the Village Police Act (Bom. Act VIII of 1867);¹⁷ before a Sub-Registrar;¹⁸ and before a Registrar of Deeds, even though no oath or affirmation be administered to him;¹⁹ a witness falsely deposing in another's name;²⁰ a person in an application for execution of a decree intentionally omitting to state an adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court;²¹ a person making false statements in an application for mutation of names under s. 42 of the Bengal Land Registration Act (Beng. VII of 1876);²² an official making a false return of the service of summons;²³ a false return to a warrant of sale;²⁴ and a person making a false statement on oath for getting an adjournment from a Court that his father was ill and had not come to Court when as a matter of fact his father had come to Court,²⁵ were held guilty of giving false evidence.

False statement in application or affidavit of accused.—The Allahabad High Court has held that a person seeking by an application in revision to get rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application and, consequently, if he did tender such an affidavit, he could not be prosecuted for false statements which might be contained therein.¹ It has similarly held that where an accused person applies for the transfer of the case pending against him to some other Court, supporting his application by an affidavit, he cannot, or at least ought not to, be prosecuted under s. 193 in respect of statements made therein.² The Lahore High Court has dissented from this view. It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Criminal Procedure Code upon answers to questions

¹¹ *Rama Nana*, (1921) 46 Bom. 317, 23 Bom. L. R. 987.

¹² *Bhagirath Lal*, (1934) 57 All. 403.

¹³ *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.

¹⁴ *Andy Chetty*, (1865) 2 M. H. C. 438.

¹⁵ *Rawji*, (1893) Unrep. Cr. C. 632, Cr. R. No. 1 of 1893.

¹⁶ *Chundi Churn Nauth*, (1867) 8 W. R. (Cr.) 5.

¹⁷ *Irbasapa*, (1880) 4 Bom. 479.

¹⁸ *Juggut Chunder Dutt*, (1866) 6 W. R. (Cr.)

⁸¹ See *Narayanaswamy Iyer*, [1912] M. W. N. 1107, 14 Cr. L. J. 102.

¹⁹ (1865) 2 W. R. (Cr. L.) 9.

²⁰ *Prema Bhika*, (1868) 1 B. H. C. 89.

²¹ *Bapuji Dayaram*, (1886) 10 Bom. 288.

²² *Naloo Patra*, (1910) 38 Cal. 368.

²³ *Shama Churn Roy*, (1867) 8 W. R. (Cr.) 27.

²⁴ *Chenanna Goud*, (1903) 1 Weir 155.

²⁵ *Durga Prasad*, (1931) 34 Cr. L. J. 686, [1933] AIR (A) 318.

¹ *Barkat*, (1897) 19 All. 200.

² *Bindeshri Singh*, (1906) 28 All. 331. But recently in a similar case notice was issued on the accused to show cause why he should not be prosecuted for perjury, although the notice was discharged as it was not found that deliberate false statements were made in the affidavit filed by him: *Lachmi Narain*, [1947] All. 155.

put to the accused by the Court.³ Further, it has held that there is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an affidavit tendered by him in support of his application for transfer; and that such statement can be the subject matter of a charge for perjury.⁴ The Chief Court of Oudh has taken the same view as the Lahore High Court.⁵

False balance-sheet.—The making of a false balance sheet is not an offence within this section but s. 418.⁶ It is more appropriately punishable under s. 282 of the Indian Companies Act (VII of 1913).⁷

False darkhast.—The signing and verifying of a darkhast containing false statements is an offence under this section, and it makes no difference that at the time when the signature and verification were appended the darkhast was blank.⁸

False kabinnama.—The alleged fabrication of a kabinnama falsely reciting a valid marriage and a promise of a dower to the bride does not attract s. 193 when there is no judicial proceeding, pending or contemplated.⁹

Evidence under illegal pardon.—Evidence of an accused person illegally pardoned cannot be used against him, or subject him to a prosecution for giving false evidence.¹⁰

Irregular trial.—H, a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S, upon a charge of "assaulting and obstructing him, H, in the discharge of his duty". Upon such warrant S was arrested and brought before Justices, and was, without objection, tried by them and convicted. H was afterwards indicted for perjury committed on the said trial of S, and convicted. It was held that H was rightly convicted, notwithstanding that there was neither written information, nor oath, to justify the issue of the warrant.¹¹

192. Whoever causes any circumstance to exist or makes any false entry in any book or record, or makes any document containing a false statement,¹ intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant² as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion³ touching any point material⁴ to the result of such proceeding, is said "to fabricate false evidence".

Fabricating false evidence.

ILLUSTRATIONS.

(a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(b) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(c) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

COMMENT.

The wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision.

³ *Ghulam Muhammad*, (1922) 3 Lah. 46; *Allah Wasai*, (1925) 1 Lah. C. 522, 26 Cr. L. J. 1369, [1926] AIR (L) 12.

⁴ *Pir Qadir Bakhsh Shah*, (1924) 6 Lah. 34.

⁵ *Prag Dat*, (1929) 7 O. W. N. 9, 31 Cr. L. J. 600, [1930] AIR (O) 62.

⁶ *Moss*, (1893) 16 All. 88.

⁷ *Ramnarayan*, (1919) 21 Bom. L. R. 732, 20

Cr. L. J. 657; *Shamdasani v. Pochkhanavala*, (1927) 29 Bom. L. R. 722, 28 Cr. L. J. 568, [1927] AIR (B) 414.

⁸ *Ratanchand Dhannaram*, (1904) 6 Bom. L. R. 886, 1 Cr. L. J. 959.

⁹ *Serajul Huq*, (1940) 44 C. W. N. 897.

¹⁰ *Bala Jiva*, (1885) 10 Bom. 190.

¹¹ *Hughes*, (1879) 4 Q. B. D. 614.

Ingredients.—The offence defined in this section contains the following ingredients:—

1. Causing any circumstance to exist, or making
 - (a) any false entry in a book or record, or
 - (b) a document containing a false statement.
2. That such circumstance, false entry, or false statement must have been intended to appear in evidence in
 - (i) a judicial proceeding, or
 - (ii) a proceeding taken by law before a public servant or an arbitrator.
3. That such circumstance, false entry or false statement so appearing in evidence, might cause any person, who, in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion.
4. The formation of opinion should be touching any point material to the result of such proceeding.

1. 'Causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement'.—The person accused must be proved to have done any of these things. An entry would be false entry or a statement in a record or document if it does either by reason of some false additions or of some material omissions misrepresents the truth. The omission may be illegal or may not be illegal. The thing to consider is what is the effect of the omission on the entry as made or on the statement as occurring in a document.¹² A person commits the offence of fabricating false evidence, if he makes a document which, though it may not contain any false statement in express terms, yet contains false recitals which imply such a false statement.¹³

Mere indiscretion in signing a fabricated document without knowing its contents will not render a person liable.¹⁴ Intention is the gist of the offence under this section. See s. 193, *infra*.

An offence of abetting the making of a false document can be committed by attesting the document even if the document does not require attestation to complete it, if the person who brings this document into existence intended that it should be attested and that the accused should be one of the attestors. The document in such circumstances is, therefore, not complete until the accused had signed. He, therefore, abets the making of a false document, and where he must have known that the document is intended to be used for the purpose for which it is made he is also guilty under s. 193 of fabricating false evidence.¹⁵

2. 'That such circumstance, etc., may appear in evidence in a judicial proceeding, or in a proceeding . . . before a public servant, etc.'—Judicial proceeding.—The Code of Criminal Procedure says that 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath [s. 4(m)]. The power to take evidence on oath, which includes affirmation as well,¹⁶ is the characteristic test of 'judicial proceeding'.

But the above definition will chiefly apply to cases relating to procedure.¹⁷ The expression 'judicial proceeding' has been the subject of the following judicial interpretations:—

(1) It means nothing more nor less than a step taken by the Court in the course of the administration of justice in connection with a case pending.¹⁸

(2) An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but, even a judge, acting without such an object in view, is not acting judicially.¹⁹

¹² *Jatindra Nath Sahu*, (1936) 38 Cr. L. J. 700, [1937] AIR (C) 42.

¹³ *Mohadeo Misser v. Narayan Ram Sha*, (1905) 10 C. W. N. 220, 3 Cr. L. J. 196.

¹⁴ *Jai Jai Ram*, (1919) 17 A. L. J. R. 574, 20 Cr. L. J. 268, [1919] AIR (A) 316.

¹⁵ *P. Rama Naidu*, [1941] 2 M. L. J. 746, [1941] M. W. N. 1036, (1941) 43 Cr. L. J. 227, [1942] AIR (M) 92 (1).

¹⁶ The General Clauses Act (X of 1897), s. 3 (36).

¹⁷ *Kassim Khan*, (1881) 7 Cal. 121, F.B.; *Sankaralinga Kone*, (1900) 23 Mad. 544.

¹⁸ Per Scotland, C. J. in *Venkatachalam Pillai*, (1864) 2 M. H. C. 43, 46.

¹⁹ Per West, J., in *Tulja*, (1887) 12 Bom. 36, 42; *A. John Forbes v. Amecroonissa Begum*, (1865) 10 M. I. A. 340.

(3) The examination of a complainant in reference to the matter of his petition of complaint is an investigation directed by law, and therefore a stage of a judicial proceeding.²⁰

(4) An inquiry by police preliminary to a proceeding before a Court of justice,²¹ is a judicial proceeding.

(5) An inquiry by a Magistrate before the issue of an order under the Criminal Procedure Code, s. 144,²² is a stage of a judicial proceeding.

(6) An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding.²³

(7) A preliminary inquiry by a Court under s. 476 of the Criminal Procedure Code is a judicial proceeding.²⁴

Stephen²⁵ says that a 'judicial proceeding' means a proceeding which takes place in or under the authority of any Court of Justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability.

Cases.—Where the accused was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, it was held that the Magistrate was right in convicting and punishing the accused for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding, and of voluntarily assisting in concealing stolen property under s. 414.¹ A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. It was held that his offence fell within this section.² Where the date of a document, which would otherwise not have been presented for registration within time, was altered for the purpose of getting it registered, it was held that this offence was committed.³

One C, whose brother D was an accused person, applied to the Court on behalf of the accused asking that the witnesses for the prosecution might first of all be made to identify D. The Court assenting to his request, C produced before the Court ten or twelve men, none of whom could be identified as D by any of the witnesses. Upon being asked by the Court where D was, C pointed out a man, who was not D. It was held that C was guilty of fabricating false evidence.⁴

The accused transferred the whole of his property in favour of his wife, but before registering the sale deed mortgaged the property to F. The sale deed was, however, registered after the mortgagee had made all necessary inquiry at the Registration Office. After the registration of the sale deed the mortgage deed was also registered. The accused was also charged for cheating the mortgagee. It appeared during the trial that the mortgage deed filed by the complainant bore on it an endorsement of the return of the consideration although there was no such endorsement on it when it was filed in Court. The accused was thereupon further charged for fabricating false evidence, and forgery. It was held that the accused was guilty of fabricating false evidence and cheating, as he must be presumed to know the probable result of his action and it obviously could not have been absent from his mind when he forged the endorsement that he was thereby attempting to defraud the mortgagee of his money.⁵ The accused, who was in possession of the complainant's house as a yearly tenant, about the time the tenancy came to an end, prepared another rent-note for a period of four years and got it registered, without the complainant's knowledge. It was held that the accused had committed this offence inasmuch as the rent-note, which contained an admission against the interest of the accused, could be admitted in evidence on his

²⁰ *Mata Dayal*, (1872) 4 N. W. P. 6.

²¹ *Soondar Putnaick*, (1865) 3 W. R. (Cr.) 59.

²² *Tirumarasimha Chari*, (1895) 19 Mad. 18.

²³ *Suppa Tevan*, (1905) 29 Mad. 89.

²⁴ *Abdullah Khan*, (1909) 37 Cal. 52; *Gopal Barik*, (1906) 34 Cal. 42, 46. In *Chanan*, (1909) P. R. No. 1 of 1910, 11 Cr. L. J. 90, execution proceedings are held to be judicial proceedings.

²⁵ Digest of Criminal Law, Art. 148.

¹ *Rameshar Rai*, (1877) 1 All. 379.

² *Mazhar Husain*, (1883) 5 All. 553.

³ *Mir Ekrrar Ali*, (1880) 6 Cal. 482.

⁴ *Cheda Lal*, (1907) 29 All. 351; *Sur Nath Bhaduri*, (1927) 50 All. 365. Contra, *Durga Prasad*, (1915) 16 Cr. L. J. 667, [1915] AIR (A) 388.

⁵ *Abdul Rashid Khan*, (1913) 12 A. L. J. R. 104, 15 Cr. L. J. 221, [1914] AIR (A) 337.

behalf.⁶ Where the accused had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered a *kobala* (agreement) in her favour falsely reciting that he had married her, and purporting to convey to her a plot of land in lieu of her dower, it was held that he had acted in furtherance of his desire to secure her person; that, as this could, under the circumstances, be done only by judicial proceedings, his intention was to use the document with its false statements, in a judicial proceeding and thereby to mislead the Court, and that he was, therefore, guilty of an offence under s. 193.⁷ The accused owed money to the complainant and sent a registered and insured packet purporting to contain currency notes in settlement of the debt. The packet contained waste paper. The complainant sued the accused for the debt, and the accused filed an application in the Court of the Subordinate Judge to receive the complainant's signed acknowledgment of the receipt of the packet as collateral evidence in proof of satisfaction. It was held that the only offence committed by the accused was an offence punishable under s. 193.⁸

Attempt.—Where the accused person had dug a hole intending to place salt therein, in order that the discovery of the salt so placed might be used in evidence against his enemy in a judicial proceeding, it was held that he was guilty of an attempt to fabricate false evidence.⁹

Abetment.—M instigated Z to personate C and to purchase in C's name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed C's name on such paper as the purchaser of it. M acted with the intention that such endorsement might be used against C in a judicial proceeding. It was held that the offence of fabricating false evidence was actually committed, and that M was guilty of abetting it.¹⁰

Where an accused person merely countersigned a report which was never read out to him and of the contents of which he was not aware, it was held that the act amounted to an indiscretion on his part, and he was not guilty of abetting the fabrication of a false report.¹¹

Not judicial proceeding.—Where the bailiffs of a Court, twelve in number, were always called upon to swear the service of summons in different cases before the Court, and it was the practice to call them all up at the beginning of each day, and to affirm them all at the time solemnly to give true evidence in all cases coming before the Court on that day and one of the bailiffs at a late hour of the day gave false evidence, it was held that he was guilty under s. 193 although he was not affirmed to speak the truth in that suit after it was called on for hearing and the names of cases in the day's list were not mentioned when the affirmation was administered.¹²

An inquiry by a Magistrate with a view to tracing the writer of an anonymous letter addressed to him, charging certain persons with murder and without any reference to the truth or otherwise of the charge of murder;¹³ an inquiry by a Magistrate to discover the writer of a scandalous petition;¹⁴ a preliminary inquiry, by a Subordinate Magistrate, under the direction of a District Magistrate, into the circumstances of a complaint against the police;¹⁵ the recording of a statement by a Third Class Magistrate having no authority to carry on the preliminary inquiry in the case;¹⁶ and a reference to a District Judge by the Telegraph authorities of a letter for verification,¹⁷ were held to be not judicial proceedings.

The Calcutta High Court has held that execution proceedings subsequent to the trial of a suit are not judicial proceedings.¹⁸ The Bombay High Court has ruled that execution proceedings are judicial proceedings for the purpose of this section and

⁶ *Rajaram Bhavanishankar*, (1920) 22 Bom. L. R. 1229, 22 Cr. L. J. 23, [1920] AIR (B) 319.

⁷ *Legal Remembrancer v. Ahl Lal Mandal*, (1921) 48 Cal. 911.

⁸ *Vaithianathaswami Aiyar*, (1926) 51 M. L. J. 800, 24 L. W. 725, 28 Cr. L. J. 70, [1927] AIR (M) 199.

⁹ *Nunda*, (1872) 4 N. W. P. 133; *Soondur Putnaick*, (1865) 3 W. R. (Cr.) 59.

¹⁰ *Mula*, (1879) 2 All. 105; *Durgacharan Gir*, (1902) 25 All. 75.

¹¹ *Jai Jai Ram*, (1919) 17 A. L. J. R. 574, 20 Cr. L. J. 268, [1919] AIR (A) 316.

¹² *Venkatachalam Pillai*, (1864) 2 M. H. C. 43.

¹³ *Bylkunt Nath Banerjee*, (1866) 5 W. R. (Cr.) 72.

¹⁴ *Jeebhai Vaja*, (1874) 11 B. H. C. 11.

¹⁵ *Venkataramanna*, (1899) 23 Mad. 223. See *Bhole Singh*, (1915) 38 All. 32.

¹⁶ *Bharma Ningappa*, (1886) 11 Bom. 702, F.B.; *Makhni*, (1890) 10 A. W. N. 100; *Poosia Naicken*, (1891) 1 Weir 151.

¹⁷ *Chait Ram*, (1883) 6 All. 108.

¹⁸ *Kanto Ram Das v. Gobardhan Das*, (1907) 35 Cal. 138.

s. 193. It is not essential for the purpose of these sections that the judicial proceeding in which the person intends to use the false evidence must be pending at the date of the fabrication.¹⁹ It is enough that there is a reasonable prospect of such a proceeding having regard to the circumstances of the case and that the fabricated document is intended to be used in such a proceeding.²⁰ Proceedings before a Debt Settlement Board are not judicial proceedings, except for the limited purpose of s. 228.²¹

3. 'Proceeding... before a public servant'.—As to the definition of 'public servant' see s. 21, *supra*. The provisions of this section are not confined to false evidence to be used in judicial proceedings. It is sufficient if the evidence is to be used to influence a public servant in any proceeding taken by law before him.²² Where, therefore, the accused, in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate and as to what estates the rents were in arrear, so that he might take steps to enforce payment, it was held that the accused had committed an offence under this section.²³ N, one of the accused, was proposing to sell some property to B. An agreement, dated 23rd May, was written out by N on a stamp paper of Rs. 5. The sale having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. N took advice with regard to this and was told that no refund would be made after two months. M, the other accused, gave him this advice and also told him that he might alter the date in the document from 23rd May to 23rd September. This was unnecessary as the period was six months and not two. It was held that they were guilty of fabricating and abetting the fabrication of false evidence.²⁴ Where a *patwari* was directed by a revenue Court to prepare a written statement, in order to obviate the necessity of taking down his evidence, and he submitted such statement on oath and the statement was proved to be false, it was held that he was guilty of fabricating false evidence.²⁵

No fabrication if public servant not authorised to hold investigation.—The making up of accounts falsely with the intention of producing them before a Forest Officer not empowered by law to hold an investigation and take evidence does not amount to fabrication of false evidence.¹ If the proceedings, in which evidence is given, are not judicial proceedings or are *ultra vires*, no offence is committed.²

Evidence fabricated must be admissible evidence.—If the evidence fabricated is not admissible in evidence then there is no fabrication of false evidence under this section.³ The soundness of this view is doubted by the Calcutta High Court⁴ on the ground that it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence. Decisions laying down that s. 192 is limited to such cases as those in which the fabricated evidence is, in fact, admissible under the terms of the law of evidence, are doubtful and the view expressed in such decisions might raise considerable difficulty in cases where the Judge has improperly admitted in evidence a document not admissible under the terms of the law.⁵ The mere fact that a document would be ultimately inadmissible in evidence does not necessarily take it out of the mischief of s. 193.⁶ Nevertheless, since every one is presumed to know the law, it is submitted that a Court may draw the presumption in favour of an accused person that, when what is fabricated is by law inadmissible in evidence, there was no intention on the part of the fabricator that it should appear in evidence in a judicial proceeding. Such a presump-

¹⁹ *Govind Pandurang*, (1920) 22 Bom. L. R. 1239, 45 Bom. 668.

²⁰ *Rajaram Bhavanishankar*, (1920) 22 Bom. L. R. 1229, 22 Cr. L. J. 23, [1920] AIR (B) 319.

²¹ *Hari Charan Kundu v. Kaushi Charan*, [1940] 2 Cal. 14.

²² *Ismail Khadirsab*, (1928) 30 Bom. L. R. 330, 333, 52 Bom. 385.

²³ *Juggun Lall*, (1880) 7 C. L. R. 356.

²⁴ *Mohesh Chandra Chaudhuri*, (1915) 28 C. L. J. 213, 19 Cr. L. J. 971, [1918] AIR (C) 61.

²⁵ *Meharban Ali Khan v. Sita Ram*, [1929] A. L. J. R. 512, 30 Cr. L. J. 874, [1929] AIR (A) 374.

¹ *Ramajirav Jiwajirav*, (1875) 12 B. H. C. 1.

² *Babu Ram*, (1911) 8 A. L. J. R. 674, 12 Cr. L. J. 373; *Phulel*, (1912) 35 All. 102; *Sumat Prasad*, [1942] All. 42; *Abdul Rahman*, (1909) 32 All. 30.

³ *Gauri Shankar*, (1883) 6 All. 42; *Zakir Husain*, (1898) 21 All. 159; *Chandra Kumar Missir*, (1905) 2 C. L. J. 46, 2 Cr. L. J. 383; *Dabee Mahto*, (1882) 10 C. L. R. 433; *Keilasum Putter*, (1870) 5 M. H. C. 373, 1 Weir 175.

⁴ *Mahammad Kazem Ali v. Jorabdi Naskar*, (1919) 46 Cal. 986.

⁵ *Baroda Kanta Sarkar*, (1915) 16 Cr. L. J. 620, [1916] AIR (C) 553; *Mahammad Kazem Ali v. Jorabdi Naskar*, (1919) 46 Cal. 986.

⁶ *Mahesh Chandra Dhupi*, [1940] 1 Cal. 465.

tion could, of course, be rebutted by proof of other facts, e.g. an actual attempt by the fabricator to use the fabricated matter in evidence. The former Chief Court of the Punjab dissented from this view. It held that a person was guilty of fabricating false evidence when he made a false entry in a document intending that it should appear in evidence and mislead the Judge or Magistrate, and the mere fact that the entry was not legally admissible in evidence could not affect his guilt.⁷

The section itself says nothing about admissibility or inadmissibility, but if an accused person is presumed to know the law, he is perhaps entitled to the benefit, as well as being subject to the detriment, of this presumption. If the evidence fabricated is inadmissible evidence, then *prima facie* the accused knew this, and did not intend the evidence to be used in a judicial proceeding. But an actual attempt to secure the admission of inadmissible and fabricated evidence, if proved, might rebut a presumption that there was no intention to use what the fabricator knew, or ought to have known, was inadmissible.

Cases.—Where a police-officer, who had suppressed a document, made a false entry in his diary to support his assertion that he had forwarded certain documents, intending that such entry might be used as evidence in his behalf that he had so forwarded the document, it was held that the evidence fabricated must be admissible evidence and as the entry would not be admissible in his behalf, though contrary to his intention, he was not liable.⁸ Where a police-officer made a false entry in the special diary relating to a case which was being investigated by him but the document in which the alleged false entry was made was not one which was admissible in evidence, it was held that he was not guilty under this section.⁹ Similarly, where a person made a false statement in the recital of title to property in a document when such statement was not admissible in evidence against the person or persons against whose interest such statement was made, it was held that he was not guilty.¹⁰

On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife, an assignment of perjury in a statement by the accused, as a witness for the husband, that he had seen the wife committing adultery (of which he had told the husband), was held bad for immateriality, as the supposed statement would not be legally relevant to the charge of assault as affording no ground of legal justification.¹¹

4. 'That such circumstance... may cause any person who in such proceeding is to form an opinion... to entertain an erroneous opinion'.—The false evidence must lead to the formation of an erroneous opinion. If a document does not lead to the forming of an erroneous opinion touching a particular point but leads rather to the forming of a correct opinion, then this offence is not committed.¹²

5. 'Touching any point material'.—False evidence under this section should be material to the case in which it is given though not so under s. 191.¹³ The word 'material' means of such a nature as to affect in anyway, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material although evidence of its existence was improperly admitted.¹⁴ Hawkins¹⁵ says that he "cannot find this matter anywhere thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which, from the consideration of the circumstances of each particular case, may generally, without any great difficulty, discern whether the matter in which perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not".

All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements.¹⁶ Every question on cross-examination of a witness, which goes to his credit, is material.¹⁷ Again, "if a witness is allowed to give evidence,

⁷ *Amolak Ram*, (1917) 19 P. L. R. 198, 19 Cr. L. J. 141, [1918] AIR (L) 192, *Fazl Ahmad*, (1918) P. R. No. 1 of 1914, 15 Cr. L. J. 344, 15 P. L. R. 471, [1914] AIR (L) 433, dissented from.

⁸ *Gauri Shankar*, (1888) 6 All. 42.

⁹ *Zakir Husain*, (1898) 21 All. 159.

¹⁰ *Chandra Kumar Missir*, (1905) 2 C. L. J. 40, 2 Cr. L. J. 383.

¹¹ *Tate*, (1891) 12 Cox 7.

¹² *Badri Prasad*, (1917) 40 All. 35.

¹³ *Tookaram*, (1862) Unrep. Cr. C. 2; *Ganga Sahai*, (1902) 23 A. W. N. 68.

¹⁴ *Stephen's Digest of Criminal Law*, Art. 148.

¹⁵ 1 Hawk. P. C., c. 27, (Perjury), s. 8, p. 434.

¹⁶ *Baker*, [1895] 1 Q. B. 797.

¹⁷ *Overton*, (1842) Car. & M. 655.

though it may afterwards turn out that his testimony ought not to have been admitted, perjury may nevertheless be assigned upon his answer. It does not lie in the witness's mouth to say that his evidence was immaterial, especially when, if believed, it might most seriously have injured the party against whom it was given".¹⁸

The evidence fabricated must be 'material'.—English cases.—The accused had been charged with selling beer without a license, and had falsely sworn that, when previously charged with a similar offence, he had not authorized a plea of guilty to be put in, and that such plea had been put in without his knowledge and against his will. It was held that, as such statements affected the accused's credit as a witness, they were material, and he was rightly convicted of perjury.¹⁹ Upon the trial of one S for robbery, the accused, in support of an alibi, swore, first, that S was in a certain house at the time of the robbery; secondly, that S had lived in that house for the last two years; and, thirdly, that he had never been absent from it more than two or three nights together during that time. In fact S had been confined in prison during one out of those two years. It was held that the second and third allegations were material as tending to render more credible the truth of the first, and that the accused were rightly convicted of perjury assigned upon them.²⁰ On the trial of A for perjury, in an affidavit made by him, the signature to the affidavit was proved to be in A's handwriting, but there was no evidence that A was the person who swore to the truth of the affidavit. The defendant was then called as a witness, and swore that the affidavit was used before the taxing master when A was present, and that it was then publicly said that it was A's affidavit. The defendant was then indicted for perjury committed on A's trial, and the indictment alleged that it was a material question on such trial whether A was so present before the taxing master, and whether the affidavit was then used in A's presence, and whether it was then stated publicly that the affidavit was A's. It was held that the above questions were material on the trial of A.²¹ The accused was sued for debt under the name of 'Burnard Edward Mullany'. The Judge asked the accused what his name was. He replied 'Edward'. To questions by the plaintiff's attorney the accused denied that his name was 'Burnard', and said that his name was 'Edward' only. The Judge struck out the cause. The accused was indicted for perjury; and it was proved that his real name was 'Burnard', but that he had latterly been known by the name of 'Burnard Edward'. It was held that the Judge having acted upon these statements, they were sufficiently material to sustain a conviction for perjury.²² In an action by an executrix, for goods sold, she falsely swore on cross-examination that she had never been tried at the Old Bailey and had never been in custody at the Thames Police Station. It was held, on the trial of an indictment for perjury, that this evidence was material.²³

No fabrication if no erroneous opinion could be formed touching any point material to result of proceeding.—Where a person produced, as evidence in a suit, a registered deed of sale in which the property sold was wrongly numbered, and which was corrected by himself subsequent to registration,²⁴ where a Vakil presented a *vakalatnama* falsely purporting to have been executed before an officer and to bear his signature;²⁵ where there was a dispute as to the ownership of articles in a box in the accused's house and he made a hole in the wall of the house, and removed the article he claimed, his object being to make it appear that there had been a theft, but he did not charge any one with having committed the theft;¹ where a *patwari*, knowing that certain documents were forged, made entries in his papers corresponding to and based on those documents;² and where a *kabuliat* was made and signed by the lessees alone with the intention of causing it to be believed that an agreement to let, therein recited, had been made by the agent of the land-owner and with her assent,³ it was held that there was no fabrication. Certain cattle were sold in a market on the 21st of March, 1917. A clerk, whose duty it was to register sales of cattle held at that market and

¹⁸ Per Cockburn, C. J., in *Gibbons*, (1862) 31 L. J. (M.C.) 98, 102; *Phillipotts*, (1851) 5 Cox 363, 21 L. J. (M. C.) N. S. 18.

¹⁹ *Baker*, [1895] 1 Q. B. 797.

²⁰ *Tyson*, (1867) L. R. 1 C. C. R. 107.

²¹ *J. A. Alsop*, (1869) 11 Cox 264. See *Charles Naylor*, (1868) 11 Cox 13.

²² *Mullany*, (1865) 34 L. J. (M.C.) 111.

²³ *Lavey*, (1850) 3 C. & K. 26.

²⁴ *Fateh*, (1882) 5 All. 217.

²⁵ *Keilasum Putter*, (1870) 5 M. H. C. 373, 1 Weir 175.

¹ *Thewa Ram*, (1882) 10 C. L. R. 187.

² *Ram Chand*, (1890) P. R. No. 26 of 1890,

³ *Jowahir Singh*, (1892) P. R. No. 16 of 1894.

give receipts to the purchaser, gave a receipt on the 27th March, and dated it the 27th March, but subsequently altered the date to the 21st, the actual date of sale. It was held that there was no case of fabricating false evidence, for the alteration of the date was not intended to lead any one to form an erroneous opinion touching the date of sale but the contrary.⁴

English cases.—Where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties, answered, that it was, where in truth it was paid only for one of them by agreement, it was held that he could not be punished for perjury.⁵ Where a witness being asked by a Judge whether A brought a certain number of sheep from one town to another all together, answered, that he did so, where in truth A did not bring them all together, but part at one time and part at another, it was held that he was not guilty of perjury, because the substance of the question was, whether A did bring them at all or not, and that the manner of bringing them was only a circumstance.⁶ Where a witness swore that a person drew his dagger and wounded J, where in truth he beat him with a staff, it was held that he was not guilty of perjury, because the beating only was material.⁷ On the trial of one B, charged with a garrotte robbery on W, the accused cross-examined W, as to whether he had not met him the evening before the robbery along with one M, and proposed to them to commit a burglary. The prosecutor denying this, the accused called M as his witness, who swore that he did meet the prosecutor along with the accused the night before the burglary, and that the prosecutor did propose to them to commit a burglary. On the trial of M for perjury, it was held that the evidence was not material.⁸

Fabrication of false evidence by accused.—The authors of the Code say: “we do not propose to punish him for fabricating evidence with the view of escaping punishment, unless he also contemplated some injury to others as likely to be produced by the evidence so fabricated...If A, after having stabbed Z, in order to escape detection, disposes Z’s body in such a manner as is likely to lead a jury to think the death accidental, we do not propose to punish A as the fabricator of false evidence.”⁹ The Allahabad High Court once held that the accused could not be charged with fabricating false evidence with the object of diverting suspicion from himself and concealing his guilt.¹⁰ But subsequently it has held that an accused person can be convicted for fabricating false evidence.¹¹ The Bombay High Court has differed from the former decision of the Allahabad High Court in a case in which Macleod, C.J., observed: “To hold that an accused person may use and fabricate false evidence with impunity so long as he does not bribe anyone to assist him would appear to me to open a very wide door to the fabrication of false defences.”¹²

193. Whoever intentionally¹ gives false evidence in any stage of a judicial proceeding,² or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding,³ shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

and whoever intentionally gives or fabricates false evidence in any other case,⁴ shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial is a judicial proceeding.

⁴ *Badri Prasad*, (1917) 40 All. 35.

⁵ 1 Hawk. P. C. (Perjury), c. 27, s. 8, p. 433; *Laistons Case*, 2 Roll. 41, 81 Eng. Rep. 646.

⁶ 1 Hawk. P. C. (Perjury), c. 27, s. 8, p. 433.

⁷ *Ibid.*, p. 434.

⁸ *Murray*, (1858) 1 F. & F. 80.

⁹ Note G, p. 131.

¹⁰ *Ram Khilawan*, (1906) 28 All. 705.

¹¹ *Bhagirath Lal*, (1934) 57 All. 403.

¹² *Rama Nana Hagavne*, (1921) 46 Bom. 317, 325, 23 Bom. L. R. 987, 993.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

ILLUSTRATION.

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

ILLUSTRATION.

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

COMMENT.

This section specifies the punishment which would be inflicted for offences described in ss. 191 and 192. If the offences are committed in any stage of a judicial proceeding they are more severely punishable than when they are committed in a non-judicial proceeding.

1. 'Intentionally'.—Intention is the essential ingredient in the constitution of this offence.¹³ Proof of corrupt intention is not necessary. It is enough to prove intention, and if the statement was false, and known or believed by the accused to be false, it may be presumed that in making that statement he intentionally gave false evidence.¹⁴ False evidence is intentionally given if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true.¹⁵ It is not sufficient to show that the witness probably knew the real facts. It must be shown that he had personal knowledge.¹⁶ The Court may infer the corrupt intention from surrounding circumstances.¹⁷ If, having regard to all the circumstances of the case, it appears that the falsehood was not wilful, but rather proceeded from inadvertence or a mistake as to the true nature of the question, the evidence could not be considered to be false evidence intentionally given. An inconsistent statement made during cross-examination is not perjury if it is the result of confusion or mistake. If a man reverts to the truth in the course of the trial, he cannot be prosecuted for perjury.¹⁸

A man cannot be convicted of perjury for having acted rashly, or for having failed to make a reasonable inquiry with regard to the facts alleged by him to be true.¹⁹ It must be proved that he made some statement which he knew to be false, or which he did not believe to be true.²⁰

2. 'Gives false evidence in any stage of a judicial proceeding'.—A Court is not justified in ordering prosecution of a person for perjury in respect of a statement which is literally and strictly speaking true.²¹ Where a person answers questions put to him in a judicial proceeding after he is sworn to tell the truth and the answers are not true, he commits perjury, whether the questions which he has answered are such

¹³ *Munni Baksh*, (1898) 3 C. W. N. 81; *Azibulla Sarcar v. Uday Sonthal*, (1908) 13 C. W. N. 422, 9 Cr. L. J. 282; *Rattan Singh*, (1911) 12 P. L. R. 312, 12 Cr. L. J. 265; *Asgarali*, [1942] Nag. 695.

¹⁴ *Amere Ali Khan*, (1871) 3 N. W. P. 133; *Nga Yon*, (1918) 3 U. B. R. 84, 19 Cr. L. J. 726; *Taj Mahmud*, (1927) 15 Lah. 407.

¹⁵ *Babu Ram*, (1904) 26 All. 509; *Jankilal*,

(1929) 30 Cr. L. J. 655, [1929] AIR (N) 193.

¹⁶ *Natha Singh*, (1927) 22 P. L. R. 190, 28 Cr. L. J. 1010, [1927] AIR (L) 874.

¹⁷ *Rhatten Ram*, (1865) 2 W. R. (Cr.) 63.

¹⁸ *Allah Wasaya*, (1928) 29 Cr. L. J. 1044.

¹⁹ *Muhammad Ishaq*, (1914) 36 All. 362.

²⁰ *Ashutosh Gangoli v. Brij Narain Lal*, (1921) 22 Cr. L. J. 393.

²¹ *Chiragh Din*, (1925) 27 Cr. L. J. 330.

as should have been or could have been properly asked.²² An identifier who knowingly makes a false affidavit of service of process for the purpose of being used in a judicial proceeding, commits an offence under this section.²³ By 'any stage of a judicial proceeding' is meant any step taken by the Court in the course of administration of justice in connection with a case pending.²⁴

If the statement of the accused is designedly false he is liable for the consequences irrespective of the fact whether the statement had a material bearing or not upon the matter which was under inquiry before the Court. The materiality or immateriality of the statement could have a bearing upon the question of sentence which was to be passed in the case.²⁵ Where the complainant made an inaccurate statement that he had been acquitted in a certain case not with a view to adding anything to the gravity of the offence, with which the accused in the case had been charged, but with a view apparently to appropriate some amount of credibility for himself and the statement was not a material statement in the sense that it did not in any way hamper the course of justice, because the accused were, as a matter of fact, acquitted. It was held that it was not one of those cases in which it could be said that the interest of justice would be advanced by prosecuting a person who has given a fraudulently false evidence which has interfered with the course of justice. It was one of those routine statements which are made by almost every witness.¹

An inquiry under s. 11 of the Frontier Crimes Regulation,² or a proceeding held by a Magistrate into the conduct of a village headman against whom reports have been made³ is not a 'judicial proceeding' within the meaning of this section; but a proceeding before an additional Income-tax Officer, on the production of account books, pursuant to a notice under s. 23 (2) of the Income-tax Act⁴ or an inquiry or investigation by a Court or Board under s. 9 of the Trade Disputes Act (VII of 1929) is.

This section does not apply to a false deposition given before a Court of a Native State.⁵

3. 'Fabricates false evidence for the purpose of being used in any stage of a judicial proceeding'.—The word 'fabrication' refers to the fabrication of false evidence; and if the evidence fabricated is intended to be used in a judicial proceeding, the offence is committed as soon as the fabrication is complete; it is immaterial that the judicial proceeding has not yet been commenced.⁶

It is not essential to show that any actual use has been made of the evidence fabricated. The mere fabrication is punishable under this section: the use of the fabricated article is punishable under s. 196.

The misreading of a document for the information of the Magistrate by a witness does not amount to fabricating false evidence.⁷

4. 'Intentionally gives or fabricates false evidence in any other case'.—A conviction may be had under this section, even if the evidence be given in matters not judicial, but it must be proved that the false statement was made under the sanction of law.⁸

Explanation 2.—A preliminary inquiry held by a Court under s. 476 of the Criminal Procedure Code is a stage of a judicial proceeding under this Explanation, and a person giving false evidence in the course of it commits an offence under this section.⁹

The Bombay High Court has, in a full bench case, laid down that a statement recorded by a Magistrate in the course of a police investigation under s. 164 of the Criminal Procedure Code is not evidence in a stage of a judicial proceeding within the meaning of this Explanation.¹⁰ The Lahore High Court has held likewise.¹¹

²² *Musammatt Tunia*, (1925) 7 P. L. T. 423, 26 Cr. L. J. 1611, [1926] AIR (P) 168.

²³ *Kari Gope v. Mahanth Manmohan Das*, (1927) 6 Pat. 760.

²⁴ *Munni Buksh*, (1898) 3 C. W. N. 81.

²⁵ *Raja Ram*, [1930] A. L. J. R. 251, 30 Cr. L. J. 1154, [1929] AIR (A) 936.

¹ *Batakrushna Pal*, (1944) 47 Cr. L. J. 177, (1944) 26 P. L. T. 216, [1945] AIR (P) 295.

² *Jahangir*, (1924) 25 Cr. L. J. 1350, [1924] AIR (L) 729.

³ *Daya Ram*, (1934) 57 All. 407.

⁴ *Lal Mohan Poddar*, (1927) 55 Cal. 423.

⁵ *Rambharathi Hirabharthi*, (1923) 47 Bom. 907, 25 Bom. L. R. 772.

⁶ *Mulla*, (1879) 2 All. 105; *Krishna Chetty v. Karur Vysya Bank Ltd.*, [1937] M. W. N. 870.

⁷ *Latkanising*, (1884) 9 C. P. L. R. 5.

⁸ *Audheen Roy*, (1870) 14 W. R. (Cr.) 24.

⁹ *Abdullah Khan*, (1909) 87 Cal. 52.

¹⁰ *Purshottam Ishwar Amin*, (1920) 23 Bom. L. R. 1, 45 Bom. 834, F.B.

¹¹ *Sajawal*, (1932) 33 P. L. R. 179, 33 Cr. L. J. 413, [1932] AIR (L) 254.

Amendment.—The words “or before a Military Court of Request” after “Court-martial” in Explanation 1 were repealed by the Cantonments Act (XIII of 1889). Act XIII of 1889 was repealed by Act XV of 1910, which in turn has been repealed by Act II of 1924.

PRACTICE.

Evidence.—Prove the following points for giving ‘false evidence’ :—

(1) That the accused was legally bound to state the truth, either by an oath or by an express provision of law,¹² or

That the accused made the declaration in question.

Due administration of the oath to the accused person should be proved like any other fact.¹³

(2) That he made such statement or declaration whilst so bound.¹⁴

(3) That such statement, or declaration, was made in a stage of a judicial proceeding.¹⁵

(4) That the statement or declaration is false.¹⁶

It must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed, with the result that a wrong inference may be deduced.¹⁷

(5) That the accused when making such statement or declaration, (a) knew it to be false, or (b) believed it to be false, or (c) did not believe it to be true.¹⁸

(6) That he made such false statement intentionally.

If the accused proves that he did not intentionally make any false statement, he is entitled to be acquitted.¹⁹

If the case falls under the second part of the section it is not necessary to prove (3).

Prove the following points for ‘fabricating false evidence’ :—

(1) That the accused (a) caused a certain circumstance to exist, or (b) made the false entry, or (c) made the document to contain a false statement.

(2) That he did as in (1) intending that such circumstance, entry, or statement should appear in evidence (a) in a judicial proceeding, or (b) in a proceeding taken by law, before a public servant, or (c) in a proceeding before an arbitrator.

There must be a distinct finding to this effect. Where the accused by falsely representing to the Marriage Registrar that a certain marriage had been solemnized, induced the Registrar to make a false entry of the registration of the marriage, it was held that he could not be convicted of the offence of fabricating false evidence under this section in the absence of a finding that the intention of the accused was that the false entry in the marriage register might appear in evidence in a judicial proceeding or some other proceeding of a like nature as contemplated by s. 192.²⁰

(3) That the person conducting the judicial or other proceeding had to form an opinion upon the evidence in which such false evidence appeared.²¹

(4) That the accused intended that person to entertain an erroneous opinion upon the evidence.

(5) That such erroneous opinion touched a point material to the result of such proceeding. It should be distinctly shown whether the evidence on which perjury is assigned is material in respect of matters in issue in the cause.²²

If the case falls under the second part of the section it is not necessary to prove (a) in (2).

¹² *Munwar Khan*, (1865) 4 W. R. (Cr.) 24.

¹³ *Alay Ahmad*, (1919) 20 Cr. L. J. 370, (1918) AIR (A) 167.

¹⁴ *Siddhoo*, (1870) 13 W. R. (Cr.) 56.

¹⁵ *Fatik Biswas*, (1868) 1 Beng. L. R. (A. Cr. J.) 13, 10 W. R. (Cr.) 37.

¹⁶ *Nirgin Mahton*, (1920) 21 Cr. L. J. 500, [1920] AIR (P) 171.

¹⁷ *Ratansi Daya*, (1915) 9 S. L. R. 170, 17 Cr. L. J. 96, [1916] AIR (S) 70 (2).

¹⁸ *Maharaj Misser*, (1871) 7 Beng. L. R. Appx. 66, 16 W. R. (Cr.) 47; *Amere Ali Khan*, (1871) 3 N. W. P. 133; *Bankatram Lachiram*, (1904) 6

Bom. L. R. 379, 28 Bom. 533; *Prakash Chandra Sarkar*, (1905) 2 C. L. J. 101, 2 Cr. L. J. 455; *Taj Mahmud*, (1927) 15 Lah. 407; *Jagdat Singh*, (1933) 34 Cr. L. J. 917, [1934] AIR (P) 133; *Ramdeni Pathak*, (1937) 39 Cr. L. J. 358, [1938] AIR (P) 145.

¹⁹ *Anandi Prasad*, (1933) 11 O. W. N. 87, 35 Cr. L. J. 390, [1934] AIR (O) 65.

²⁰ *Mohamed Siddiq*, (1907) 11 C. W. N. 911, 6 Cr. L. J. 162.

²¹ *Ganga Sahai*, (1902) 23 A. W. N. 68.

²² *Ball*, (1854) 6 Cox 360.

Nature of proof.—The true rule in a case of giving false evidence is “that no man can be convicted of giving false evidence, *except on proof of facts which, if accepted as true, shew not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true.* If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand; because, assuming all that is proved to be true, it is still *possible* that no crime was committed.”²³

According to the Indian Evidence Act no particular number of witnesses is required to prove any fact, though perjury according to English law must be proved by two witnesses, or by one witness, confirmed either by a written document, or by some material and relevant facts which contradict the statement upon which the perjury is assigned. It has been laid down that in ordinary cases and where the provisions peculiar to the Indian law do not apply, the rule of English law which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.²⁴ The Allahabad High Court has differed from this view and has held that the dictum of English common law that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a safe guide for the Indian Courts, which are bound by the statute law enacted in ss. 3 and 134 of the Indian Evidence Act.²⁵

Before a conviction for perjury can be sustained on the strength of one man's oath against another, it must be shown either that the person is of such outstanding character that it is impossible to conceive of him telling a lie in circumstances with which the Court is dealing or that that person's word is so strongly corroborated that no reasonable Judge could do otherwise than believe him.¹

The statement which the accused is charged with having made before a Magistrate should be clearly proved to have been made by him.² No evidence which does not profess to give the exact words by the accused can alone be a safe foundation for a conviction.³ But it is sufficient if a witness states from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it.⁴

The prosecution should make out that there was on the day stated in the charge a judicial proceeding pending, and that the accused in the course of that proceeding made the statement alleged to be false.⁵ It is desirable that the due administration of the oath to the accused person on the occasion in question should be proved like any other fact.⁶

Under this section read with s. 192, an offence is committed if evidence is fabricated either in connection with some judicial proceedings or quasi-judicial proceedings pending or contemplated at the time of the fabrication. If the charge is that the evidence has been fabricated in connection with proceedings which are only contemplated by the accused, the burden will be upon the Crown to prove the fact that proceedings were contemplated.⁷

A conviction for an offence under this section may be based on circumstantial evidence.⁸

Proceedings in trial.—The proceedings in a criminal trial, when necessary to be proved, should be proved by their production.⁹

²³ Per Northan, J., in *Ahmed Ally*, (1869) 11 W. R. (Cr.) 25, 27; *Padarath Singh v. Ratan Singh*, (1919) 5 P. L. J. 23, 21 Cr. L. J. 145; *S. C. Gupta*, (1923) 1 Ran. 290; *Asgarali*, [1942] Nag. 695. The Judicial Commissioner of Oudh has held that to justify a conviction for perjury it is not necessary to prove that the statement is impossible, it is sufficient to prove it is incredible : *Mohammad Ismail Khan (Hakim)*, (1919) 22 O. C. 236, 21 Cr. L. J. 12, [1919] AIR (O) 20.

²⁴ *Bai Gangadhar Tilak*, (1904) 6 Bom. L. R. 324, 339, 28 Bom. 479.

²⁵ *Arjun Singh*, (1931) 53 All. 598.

¹ *Rambhau*, [1942] N. L. J. 327.

² *Siddhoo*, (1870) 13 W. R. (Cr.) 56.

³ *Mungul Dass*, (1875) 23 W. R. (Cr.) 28.

⁴ *Rowley's Case*, (1825) 1 Mood. 111.

⁵ *Futteali Biswas*, (1868) 10 W. R. (Cr.) 87; *Sarjan Miya*, (1876) 25 W. R. (Cr.) 23; *Carr*, (1867) 10 Cox 664.

⁶ *Alay Ahmad*, (1919) 20 Cr. L. J. 370, [1919] AIR (A) 167.

⁷ *Indrachand Bachraj*, (1931) 34 Bom. L. R. 294, 56 Bom. 213.

⁸ *Ganwar Bangul*, [1944] Kar. 133.

⁹ *Ravji Taju*, (1871) 8 B. H. C. (Cr. C.) 37.

The record of proceedings in the Small Cause Court is not admissible in evidence unless authenticated by the signature of the presiding Judge.¹⁰

Depositions.—When a person is charged with giving false evidence upon a deposition made before a Magistrate, it is necessary first to prove that he is the person who gave such evidence; that it was given in a judicial proceeding, (e.g. on the complaint of AB against CD) on or about a certain day; and that he gave it on oath or affirmation. Where the deposition is accompanied by a memorandum signed by a Magistrate and the Magistrate's signature thereto is proved, then the deposition is proof of what the person charged with perjury stated, and he is concluded by it.¹¹ It is always necessary to prove the deposition alleged to contain the false statement.¹²

If the deposition on which the prosecution is based is not properly taken the conviction cannot be sustained, e.g. if it is not read over and interpreted to the witness in accordance with the provisions of O. XVIII, r. 5, of the Civil Procedure Code, before it is signed by him.¹³ The perusal of his deposition by a witness is a substantial compliance with r. 5, O. XVIII, of the Civil Procedure Code, and such deposition, when duly signed by the Judge, is admissible under s. 80 of the Evidence Act, without proof, on a subsequent trial of the deponent for giving false evidence.¹⁴ The provisions of O. XVIII, rr. 5 and 6, of the Civil Procedure Code, are directory, and non-compliance therewith does not render the deposition inadmissible on a subsequent trial of the deponent either for giving false evidence or for abetment of forgery and of dishonest user of a bond proved by him, in the course of a civil suit.¹⁵ Where there was no evidence to show that the deposition of a witness in a civil suit was not read over to him by the Judge, it must be presumed under s. 80 of the Evidence Act that the Judge complied with the provisions of O. XVIII, r. 5, of the Civil Procedure Code; and that an accused person might be convicted of the offence of having given false evidence before a civil Court notwithstanding that the Court had made no note in writing to the effect that the evidence had been read out to the deponent.¹⁶ A hearsay statement recorded by a Magistrate cannot be made the subject of a prosecution under this section.¹⁷

The Privy Council has laid down that non-compliance with the provisions of s. 360, Criminal Procedure Code, would not by itself be a ground sufficient for quashing a conviction, though it might be taken into account with other elements of objection to the satisfactory character of a trial.¹⁸ Under the Privy Council ruling, s. 537, Criminal Procedure Code, cures the defect of non-compliance with the provisions of s. 360, but it is submitted the Privy Council ruling will not apply where the provisions of O. XVIII, r. 5, of the Civil Procedure Code, are not complied with because there is no provision similar to s. 537 in the Civil Procedure Code.

There can be no conviction under this section based on a false statement which is not made and recorded with all due formalities in the manner required by law.¹⁹ The deposition itself ought to be put in, and proceedings in the case ought also to be put in to show the nature of the proceedings in which the evidence is given. Oral

¹⁰ *Shib Chandra Das*, (1870) 6 Beng. L. R. 730n.

¹¹ (1867) 8 W. R. (Cr. L.) 16.

¹² *Bhakoos Tutum*, (1867) 7 W. R. (Cr.) 13.

¹³ *Mayadeb Gossami*, (1881) 6 Cal. 762; *Nabab Ali Sarkar*, (1923) 51 Cal. 236; *Chenchiah*, (1919) 42 Mad. 561; *Taj Mahmud*, (1927) 15 Lah. 407; *Hariram*, [1945] Nag. 788. The view taken in *Kamatchinathan Chetty*, (1904) 28 Mad. 308, that the deposition read over by a clerk at a place where neither the Judge nor Vakils were present is not a valid deposition, has been commented on in *Bogra*, (1910) 34 Mad. 141, where it is held that where a witness admits that the deposition represents what he said the deposition even if irregularly recorded is not a nullity. *Kamatchinathan's* case has been dissented from in a case in which it is held that even if the deposition is not read over as required it is still admissible in evidence: *Meango v. Baviah*, [1918] M. W. N. 235, 74 L. W. 435, 19 Cr. L. J. 603, [1918] AIR (M) 533.

¹⁴ *Ramesh Chandra Das*, (1919) 46 Cal. 895.

¹⁵ *Elahi Baksh Kazi*, (1918) 45 Cal. 825.

¹⁶ *Jagat Ram*, (1918) P. R. No. 28 of 1918, 19 Cr. L. J. 972, [1919] AIR (L) 348.

¹⁷ *Chedi*, (1910) 7 A. L. J. R. 618, 11 Cr. L. J. 351.

¹⁸ *Abdul Rahman*, (1926) 29 Bom. L. R. 813, 5 Ran. 53, 54 I. A. 96, overruling *Hira Lal Ghose*, (1924) 52 Cal. 159, and *Dargahi*, (1924) 52 Cal. 499. The cases of *Mohendra Nath Misser*, (1908) 12 C. W. N. 845, 8 Cr. L. J. 116, *Jogendra Nath Ghose*, (1914) 42 Cal. 240, *Harro Nath Malo v. Sonai Mia Chowdhury*, (1922) 28 C. W. N. 119, 38 C. L. J. 281, 25 Cr. L. J. 289, [1924] AIR (C) 182, *Bansi Pande*, (1917) 2 P. L. W. 176, 18 Cr. L. J. 1039, [1917] AIR (P) 639, *Samserali Hazi*, (1925) 53 Cal. 129, and *Abdul Mallick*, (1925) 42 C. L. J. 585, 30 C. W. N. 644, 27 Cr. L. J. 375, [1926] AIR (C) 157, are no longer of any authority.

¹⁹ *Kartar Singh*, (1916) P. R. No. 12 of 1917, 18 Cr. L. J. 607, [1917] AIR (L) 192.

evidence of the contents of the deposition is inadmissible under s. 91 of the Evidence Act.²⁰ Where the law requires the evidence to be taken down in writing, a certified copy of the deposition must be placed on the record. The certified copy should also show on the face of it that it is a copy of part of the record in a specified proceeding. The mere production of a certified copy is not sufficient to show that the accused is the person who made the statement. There must be oral evidence of some one, who heard the deposition given, that the accused is the person whose evidence is therein recorded.²¹

The record of a previous deposition given by the accused is relevant and necessary evidence. Such record is not inadmissible under s. 145 of the Evidence Act.²²

The failure of a civil Court to make a memorandum of the evidence of the accused when examined before it does not vitiate the deposition, if the evidence itself was duly recorded in the language in which it was delivered in such Court.²³

Powers of appellate Court.—"It is an unusual and not . . . a proper procedure for an Appellate Court which did not hear the evidence to order a prosecution for perjury in the lower Court on materials which were not before that Court and which the witness had no opportunity of explaining while in the box."²⁴

Contradictory statements.—Where a person makes two contradictory statements he may not be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.²⁵ Thus the confusion created by the vast array of conflicting rulings of the different High Courts is done away with. But where there are two contradictory statements of a witness there is no reason why the Court should not apply its mind to discover which of them is true.¹

A statement made by an approver, to whom pardon has been tendered not in the course of any "inquiry" under the Criminal Procedure Code, cannot form the basis of an alternative charge of an offence punishable under this section.²

If one of the statements is made before a Magistrate not having authority to carry on a preliminary inquiry in the case and the other before a Magistrate having jurisdiction, there will not be a sufficient basis for an alternative charge of giving false evidence.³ But where a witness had made one statement on oath before a Third Class Magistrate under s. 164 of the Criminal Procedure Code, and again another and totally inconsistent statement at the trial of the case before a First Class Magistrate, it was held that he could be convicted under the second—if not under the first—paragraph of this section.⁴ A full bench of the Bombay High Court has held that although a statement which is made in the course of a police investigation under s. 164, Criminal Procedure Code, is not evidence in a stage of a judicial proceeding but comes within the words "evidence in any other case" in the second clause of this section, yet it can be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation, so that the two can be said to be a series of acts on which an alternative charge can be framed, under s. 236 of the Criminal Procedure Code.⁵ This ruling of the Full Bench is doubted in a subsequent case in which it is held that for the purposes of s. 476, Criminal Procedure Code, before a Court can sanction a prosecution of a person for perjury for making a statement under s. 164 of the Code and a

²⁰ *Bapu Naran*, (1888) Unrep. Cr. C. 401, Cr. R. No. 62 of 1888; *Imam Din v. Niamat Ullah*, (1920) 1 Lah. 361.

²¹ *Mi Shwe Ke*, (1902) 1 L. B. R. 268.

²² *Government of Bengal v. Ganoo Mahto*, (1908) 9 C. L. J. 378, 10 Cr. L. J. 499.

²³ *Beharee Lall Bose*, (1868) 9 W. R. (Cr.) 69.

²⁴ *Per Holmwood, J.*, in *Loke Nath Sahi*, (1906) 10 C. W. N. 1091, 1093, 4 Cr. L. J. 219, 220.

²⁵ *Vide ill. (b) to s. 236, Criminal Procedure Code; Chantassayya Rachayya Pujari*, (1946) 48 Bom. L. R. 755; *Public Prosecutor v. Atchamma*, [1947] M. W. N. 610.

¹ *Sheo Prasad*, (1941) 17 Luck. 376.

² *Motilal Hiratal*, (1921) 23 Bom. L. R. 884, 46 Bom. 61.

³ *Bharma Ningappa*, (1886) 11 Bom. 702,

r.B.; Shettapa Satapa Mudenavar, (1912) 14 Bom. L. R. 753, 13 Cr. L. J. 709.

⁴ *Khem*, (1899) 22 All. 115; *Tasadduk Husain*, (1908) 28 A. W. N. 73, 7 Cr. L. J. 302. See *Kadir Meerah*, (1909) 5 M. L. T. 356, in which the statement made by the accused before a police-officer making investigation under s. 174, Criminal Procedure Code, contradicted that made before the Magistrate and it was held that a sanction to prosecute in respect of the statement made before the Magistrate was not invalid.

⁵ *Purshottam Ishwar Amin*, (1920) 45 Bom. 834, 23 Bom. L. R. 1, *r.B.*, overruling *Mugapa bin Ningapa*, (1898) 18 Bom. 377, *r.B.*; *Patraji*, (1925) 2 O. W. N. 637, 26 Cr. L. J. 1457, [1925] AIR (O) 660.

contrary statement subsequently before the committing Magistrate, it is absolutely essential that the Court should be satisfied that the latter statement was untrue. There can be no prosecution if the former statement is untrue; and *a fortiori* there can be no prosecution if the Court is not in a position to find out which of the two statements is false.⁶ Where an accused person is examined by a Magistrate for the sake of obtaining information on which proceedings can be taken, the Magistrate cannot legally examine him on oath, nor can the accused be said at that stage of the proceedings to be a witness even though he were examined on oath. Consequently it was held that any charge for giving false evidence founded on such statement was bad and that a conviction and sentence founded on such statement as being contrary to another statement made by the accused when examined as a witness at the trial, without any proof or finding that the second statement was false, could not be maintained.⁷ It is not necessary that the contradictory statements must have been made at different inquiries or trials to render a person liable to conviction.⁸ It is, however, clear that the case of a witness making contradictory statements in the course of the same deposition is different from the case of a witness making contradictory statements in the course of different depositions recorded at different times. Usually it is not expedient to prosecute a witness who has made contradictory statements in the course of the same deposition, because the presumption is that the witness is trying to correct a false statement by his subsequent statement, and in such cases some *locus poenitentiae* should be given to the witness, but this does not apply where different depositions are recorded after an interval of time.⁹ The accused deposed before a Magistrate that he had seen P and others gambling in a certain place. The deposition was read over to the accused and acknowledged by him to be correct. In his cross-examination some days after he deposed he did not know P and had never seen him gambling. He was charged and convicted under this section of having intentionally given false evidence in that he made two contradictory statements one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal or illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial, it was held by two Judges that the conviction was legal.¹⁰ The fact of a witness having made contradictory statements before the committing Magistrate and in Court would not alone justify any step to prosecute him for perjury. Under exceptional circumstances such a step may be taken.¹¹

With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony.¹² Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false.¹³ An opportunity should always be given to the accused to explain what he meant by two apparently contradictory statements.¹⁴

It is necessary to prove that both the contradictory statements were such that a charge of giving intentionally false evidence might have been made in regard to either of them or in regard to both of them in the alternative.¹⁵ A witness making two contradictory statements in the course of the same deposition cannot ordinarily be held to have committed perjury in one or the other of them alternatively. If the first can be proved untrue he can be found guilty, technically, of an attempt to commit perjury at the most, and if the second can be proved untrue he can be convicted of per-

⁶ *Ningapa Ramappa*, (1941) 43 Bom. L. R. 864; *Sultansha Siddisha*, (1940) 42 Bom. L. R. 745, 42 Cr. L. J. 155, [1940] AIR (B) 385.

⁷ *Hari Charan Singh*, (1900) 27 Cal. 455.

⁸ *Palani Palagan*, (1902) 26 Mad. 55; Bhashyam Ayyangar, J., *dissentiente*. The opinion of Bhashyam Ayyangar, J., is followed in *Lachmai Narain*, (1918) 16 O. C. 81, 14 Cr. L. J. 280. See *Habibullah*, (1884) 10 Cal. 937.

⁹ *Local Government v. Jit Singh*, (1935) 31 N. L. R. 308, 36 Cr. L. J. 935, [1935] AIR (N) 145.

¹⁰ *Palani Palagan*, (1902) 26 Mad. 55.

¹¹ See *Tripura Shankar Sarkar*, (1910) 37

Cal. 618, s.B.

¹² *Ross*, (1871) 6 M. H. C. 342, 1 Weir 161.

¹³ Per Duthoit, J., in *Ghulet*, (1884) 7 All. 44, 63; *Narayanan Nair*, [1910] M. W. N. 397, 11 Cr. L. J. 353; *Bansi Pande*, (1917) 2 P. L. W. 176, 18 Cr. L. J. 1039, [1917] AIR (P) 639; *Barkat Ram*, (1911) 12 P. L. R. 518, 12 Cr. L. J. 216; *Taj Mahmud*, (1927) 15 Lah. 407.

¹⁴ *Fazal Din*, (1921) 3 L. L. J. 442.

¹⁵ *Hari Charan Singh*, (1900) 27 Cal. 455; *Asa Nand*, (1904) 5 P. L. R. 261, 1 Cr. L. J. 517.

jury, but if neither is affirmatively proved untrue he cannot be convicted in the alternative of anything more than the attempt.¹⁶

In the case of contradictory statements, although the Court "may believe that on the one, or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time.¹⁷ The Court dealing with contradictory statements "should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated facts on which his first statement was based and then denied these facts on oath on a subsequent occasion.¹⁸ Where the witness has corrected his previous statement in the same deposition every presumption in favour of his having made the incorrect statement in good faith should be raised in his favour, as it is undesirable that witnesses should be afraid to correct mistakes for fear of rendering themselves liable to prosecution.¹⁹

Where the evidence on which the prosecution relied to prove a statement made by the accused to be false, consisted solely of his own previous contradictory statements, it was held that such evidence was not sufficient to justify a conviction.²⁰

Witnesses should not be prosecuted because they give evidence which is contradictory at two different stages of a case, e.g., first before a Magistrate, secondly, before a Sessions Court. It is only where a Court is expressly of opinion that it is expedient in the interest of justice that an inquiry should be made into the offence of giving false evidence that an order under s. 476 of the Code of Criminal Procedure can be made.²¹ Where it is transparent that the criminal case is calculated to hamper the fair trial in a civil Court, no prosecution for perjury should be lodged till after the case is decided by the civil Court.²²

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or First Class Magistrate.

The making of any number of false statements in the same deposition is one aggregate case of giving false evidence. Charges of false evidence cannot be multiplied according to the number of false statements.²³ But the Bombay High Court has ruled that where a person makes several false statements in the course of a single deposition, he commits as many offences as there are false statements.²⁴

Before criminating a man upon his own statement under examination, it is necessary to see that such statement has been deliberately made and recorded; that after being recorded it has been shown or read to the accused; and that the examination has been attested by the signature of the Magistrate following a certificate to be given under his own hand.²⁵

Deposition to be read as a whole.—A deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him.¹

Reading extracts from the alleged conflicting statements of the accused is not sufficient to enable the jury to form a fair opinion on the question. The whole of the

¹⁶ *Local Government v. Gambhir Bhujua*, (1926) 23 N. L. R. 35, 28 Cr. L. J. 645, [1927] AIR (N) 189.

¹⁷ Per Jenkins, C. J., in *Bankatram Lachiram*, (1904) 6 Bom. L. R. 379, 397, 28 Bom. 533, 561.

¹⁸ Per Chandavarkar, J., in *ibid.*, pp. 379, 382, 28 Bom. 533, 542.

¹⁹ *Girdharimal*, (1915) 9 S. L. R. 202, 17 Cr. L. J. 240, [1916] AIR (S) 78.

²⁰ *Bukshali*, (1911) 5 S. L. R. 136, 13 Cr. L. J. 28.

²¹ *Keramat Ali*, (1928) 55 Cal. 1312; *Kamini Kumar Chuckerbutty*, (1929) 33 C. W. N. 664, 31 Cr. L. J. 373, [1929] AIR (C) 390; *Pragji*, [1936]

O. W. N. 763, 37 Cr. L. J. 885, [1936] AIR (O) 373; *Suba Singh*, (1940) 22 P. L. T. 775, 42 Cr. L. J. 446, [1941] AIR (P) 165.

²² *Rewashankar Moolchand*, [1939] N. L. J. 562, (1939) 41 Cr. L. J. 182, [1940] AIR (N) 72.

²³ (1871) 6 M. H. C. Appx. 27; *Rakkhal Chandra Laha*, (1909) 36 Cal. 808.

²⁴ *Sejmal Punamchand*, (1926) 29 Bom. L. R. 170, 51 Bom. 310.

²⁵ *Mussamut Niruni*, (1867) 7 W. R. (Cr.) 49.

¹ *Gopal*, (1890) Unrep. Cr. C. 502, Cr. R. No. 16 of 1890; *Pandu Namaji Gavande*, (1916) 19 Bom. L. R. 61, 18 Cr. L. J. 480; *Abdul Rahman*, (1926) 29 Bom. L. R. 813, 5 Ran. 53, 54 I. A. 96.

deposition given on each occasion ought to be laid before the jury.² There ought to be a *locus poenitentiae* for witnesses, who have deposed falsely, retracting their false statements.³

Where a witness, having made a false statement, is cautioned by the trying Judge and is informed of various circumstances which seem to establish the falsehood of that statement, and the witness after such caution acknowledges that his earlier statement was false and corrects it, it is not desirable to subject such a witness to a prosecution for perjury.⁴ Where the accused retracts his false statements, made on solemn oath in a witness-box, only when he discovers that his fraud has been detected, no Court can infer from the subsequent correction or retraction, that there is no intention to give false evidence.⁵

Witness criminating himself.—Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the state of the law, to deny the existence of facts for fear of penal consequences. Although without such a warning he may make a false denial and thereby become guilty of the offence of intentionally giving false evidence, his offence will not be deserving of severe punishment.⁶

Separate trial.—In prosecutions for giving false evidence the case of each accused person should be separately inquired into, and, if committed for trial, separately tried. It is wholly erroneous to include them in one joint charge.⁷ The joint trial of several persons for perjury is illegal.⁸ A person accused of perjury is entitled to have the specific charge made against him tried quite independently of a like charge against another person.⁹ The Bombay High Court has laid down that the joint trial of two accused is permissible under s. 289 of the Criminal procedure Code if there was a common purpose to make false statements. In such a case there is one transaction from the point of view of both the accused and their joint trial for making false statements to achieve that object is legal.¹⁰ The Lahore High Court has dissented from this view. Where a prosecution of twelve defence witnesses in a gambling case for perjury was ordered by a Sessions Judge, it was held that their joint trial for perjury was illegal.¹¹

Complaint.—Complaint in writing of the Court before which the offence is committed, or of some other Court to which such Court is subordinate, is required.¹² Prosecution should be instituted after due consideration on the part of the Court before whom the false evidence was given, or on the part of a Court to which such Court is subordinate.¹³ The Court is bound to satisfy itself that there is at least a *prima facie* case, and that there is a reasonable prospect of a successful termination of the prosecution,¹⁴ and that a prosecution is necessary in the interests of justice.¹⁵ The statement must be intentionally false in order to justify a prosecution.¹⁶ The offence of perjury is an offence against public justice. The person best qualified to say whether a prosecu-

² *Kally Churn Gangooly*, (1866) 6 W. R. (Cr.) 92.

³ *Gullie Mullick*, (1864) W. R. (Gap No.) (Cr.) 10.

⁴ *Pandu Namaji Gavande*, (1916) 19 Bom. L. R. 61, 18 Cr. L. J. 480; *William*, (1921) 25 O. C. 189, 23 Cr. L. J. 652, [1921] AIR (O) 198; *Fakir Chand*, (1924) 1 Lah. C. 322, 26 Cr. L. J. 1460, [1925] AIR (L) 646.

⁵ *Badakmal*, (1929) 31 Cr. L. J. 136, 24 S. L. R. 7; [1930] AIR (S) 61.

⁶ *Jaddoonath Dutt*, (1878) 2 C. L. R. 181.

⁷ *Niaz Ali*, (1882) 5 All. 17; *Anant Ram*, (1882) 4 All. 293; *Changu*, (1882) 2 A. W. N. 124; *Ruttee Ram*, (1870) 2 N. W. P. 21; *Kureem*, (1869) 11 W. R. (Cr.) 16; *Maharaj Misser*, (1871) 7 Beng. L. R. Appx. 66, 16 W. R. (Cr.) 47; *Kotha Subba Chetti*, (1883) 6 Mad. 252; *Nathu Sheikh*, (1884) 10 Cal. 405; *Agha Ali Ahmad*, [1943] Lah. 760.

⁸ *Lachhman Singh*, (1922) P. W. R. No. 15 of 1922, 23 Cr. L. J. 439, [1923] AIR (L) 89.

⁹ *Khoab Lall*, (1868) 9 W. R. (Cr.) 66; *Bhatro Misser*, (1867) 7 W. R. (Cr.) 51; *Bhava-*

nishankar Haribhai, (1868) 5 B. H. C. (Cr. C.) 55.

¹⁰ *Sejmal Punamchand*, (1926) 29 Bom. L. R. 170, 51 Bom. 310; *Nathu Singh*, [1937] Nag. 102. Contra, *Krishnarao*, (1902) 4 Bom. L. R. 53.

¹¹ *Agha Ali Ahmad*, [1943] Lah. 760.

¹² Criminal Procedure Code, s. 195. See also ss. 476-478, 487. *Varadaramanujala v. Kaimanoor*, [1943] Mad. 600; *Jagannatha Chari*, [1942] M. L. J. 105, (1941) 55 L. W. 321, [1942] M. W. N. 126, (1941) 43 Cr. L. J. 738, [1942] AIR (M) 326.

¹³ *Mahomed Hossain*, (1871) 16 W. R. (Cr.) 37.

¹⁴ See *Mathura v. Damri*, (1911) 15 C. L. J. 337, 13 Cr. L. J. 291; *Danappa Narsappa*, (1921) 24 Bom. L. R. 45, 23 Cr. L. J. 176, [1922] AIR (B) 38.

¹⁵ *Veeraraghava Swami Naidu v. Bhagavatula Visvanadhan*, [1911] 2 M. W. N. 172, 12 Cr. L. J. 446.

¹⁶ *Sheodahin Singh v. Bandhan Singh*, (1905) 2 A. L. J. R. 836, 3 Cr. L. J. 45.

tion should or should not be instituted is the Judge before whom the evidence was given and who had considered all the facts of the case.¹⁷ Perjury is a concomitant of a Court of law, the question always being one of degree. Every act of perjury is, in strict law, an offence, but it does not follow, that on that account every perjurer should be charged.¹⁸ The perjury must be sufficiently serious as to require punishment by a criminal Court.¹⁹

Where an offence is committed under this section in respect of proceedings in a Court of law which are contemplated but which in fact are never started, the Magistrate can take cognizance of the offence without getting any complaint from a Court. The crucial date in the case of an offence committed under this section is the date on which the offence was committed; while for the purpose of s. 195 of the Criminal Procedure Code, the crucial date is the date when the Court takes cognizance of the offence. Proceedings contemplated at the date of the offence are sufficient to constitute the offence under this section; but proceedings contemplated at the date when the Magistrate takes cognizance are not sufficient to bring the case within s. 195 of the Criminal Procedure Code.²⁰ Ordinarily it is inadvisable to launch a prosecution for perjury under such circumstances as will compel a witness to adhere to his original lie under penalty of a prosecution if he tells the truth.²¹ Where a witness makes a statement which is false and at once admits this, and states what is the real truth, he should not be prosecuted for giving false evidence.²² Prosecutions for perjury should not be ordered where the statements complained of are slightly discrepant owing to inaccuracies of mind and are not deliberately false.²³

No Court should entertain an application to prosecute made by persons who are not parties to the suit out of which the proceedings for giving false evidence arise.²⁴ A complaint should only be made after careful consideration, and having in view the ends of justice and not in order to assist the private ends of individuals. It is desirable in most cases that the Court should have all the facts before it.²⁵

A prosecution for perjury should be instituted as soon as possible. An officer other than he who tried the case in which perjury was committed does not act without jurisdiction, if he files a complaint to prosecute, but it is very much more satisfactory that the complaint should be made by the very Judge in whose Court an offence has actually taken place.¹

A complaint for an offence under this section must specify the false evidence the accused is charged with. The exact words upon which the prosecution is based, and the exact offences which the Magistrate is to investigate should be pointed out.² The particular words which constitute perjury should be specified,³ so that the accused person should not be taken by surprise.⁴ The accused should be in a position to know what statements are alleged to be false.⁵

Although notice is not invariably necessary, the person sought to be prosecuted must be heard.⁶ It is necessary that he should be given an opportunity to substantiate

¹⁷ *Chiranjil Lal v. Ram Lal*, (1912) 9 A. L. J. R. 538, 13 Cr. L. J. 496.

¹⁸ *Public Prosecutor v. Mayandi Nadar*, (1931) 34 Cr. L. J. 948, [1933] AIR (M) 230.

¹⁹ *Devaklal*, [1934] M. W. N. 243.

²⁰ *Indrachand Bachraj*, (1931) 34 Bom. L. R. 294, 56 Bom. 213.

²¹ *Dad*, (1901) P. R. No. 21 of 1901; *Santa Singh*, (1899) P. R. No. 3 of 1899.

²² *Dasonda Singh*, (1911) 12 P. L. R. 865, 12 Cr. L. J. 405.

²³ *Chandra Mohan Nanda*, (1917) 19 Cr. L. J. 230, [1918] AIR (C) 106 (2).

²⁴ *Abdul Jamal*, (1913) 14 P. L. R. 253, 14 Cr. L. J. 107.

²⁵ See *Chundra Kant Ghose*, (1888) 3 C. W. N. 3.

¹ See *Yad Ram v. Risal*, (1909) 7 A. L. J. R. 50, 11 Cr. L. J. 140; *Devo Jethiram*, Cr. Appeal No. 350 of 1910, 30th Nov. 1910, Cor. Batchelor and Rao, JJ. (Unrep. Bom.); *Daroga Jha v. Babu Jan Mandal*, (1920) 2

P. L. T. 311; *Trailokya Nath Banerji v. Radharanjan*, (1921) 25 C. W. N. 886, 23 Cr. L. J. 380.

² *Kartick Chunder Holdar*, (1868) 9 W. R. (Cr.) 53; *Danappa Narsappa*, (1921) 24 Bom. L. R. 45, 23 Cr. L. J. 176, [1922] AIR (B) 38.

³ *Gobind Chunder Ghose*, (1868) 10 W. R. (Cr.) 41; *Boddhun Ahir*, (1872) 17 W. R. (Cr.) 32; *Goberdhone Chowkidar v. Habibullah*, (1897) 3 C. W. N. 35; *Seshayya v. Subbarayudi*, [1925] M. W. N. 470, 26 Cr. L. J. 1589, [1925] AIR (M) 1157.

⁴ *Chote Lal*, (1917) 39 All. 367.

⁵ *Bhoku*, (1910) 7 A. L. J. R. 991, 11 Cr. L. J. 438.

⁶ See *Pampapati Sastri v. Subba Sastri*, (1899) 23 Mad. 210; *Kedarnath Das v. Mohesh Chunder Chuckerbutty*, (1889) 16 Cal. 661. See *Krishnanund Das v. Hari Bera*, (1885) 12 Cal. 58, F. B. overruling *Abbilakh Singh v. Khub Lal*, (1884) 10 Cal. 1100; *Mangar Ram v. Behari*, (1896) 18 All. 358.

his allegations.⁷ The Court must form judgment upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him, on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, no notice to the complainant is necessary.⁸ When a civil Court takes action under s. 476 to prosecute a person for perjury such Court is bound to set forth in its order the specific assignments of perjury alleged against the accused. Failure to do so is a material irregularity within the meaning of s. 115 of the Code of Civil Procedure.⁹

Accused must have full notice of the case against him.¹⁰ Complaint to prosecute should not be lightly launched in cases where the Courts would have to determine the question by merely weighing the evidence on both sides.¹¹ The prosecution for perjury is an exceptional measure and complaint ought not to be made when material has only been provided by an unnecessary examination on oath. Magistrates should not be encouraged to make unnecessary examinations on oath in order to obtain material for a prosecution for perjury in case the approver should subsequently resile from his statement.¹²

A Court filing a complaint in respect of contradictory statements must be competent to file a complaint in respect of each of the statements.¹³ When contradictory statements, forming the basis of an alternative charge of giving false evidence, are made before different Courts, the complaint of each of those Courts is necessary before the Court can take cognizance of the charge of giving false evidence.¹⁴ When a person makes a statement in the committing Court and contradicts it in the Sessions Court, the Sessions Judge can complain in the alternative that one or other of the statements must be false, even though the statement in the Sessions Court is true, since the false statement at the committal stage which eventuates in a trial is "in relation to the trial".¹⁵

A Court should not file a complaint when the case in which perjury is committed has gone to a higher tribunal.¹⁶

Notice.—Where a Judge issues notice to the accused to show cause why his prosecution under this section should not be launched he must allow sufficient time for the notice to be served upon the accused and should not file a complaint before the notice has been served.¹⁷

Calcutta Rule.—When, during the investigation of a complaint under Chapter XX of the Criminal Procedure Code, it may appear to the Magistrate that a witness is giving false evidence, so that criminal proceedings against such witness are likely to be necessary, the Magistrate will exercise a sound discretion in taking down, under s. 359, at least the evidence of this particular witness at length in the manner prescribed in ss. 356, 357 and 360.¹⁸

Lahore Rule.—1. The attention of all Magistrates is called to the law regarding 'giving or fabricating false evidence' contained in ss. 191 to 196 of the Indian Penal Code.

2. It may add too much to the already heavy work of Magistrates to prosecute every person who is guilty of these offences, but it is prejudicial to the interests of justice to allow any gross case to pass unnoticed. It is the duty, therefore, of every judicial officer to bring every case which happens in his Court to the notice of the District Magistrate. The District Magistrate will decide whether a prosecution should be instituted.

⁷ *Seshayya v. Subbarayudi*, [1925] M. W. N. 470, 26 Cr. L. J. 1580, [1925] AIR (M) 1157; *J. E. James*, (1933) 34 Cr. L. J. 833, [1933] AIR (C) 606.

⁸ See *Sheik Beari*, (1886) 10 Mad. 232, F.B.

⁹ See *Kashi Shukul*, (1916) 38 All. 695.

¹⁰ See *Rakhai Chandra Laha*, (1909) 36 Cal. 808.

¹¹ See *Padarath Singh v. Ratan Singh*, (1919) 5 P. L. J. 23, 1 P. L. T. 458, 21 Cr. L. J. 145; *Navalal Jha*, (1935) 37 Cr. L. J. 193, [1936] AIR (P) 162.

¹² *Nga Bo Gyi*, (1925) 3 Ran. 224.

¹³ See *Rami Reddi v. Public Prosecutor of Kurnool*, (1914) 27 M. L. J. 586, [1914] M. W. N. 793, 15 Cr. L. J. 612, [1915] AIR (M) 508.

¹⁴ See *Purshottam Ishwar*, (1920) 45 Bom. 834, 23 Bom. L. R. 1, F.B.

¹⁵ *Ganesh Mulli*, (1931) 55 Mad. 173.

¹⁶ *Birendra Nath Das Gupta*, (1914) 18 C. W. N. 1342, 16 Cr. L. J. 147, [1915] AIR (C) 265.

¹⁷ See *Umarbhai*, (1888) Unrep. Cr. C. 404, Cr. R. No. 65 of 1888.

¹⁸ C. H. C. R. & O., Ch. 1, Rule 43, p. 16.

3. It should be remembered that the provisions of s. 487 of the Code of Criminal Procedure make it clear that a Court before which the offence of giving false evidence has been committed is precluded from trying the offence itself.

4. Attention is also called to ss. 195 and 476 of the Code of Criminal Procedure which so far protects witnesses that no prosecutions are to be instituted in the Criminal Courts except on the complaint in writing of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate. The offence is one against public justice, and the prosecution is not left to the discretion of individuals. Section 476 (B) enables a superior Court, on application, to order the withdrawal of complaint made by a subordinate Court, or to make a complaint which a subordinate Court has refused to make.

5. Sub-section (3) of s. 195 defines, for purposes of these sections, to what Court any Court is subordinate. Thus, a District Magistrate (or any other Magistrate), with powers under s. 80 of the Code, is subordinate to the Court of Session. In districts in which, by Notification under s. 39 of the Punjab Courts Act, the Subordinate Judge of the first class is empowered to hear certain appeals from decrees or orders passed by them, Subordinate Judges other than those of the first and second class are subordinate to the Court of the Senior Subordinate Judge, by whom those appeals are heard.¹⁹ Subordinate Judges of the first and second classes are subordinate to the District Judge. An Assistant Collector of whatever grade is subordinate to the Collector.

6. When perjury on the part of a witness in commitment proceedings is alleged or suspected the committing Magistrate should leave the matter in the hands of the Sessions Judge, or should at least refrain from taking any steps until the case is decided by the Court of Session.

7. The Judges consider that the law against perjury should be fully vindicated against all persons who are convicted of perjury and Magistrates should impose deterrent sentences when convictions are obtained in prosecutions for perjury in the Courts.²⁰

When proceedings to be instituted.—Proceedings under s. 476, Criminal Procedure Code, should not be taken against a person for giving false evidence or fabricating a false document under this section until the case in which the said evidence was given or such document was used, has been finally decided.²¹

Bargain to abstain from prosecution.—A Court cannot take cognizance of a bargain to abstain from the prosecution of a person who has committed such an offence as that of wilfully giving false evidence.²²

Charge.—In framing a charge for giving false evidence, the charge should be precise. The charge should show the particular matter in respect of which the accused is put upon his trial; and only so much of the accused's statements ought to be set out as is necessary in order to show the particular false statements relied on by the prosecution.²³ It should contain a distinct assertion with regard to each statement intended to be characterised as perjury.²⁴ It should specifically state what words or expressions the accused is charged with having uttered, and in what respect they are supposed to be false.²⁵ The precise words used by the accused should be recorded, not merely the effect or a paraphrase of those words.¹

In drawing up a charge of perjury it is necessary to conform to the definition of the offence given in this section, and a charge that the accused made statements in their depositions "which they knew or had reason to know to be false", is incorrectly drawn, because a man makes a statement in the belief that it is true, though good reasons exist for knowing it to be false, for man's beliefs are not always influenced by good reasons.²

It is very irregular in a charge of intentionally giving false evidence to put the whole of a long statement bodily to a witness at once. A conviction on such a charge

¹⁹ *Dina Nath v. Muhammad Abdulla*, (1920) 2 Lah. 57.

²⁰ L. H. C. R. & O., (1928 edn.), Vol. II, Chap. XXII, p. 114.

²¹ *Gendun Singh*, (1905) 3 C. L. J. 302, 3 Cr. L. J. 303.

²² *Balkishen*, (1871) 3 N. W. P. 166.

²³ *Soonder Mohoree*, (1868) 9 W. R. (Cr.) 25.

²⁴ *Kalichurn Lahoree*, (1868) 9 W. R. (Cr.) 54.

²⁵ *Dowlut Moonshee*, (1867) 8 W. R. (Cr.) 95; *Maharaj Misser*, (1871) 7 Beng. L. R. (Appx.) 66, 16 W. R. (Cr.) 47.

¹ *Boddhun Ahir*, (1872) 17 W. R. (Cr.) 32; *Mungul Dass*, (1875) 23 W. R. (Cr.) 28; *Mi Shwe Ke*, (1902) 1 L. B. R. 268.

² See *Dwarkanath Varma*, (1933) 35 Bom. L. R. 507, 517, 14 P. L. T. 305, 34 Cr. L. J. 322, P.C., [1933] AIR (P.C.) 124.

could be properly had only on proof that the accused person had made each and every statement contained in the document.³

The charge should specify not only the judicial proceeding in the course of which the prisoner is accused of having made the false statements, but the particular stage of the proceeding in which the statement is made.⁴ It should disclose the exact date on which the offence charged was committed, and the Court or officer before whom the false evidence was given.⁵ The object of specifying the offence and the occasion when the offence is committed is to give notice not only to the accused but also to the trying Court of specific offences against the accused.⁶

An alternative charge is justifiable only when the prosecution is wholly unable to prove which of the two contradictory statements made by the accused is false.⁷

Though a charge does not distinctly specify the false statement on which the evidence of perjury is attempted to be established, the omission is not material if the accused has not been prejudiced thereby.⁸

Different occasions.—Where the accused is charged with giving false evidence on different occasions, each occasion should form the subject of a distinct head in the charge.⁹

Central provinces Circular.—In prosecutions for giving false evidence, under ss. 193, 194 and 195 of the Indian Penal Code, the particular statements alleged to be false must invariably be set out in the charge, to enable the accused to understand fully the offence with which he stands charged.¹⁰

Form.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, in the course of the trial of —, before—, stated in evidence that (*mention here the false statement*) which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session (or High Court)*).

And I hereby direct that you be tried by the said Court on the said charge.¹¹

Punishment.—A false statement by a witness, as to his position or character ought not be punished so severely as a false charge on a false claim.¹²

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice is not an offence which should be lightly passed over. But for a simple mis-statement, from which no such inferences can be drawn, a comparatively light sentence will suffice, particularly where the accused pleads guilty and throws himself at the mercy of the Court.¹³

Where a person is convicted for making two contradictory statements (1) under s. 164 of the Criminal Procedure Code, 1898, and (2) as a witness at the trial, and if it is not shown which of the two statements is false, the High Court will be slow to enhance the sentence passed by the lower Court.¹⁴

By the Frontier Crimes Regulation¹⁵ an offender convicted under ss. 193, 194, 195, 196, 201, 211 and 212 may be sentenced in lieu of or in addition to fine to be whipped, or to imprisonment not exceeding seven years, or to whipping and imprisonment not exceeding five years, or to transportation for not more than seven years.

Attempt.—The term of imprisonment for attempting to fabricate false evidence for the purpose of being sued in a stage of a judicial proceeding cannot extend beyond one-half of seven years.¹⁶

³ *Isab Mandal*, (1900) 28 Cal. 348.

⁴ *Fatik Biswas*, (1868) 1 Beng. L. R. (A. Cr. J.) 13, 10 W. R. (Cr.) 37.

⁵ *Maharaj Misser*, (1871) 7 Beng. L. R. (Appx.) 66, 16 W. R. (Cr.) 47.

⁶ *Ram Dhari Singh*, (1917) 4 P. L. W. 44, 19 Cr. L. J. 169.

⁷ *Harnam Singh*, (1890) P. R. No. 27 of 1890.

⁸ *Bhuttoo Lalljee*, (1865) 2 W. R. (Cr.) 51.

⁹ *Feojdar Roy*, (1868) 9 W. R. (Cr.) 14.

¹⁰ C. P. Cr. C. (1929) No. 16 (4), p. 47.

¹¹ Criminal Procedure Code, Sch. V, xxviii(5).

¹² *Rewah Goallah*, (1866) 5 W. R. (Cr.) 95; *Govind Sahoo*, (1864) W. R. (Gap No.) (Cr.) 14.

¹³ *Gurjoon Aheer*, (1867) 7 W. R. (Cr.) 37 [55].

¹⁴ *Sultansha Sidisha*, (1940) 42 Bom. L. R. 745, 42 Cr. L. J. 155, [1940] AIR (B) 385.

¹⁵ III of 1901, ss. 11 (3) (d) and 12 (2).

¹⁶ *Soondur Putnaick*, (1865) 3 W. R. (Cr.) 59.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely¹ that he will thereby cause, any person to be convicted of an offence² which is capital by the law of British India or England,³ shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

COMMENT.

The offence under this section is an aggravated form of the offence of giving or fabricating false evidence made punishable by s. 193.

To constitute an offence under this section the accused must give false evidence intending thereby, that is, by giving such false evidence, to cause or knowing it to be likely that he will thereby, that is, by giving such false evidence, cause some person to be convicted of a capital offence. It is not necessary under this section that the false evidence which is given should be evidence given in a Court of Justice. Such statement, in the opinion of the Calcutta High Court, even if made to a police-officer, will amount to the offence of giving false evidence, provided the Court can infer that it was the intention of the accused to stick to the false evidence right up to the trial of the case.¹⁷ But the Bombay High Court has held that as the words "in any stage of a judicial proceeding" occurring in s. 193 are not repeated in this section, the latter, therefore, refers only to the final stage, that is, the trial of the case.¹⁸ Where an accused had, in a preliminary inquiry before a Magistrate, made a deposition in which he falsely stated that he had seen the persons charged before the Magistrate in the act of committing a murder, it was held that this section was inapplicable, as the natural consequence of such false evidence would be nothing graver than a committal of the persons charged to the Court of Session, and not necessarily a conviction, and it must be presumed that the accused intended the natural, that is, the ordinary consequences.¹⁹

1. 'Intending thereby to cause, or knowing it to be likely'.—When the proceeding in which evidence is given is one in which a conviction is not possible, it is difficult to affirm that the accused had such intention or knowledge as is necessary under this section. A person giving false evidence before a Magistrate holding a preliminary inquiry into a charge of murder does not commit the offence under this section. He may be guilty under s. 193.²⁰ The offence of a person accusing another falsely of murder to a police-officer in an inquiry under s. 174 of the Criminal Procedure Code would not fall under this section, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge, that the false evidence is likely to cause, a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible.²¹

Where a witness stated on oath before the Sessions Court, during the trial of the accused for murder, that another had committed the murder, whereas, before the Magistrate he had stated, as was the fact, that the accused had committed it, it was held that he was guilty under s. 193 and not under this section, as he did not know that he would cause a conviction for murder.²² Where the accused brought before a Court a witness whom he had tutored to tell a false story concerning a murder case before it, it was held that he was guilty under this section.²³

2. 'Offence' means a thing punishable under the Code or any special or local law (s. 40).

¹⁷ *Nim Chand Mookerji*, (1873) 20 W. R. (Cr.) 41.

¹⁸ *Gokaldas*, (1874) Unrep. Cr. C. 80, Cr. R. of 1874.

¹⁹ *Ibid.*

²⁰ *Muhammad*, (1886) P. R. No. 32 of 1886.

²¹ *Muhammad Hayat*, (1921) P. W. R. (Cr.) No. 6 of 1922, 23 Cr. L. J. 82, [1922] AIR (L) 138.

²² *Hardyal*, (1869) 3 Beng. L. R. (A. Cr. J.) 35.

²³ *Sur Nath Bhaduri*, (1927) 50 All. 365.

3. 'Capital by the law of British India or England'.—The following offences are punishable with death under the Penal Code :—

- (1) Waging war against the King (s. 121).
- (2) Abetting mutiny actually committed (s. 132).
- (3) Giving or fabricating false evidence upon which an innocent person suffers death (s. 194).
- (4) Murder (s. 302).
- (5) Abetment of suicide of a minor, or insane or intoxicated person (s. 305).
- (6) Dacoity accompanied with murder (s. 396).
- (7) Attempt to murder by a person under sentence of transportation, if hurt is caused (s. 307).

The following are capital offences under the English law :—

- (1) High treason.²⁴
- (2) Murder.²⁵
- (3) Piracy with violence.¹
- (4) Burning or destroying ships of war, arsenals, magazines, etc.²
- (5) Several offences relating to the army and navy.³

Amendment.—The words "by the law of British India or England" were substituted for the words "by this Code" by the Indian Railways Act (IX of 1890), s. 149.

PRACTICE.

Evidence.—Prove the same points as those for s. 193, and further—

That the accused, when giving or fabricating the same, intended thereby to cause, or knew that it was likely he would thereby cause, the person in question to be convicted of a capital offence under the Indian Penal Code, or under the English law.⁴

For the second clause prove further—

- (1) That capital punishment was carried into effect; and
- (2) That the person executed was an innocent person.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which such Court is subordinate, is required.⁵

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, in the course of the trial of——, before——, gave false evidence (*or fabricated false evidence*) intending thereby to cause (*or knowing it to be likely that you will thereby cause*)——to be convicted of the offence of——which by the law of British India (*or England*) is capital, and thereby committed an offence punishable under s. 194 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As for whipping, see the Whipping Act (IV of 1909). As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (d) and 12 (2).

195. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence¹ which by the law of British India or England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

* Giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment.

²⁴ 30 Geo. III, c. 48; 54 Geo. III, c. 146; 33 & 34 Vic, c. 28, s. 81.

²⁵ 24 & 25 Vic., c. 100, s. 1.

¹ 7 Will. IV and 1 Vic. c. 88, s. 2.

² 12 Geo III, c. 24.

³ 44 & 45 Vic., c. 58, ss. 4, 6 (1), 7, 8 (1),

9 (1), 12 (1); 29 & 30 Vic., c. 109, ss. 2-7, 10, 13, 19, 30, 34 and 52 (1).

⁴ *Naurang*, (1906) 3 A. L. J. R. 110 (n).

⁵ Criminal Procedure Code, s. 195. See also ss. 476-478, 487.

ILLUSTRATION.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment, with or without fine.

COMMENT.

This section is similar to the preceding section except as regards the gravity of the offence in respect of which perjury is committed. It stands midway between s. 193 and s. 194.

1. 'Offence' means anything punishable under the Code or any special or local law (s. 40).

Amendment.—The words "by the law of British India or England" were substituted for the words "by this Code" by the Indian Railways Act (IX of 1890), s. 149.

CASES.

Where the accused was convicted under this section for burning his house with the object of getting another convicted of the offence, and the act was done in a most open manner, and no complaint was made by the accused, it was held that the conviction could not be upheld, because there was no evidence of intention to convict.⁶ Where a person burnt his own house and charged another with the act, it was held that he could not be convicted under this section, but under s. 211.⁷ But where A, with a view of having B convicted, assisted in concealing stolen railway pins in his house and field, it was held that A was properly convicted of an offence under this section.⁸ Where false coins were made by the accused only for the purpose of passing them secretly into the house of his enemy in order to get him into trouble, it was held that he had committed an offence under this section also although he was guilty under s. 232 or 235.⁹

PRACTICE.

Evidence.—Prove the same points as those for s. 193, and further—

That the accused, when giving or fabricating the same, intended thereby to cause, or knew that it was likely he would thereby cause, the person in question to be convicted of an offence punishable with transportation for life (or imprisonment for a term of seven years or upwards) under the Indian Penal Code or the English law.¹⁰

To sustain a conviction it is not only necessary to prove that the accused spoke falsely, but also that he knew he was speaking falsely.¹¹

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.¹²

Charge.—Similar to one under s. 195 except that the offence is not capital but one punishable with transportation for life or imprisonment for a term of seven years or upwards.

Punishment.—As for whipping, see the Whipping Act (IV of 1909). As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

196. Whoever corruptly uses or attempts to use as true or genuine evidence¹ any evidence which he knows to be false or fabricated,² shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false.

⁶ *Shib Dyal*, (1873) 5 N. W. P. 188.

⁷ *Bhugwan Ahir*, (1867) 8 W. R. (Cr.) 65.

⁸ *Rameshar Rai*, (1877) 1 All. 379.

⁹ *Lal Chand*, (1912) 13 P. L. R. 129, 18 Cr.

L. J. 252.

¹⁰ *Naurang*, (1906) 3 A. L. J. R. 110 (n).

¹¹ *Gopalaswami Naidu*, (1909) 10 Cr. L. J. 7.

¹² Criminal Procedure Code, s. 195.

COMMENT.

This section makes it an offence to corruptly use any evidence which the person using it knows to be false or fabricated. There must, therefore, be knowledge of its falsity and in addition the element of corruption.

The section applies to those who make use of such evidence as is made punishable by ss. 193, 194 and 195. "It must be read with ss. 191 and 192, and can only apply to the use of evidence which was false evidence within the meaning of s. 191 or fabricated evidence within the definition laid down in s. 192."¹³

The section may include also the case of suborning false witnesses and attempting to use their evidence. There must be a use or an attempt or offer to use the evidence in a judicial proceeding or on some other occasion.

The section does not apply to subornation of perjury. It must be shown that the accused made some use of the false evidence after it was in existence.¹⁴

If a person calls witnesses in support of a statement which he makes, and causes those witnesses to come into the box for the purpose of giving evidence which he knows to be untrue, and they give that evidence, and the jury find that they knew it to be untrue, that is evidence on which a jury may find that he solicited them; but the jury must be satisfied that he knew that the statement which they were called upon to make must be untrue to their own knowledge.¹⁵

1. 'Corruptly uses or attempts to use as true....evidence'.—The word 'corruptly' is applied to the doing of acts with the intent of gaining some advantage inconsistent with official duty or the rights of others.¹⁶ It is not intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence. An intention to procure a false conviction is a corrupt intention.¹⁷ The desire to screen an offender from the legal consequences of his act could well be designated a corrupt motive, and it would not require evidence to satisfy the Court that the witness in giving false evidence had that desire. The use of false evidence with the knowledge that it is false must ordinarily be corrupt from its very nature, and the onus lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough. An accused person who uses fabricated evidence as genuine in his defence may be liable for using it corruptly. In support of an alibi on a charge of assault the accused produced a cattle-pound receipt and called the Patil of another village to prove that he was there at the time of the offence. The defence was not believed, and the accused was tried for corruptly using false evidence as true. It was held that the accused was guilty of an offence under this section.¹⁸

The document should have been corruptly used or attempted to be used as true or genuine evidence. The production of a document in compliance with an order of the Court does not amount to using the document as genuine within the meaning of the section. Where during the pendency of a suit instituted for the cancellation of certain documents which was subsequently decreed, the defendants disclosed in their affidavit of documents the documents in question and later produced them on being called upon by the plaintiff to do so, it was held that such circumstance did not constitute a deliberate use of the documents by the defendants.¹⁹

The word 'corruptly' occurs in this section, and ss. 198, 200, 219 and 220. It is used to denote that those whose duty it is, not to judge of the credibility of evidence, but to submit it for the consideration of judicial and other functionaries, on behalf of their clients, do not incur the penalties for using false evidence.²⁰

The word 'corruptly' is not used in the sense of 'fraudulently' or 'dishonestly.' Where the accused used the evidence of a Hospital Assistant and a compounder for the

¹³ *Lakshmaji*, (1884) 7 Mad. 289, 290.

¹⁴ *Sheik Suffurruddae*, (1862) 1 Ind. Jur. (O. S.) 122.

¹⁵ *Gungaimmah*, (1860) 3 Mad. Ses.

¹⁶ *Livingstone*.

¹⁷ *Fazl Ahmad*, (1913) P. R. No. 1 of 1914, 15 P. L. R. 471, 15 Cr. L. J. 344, [1914] AIR

(L) 433.

¹⁸ *Rama Nana Hagavne*, (1921) 23 Bom. L. R. 987, 46 Bom. 317.

¹⁹ *Ma Ain Lon y. Ma On*, (1924) 3 Ran. 36.

²⁰ *M. & M.* 164.

purpose of producing the out-door Register of a dispensary containing false entries to the effect that he was present and treated there on certain days when in reality he was not, it was held that in order to bring him within the section there should have been evidence that the two witnesses had been induced to come forward by some corrupt motive, e.g., bribery.²¹

It is necessary to show that the evidence which the accused used or attempted to use as true or genuine was in existence at the time.²²

2. 'Any evidence which he knows to be false or fabricated.'—The word 'evidence' does not include a document. Where the accused used in a civil suit a document as genuine which he knew to be a forged document, it was held that he should be charged under s. 471 and not under this section.²³ Where a person used in Court false documents as true besides swearing to their authenticity, he was held guilty of this offence.²⁴ Where the accused produced as evidence an account book, one page of which had been fraudulently abstracted, and another substituted for it, it was held that he was not guilty of the offence of attempting to use, as genuine, fabricated evidence, unless he knew of the forgery and intended to use the forged evidence for the purpose of affecting the decision on the point at issue when the book was tendered.²⁵ A brought a suit upon a bond and at the trial sought to support his claim by a letter fabricated probably for the purpose of enabling him to get the bond registered. A was convicted under this section. It was held that if the letter was fabricated for use before the Registrar, it was no valid objection to the conviction.¹

PRACTICE.

Evidence.—Prove (1) that the piece of evidence in question is false or fabricated.

(2) That the accused used, or attempted to use, such false or fabricated piece of evidence.

(3) That he used, or attempted to use, such evidence, as true or genuine evidence.

(4) That when the accused used such evidence, or attempted to do so, he knew it to be false or fabricated.

(5) That when the accused so used, or attempted to do so, he acted corruptly.

Procedure.—Not cognizable—Warrant—Bailable or not according as the offence of giving such evidence is bailable or not—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.² An order under s. 476 of the Criminal Procedure Code, directing a prosecution for offences under ss. 193 and 196 of the Code, amounts to a complaint under s. 260, Criminal Procedure Code, and the Court before making the order must hold an inquiry and must itself specify by its order (1) the witnesses to prove the complaint, (2) the false evidence complained against, and (3) whether the person complained against knew that the evidence which he was using as genuine was false.³

Charge.—The charge should contain the words "punishable under ss. 193 and 196 of the Indian Penal Code, etc.," as the section does not specify accurately the amount of punishment.⁴

Using, and attempting to use, false evidence are distinct offences and should be charged separately.⁵

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

²¹ *Bhausing Jalamsing*, (1909) Criminal Application for Revision No. 26 of 1909, decided on March 31, 1909, by Scott, C. J., and Chandavarkar, J., (Unrep. Bom.)

²² *Kumar Chaudhari*, (1936) 16 Pat. 21.

²³ *Kherode Chunder Mozumdar*, (1880) 5 Cal. 717.

²⁴ *Oodun Lall*, (1865) 3 W. R. (Cr.) 17.

²⁵ *Muddoo Soodun Shaw*, (1867) 7 W. R.

(Cr.) 23.

¹ *Lakshmaji*, (1884) 7 Mad. 289. See also *Sikandar Khan*, (1887) 7 A. W. N. 285.

² Criminal Procedure Code, s. 195.

³ *Kalyanji v. Ram Deen Lala*, (1924) 48 Mad. 395.

⁴ (1865) 2 W. R. (Cr. L.) 9.

⁵ *Ibid.*, cbl. 2.

197. Whoever issues or signs any certificate required by law to be given or signed,¹ or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point,² shall be punished in the same manner as if he gave false evidence.

Issuing or signing
false certificate.

COMMENT.

Several laws require a certificate of some matter to be given. The offence of certifying in any of these, knowing or believing that the certificate is false, is put on the same footing as the offence of giving false evidence. In order to constitute an offence under this section the certificate must relate to any fact of which such certificate is by law admissible in evidence.

The certificate must, however, be false in a material point. The issuing or signing of it must be by the officer, or person authorized to certify.

Ingredients.—This section has two essentials—

1. Issuing or signing of a certificate—

(a) required by law to be given or signed, or

(b) relating to a fact of which such certificate is by law admissible in evidence.

2. Such certificate must have been issued or signed knowing or believing that it is false in any material point.

1. 'Issues or signs any certificate required by law to be given or signed.'—The word 'issues' means something different from using. It is the putting forth for the purpose of being used, and is preliminary to it.

'Certificate' is a testimony given in writing to declare or verify the truth of anything,⁶ e.g., a certificate of administration,⁷ of marriage,⁸ or adjustment of decrees,⁹ of incorporation of a company given by the registrar,¹⁰ or a certificate authorizing a judgment-debtor to mortgageland ordered to be sold,¹¹ or that a case is fit for appeal to the King in Council.¹² The word 'certificate' contemplates a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. The certificate given under the rule, viz. that in the case of female depositors withdrawing money from Post Office Savings Bank by their authorized agents under r. 18, the agent must sign a certificate on the application for withdrawal to the effect "certified that the depositor is on this day alive and sane," is not a certificate prescribed by the Government Savings Banks Act (V of 1873) or statutory rules made thereunder and such certificate is not a certificate within the meaning of this section.¹³

The word 'certificate' does not mean certification under this section and s. 198. The certificate, in respect of which a man may be punished under this section and s. 198, if it is false to his knowledge or belief, must be either one (a) that is required by law to be given or signed, or (b) that relates to any fact of which such certificate is by law admissible in evidence without further proof. One or other of these requirements must be fulfilled before a man can be dealt with under this section and s. 198. A, purporting to represent a decree-holder in a certain suit, signed and filed a petition in the Court, stating, contrary to the fact, that B, the judgment-debtor, had paid off the decretal amount to the decree-holder through him. B was found to have abetted A in so doing. It was held that A was not guilty under this section and s. 198, and B could not be convicted for abetting, because a decree-holder is not bound to certify in writing a payment or adjustment of his decree.¹⁴ The accused in support of his defence produced a certificate granted by the Chairman of the Cuttack Municipality which was based on an entry in the Death Register and also, summoned the

⁶ Wharton, 14th Edn., p. 171.

⁷ Act III of 1913, ss. 31, 32.

⁸ Act XV of 1872, ss. 32, 54, 61.

⁹ Civil Procedure Code, O. XXI, r. 2.

¹⁰ The Indian Companies Act, VII of 1913, s. 24.

¹¹ Civil Procedure Code, O. XXI, r. 83.

¹² *Ibid.*, O. XVI, r. 7.

¹³ *Birendra Nath Chatterjee v. Umananda Mukherjee*, (1925) 30 C. W. N. 120, 42 C. L. J. 557, 27 Cr. L. J. 182, (1926) AIR (C) 258.

¹⁴ *Mahabir Thakur*, (1916) 23 C. L. J. 423, 20 C. W. N. 520, 17 Cr. L. J. 140, [1917] AIR (C) 466.

family astrologer to produce an almanac, to prove the date of his father's death. The Small Cause Court Judge found the date of death in the certificate to be incorrect and the accused was tried and convicted. It was held that the certificate in question was not a certificate contemplated by this section and s. 198 as it was a certificate not required by law to be given or signed.¹⁵ A medical certificate is not such a certificate as is contemplated in this section and the issue or use of a false medical certificate does not render a person liable under s. 197 or s. 198.¹⁶ A statement required in an application for change of name made under the Bengal Land Registration Act is not a certificate within the meaning of this section.¹⁷

'Required by law to be given or signed.'—Several Acts require the giving of certificates by various functionaries, e.g., the Christian Marriage Act (XV of 1872), ss. 17, 41, 61; the Indian Companies Act (VII of 1913), s. 262; the Indian Succession Act (XXXIX of 1925), s. 381; the Indian Registration Act (XVI of 1908), s. 60; the Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 94; O. XLV, r. 3; the Administrator-General's Act (III of 1913), s. 31; the Legal Practitioners Act (XVIII of 1879), s. 7.

2. 'Knowing or believing that such certificate is false in any material point.'—The certificate must be false in respect of a material point. Falsity in any other respect will be of no avail.

Intent to injure.—Under this section proof of intent to cause injury is not necessary.¹⁸

CASES.

False declaration.—Where a person signed a notice of transfer of survey numbers in the character of his father who was dead, and the declaration to this notice was signed by the accused, who confirmed the assumed character, it was held that the accused could not be convicted under this section but could be convicted of giving false information to a public servant.¹⁹

Incorrect copy.—Where a copyist made an incorrect copy of a document filed with a record it was held that he had committed an offence under this section.²⁰

Abetment of issue of false certificate of summons.—Where there was no village-watchman in a village of the name appearing on the receipt acknowledging due service, the accused was acquitted in the absence of proof of guilty knowledge or belief, it being probable that he (an utter stranger in the village) was deceived by the villagers.²¹

PRACTICE.

Evidence.—Prove (1) that the document in question purports to be a certificate.

(2) That such certificate is required by law to be given or signed, or that it related to some fact of which such certificate is by law admissible in evidence.

(3) That such certificate is false.

(4) That it is false in a material point.

(5) That the accused issued or signed the same.

(6) That he, when doing so, knew or believed, such certificate to be false.²²

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, issued (or signed) a certificate [required by law to be given (or signed)] (or) [relating to——a fact of which such certificate is by law admissible in evidence] knowing or believing that such certificate is false in a material point, to wit——, and thereby committed an offence

¹⁵ *Kumar Choudhari*, (1936) 16 Pat. 21.

¹⁶ *Prafulla Kumar Khara*, [1942] 1 Cal. 573.

¹⁷ *Bal Krishna Gir*, (1917) 3 P. L. W. 201, 18 Cr. L. J. 978, [1917] AIR (P) 696.

¹⁸ *Dewa Singh*, (1878) P. R. No. 15 of 1879.

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¹⁹ *Mulharji*, (1882) Unrep. Cr. C. 182.

²⁰ *Dewa Singh*, (1878) P. R. No. 15 of 1879.

²¹ *Hissamuddeen*, (1865) 3 W. R. (Cr.) 37.

²² *Ibid.*

punishable under s. 197 of the Indian Penal Code and within my cognizance [*or cognizance of the Court of Session*].

And I hereby direct that you be tried [by the said Court] on the said charge.

198. Whoever corruptly uses or attempts to use any such certificate¹ as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true a certificate known to be false.

COMMENT.

This section should be read along with s. 197.

It is connected with the last section just as s. 196 is connected with ss. 193, 194 and 195.

1. 'Any such certificate.'—The certificate must be one which is either "required by law to be given or signed" or "is by law admissible in evidence."²³

PRACTICE.

Evidence.—Prove points (1), (2), (3) and (4) as in s. 197, and further—

(5) That such false certificate was signed or issued.

(6) That the accused used or attempted to use such false certificate.

(7) That he did so corruptly.

(8) That he, when using such false certificate, knew it to be false in a material point.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, corruptly used (*or attempted to use*) as true a certificate [required by law to be given and signed] (*or*) [relating to a fact of which such certificate is by law admissible in evidence] but which is false in a material point, to wit——, and known by you to be the same, and thereby committed an offence punishable under s. 198 of the Indian Penal Code and within my cognizance [*or cognizance of the Court of Session*].

And I hereby direct that you be tried [by the said Court] on the said charge.

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence¹ of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true,² touching any point material to the object for which the declaration is made or used,³ shall be punished in the same manner as if he gave false evidence.

False statement made in declaration which is by law receivable as evidence.

COMMENT.

Object.—This section is intended to make the penalty attached to the offence of giving false evidence applicable to declarations which, although not compellable, have, on being made, the same effect as the compulsory declarations referred to in ss. 51 and 191.²⁴ It subjects any person who makes a false declaration, which declaration may be used as evidence of the matters stated in it, to the penalties for perjury. Section 191 deals with compulsory declarations, this section with false declarations made voluntarily, provided such declarations are capable of being used as evidence.

²³ See *Prafulla Kumar Khara*, [1942] 1 Cal. 573.

²⁴ *A. Vedamuttu*, (1868) 4 M. H. C. 185, 187.

Ingredients.—This section requires three essentials—

1. Making of a declaration which a Court or a public servant is bound or authorized by law to receive in evidence.
2. Making of a false statement in such declaration knowing or believing it to be false.
3. Such false statement should be touching any point material to the object for which the declaration is made or used.

1. 'Declaration made...which...any Court of Justice or any public servant or other person, is bound or authorised by law to receive as evidence.'—'Declaration'...means any statement of fact in the form simply of a declaration, which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or the solemn affirmation substituted for an oath: in short, a declaration receivable in lieu of personal testimony.²⁵ A statement made by a witness in a criminal trial not upon oath or solemn affirmation is not a declaration.¹

See also Explanation to s. 200 as to the meaning of 'declaration.'

'Court of Justice.'—See s. 20, *supra*. 'Public servant.'—See s. 21, *supra*.

'Bound or authorised by law to receive as evidence.'—A declaration must be one which is admissible in evidence, and which the Court before which it is filed is bound or authorized by law to receive in evidence.² It includes an affidavit in cases in which evidence may be given by affidavit.³ Where an identifier made a false affidavit, it was held that he was punishable under this section.⁴ A Sherishtadar of the Munsif's Court has power to act as the Commissioner of Oaths in respect of matters arising in the Court of the Additional Munsif, and a solemn declaration on affidavit made before him in respect of matters arising in the Court of the Additional Munsif is a legal declaration receivable in evidence in a Court of justice. Therefore, a person who swears a false affidavit, knowingly, before the Sheristadar of the Munsif's Court in respect of matters arising in the Court of the Additional Munsif is liable to be convicted under this section.⁵

A person making on oath a false statement in the nature of an affidavit in the course of a criminal proceeding before a Magistrate having no power to administer an oath;⁶ a person making a statement which is not evidence for him but against him,⁷ and a person in whose petition a false averment is made, such petition not being signed by himself but by his pleader,⁸ are held to have committed no offence under this section. A Hindu, who has become a convert to Christianity, is not under a legal obligation to speak the truth, unless his evidence be given under the sanction of an oath on the Holy Gospel.⁹ If the Court or public servant is not authorized by any provision of the law, or any rules having the force of law, to receive a declaration in evidence but does receive one, the person making it will not be liable.¹⁰ The accused made a false declaration before a Mamlatdar with a view to obtain a certificate of solvency for the purpose of securing a license from the Abkari authorities. It was held that no offence was committed under this section inasmuch as no Court or public servant was either bound or authorized by law to receive the declaration in evidence.¹¹ Similarly, where the accused reported falsely to a revenue surveyor that his father had died, in order to have his own name entered in the revenue register as owner of a certain garden and lands,

²⁵ *A. Vedamuttu*, (1868) 4 M. H. C. 185, 187. *Ismail*, (1914) 8 B. L. T. 82, 15 Cr. L. J. 603 [1914] AIR (LB) 30.

¹ *A. Vedamuttu*, *ibid*.

² *Ram Prasad*, (1912) 35 All. 58.

³ *Palaniappa Chetti v. Annamalai Chetti*, (1903) 27 Mad. 223; *Mahtab Singh*, [1941] All. 685.

⁴ *Kari Gope v. Mahanth Manmohan Das*, (1927) 6 Pat. 760.

⁵ *B. K. Pal*, (1946) 25 Pat. 273.

⁶ *Iswar Chunder Guho*, (1887) 14 Cal. 653; *The Public Prosecutor v. Ramaswamy Chetty*, (1902) 1 Weir 176; *Dital Safar*, (1911) 5 S. L. R. 102, 12 Cr. L. J. 563. These cases were decided prior to the passing of s. 539A, Criminal Procedure Code, which provides that an affidavit respecting allegations against

a public servant to be used before any Court other than a High Court may be sworn or affirmed before any Magistrate. A person who makes a false statement in an affidavit made under s. 539A, Criminal Procedure Code, is guilty of an offence under this section: *Ramsarup Singh*, (1929) 30 Cr. L. J. 645, [1929] AIR (P) 156.

⁷ *Chandi Pershad v. Abdur Rahman*, (1894) 22 Cal. 131.

⁸ *Ram Rewaz Koowar*, (1880) 7 C. L. R. 536.

⁹ *A. Vedamuttu*, (1868) 4 M. H. C. 185, 187.

¹⁰ *Abdul Majid v. Krishna Lal Nag*, (1898) 20 Cal. 724; *Iswar Chunder Guho*, *sup.*; *Yasin Sheikh*, (1904) 9 C. W. N. 69, 2 Cr. L. J. 8.

¹¹ *Rajappa Ramappa Kalal*, (1915) 17 Bom. L. R. 222, 16 Cr. L. J. 309, [1915] AIR (B) 60.

it was held that he had committed an offence under s. 182 and not under this section.¹² Where a written statement was verified as required by the provisions of O. VI, r. 15, of the Civil Procedure Code, but the Court had not ordered proof of the statements made therein by affidavit under O. XIX, r. 1, nor had the statement of the applicant been recorded on oath in support of those allegations, it was held that an allegation in a written statement did not amount to a declaration which any Court of Justice was bound or authorized by law to receive as evidence of any fact and a conviction for an offence under this section in respect of merely an allegation was untenable.¹³ A Court cannot use any declarations as evidence unless they are of the nature of declarations contemplated in O. XIX, Civil Procedure Code. A verified statement which is not a declaration in the nature of an affidavit under the Order cannot form the basis of a conviction for an offence under this section.¹⁴

Statements in a verified insolvency petition under the Provincial Insolvency Act to the District Judge are not statements "bound or authorised by law to be received as evidence" within the meaning of this section, and as such a conviction under that section for any such false statement contained in such petition is illegal.¹⁵

2. 'Makes any statement which is false, and which he either knows or believes to be false.'—There must be a deliberate false statement. Statements made in a reckless and haphazard manner, though untrue in fact, do not constitute any offence when the person making them immediately admits the mistake and corrects them.¹⁶ If an applicant makes reckless allegations against a Magistrate in his affidavit in the High Court for a transfer of criminal proceedings against him he lays himself open to a prosecution under this section.¹⁷

3. 'Touching any point material to the object for which the declaration is made, etc.'—This provision as to proving materiality shows that the section has no reference to the examination of the witness in a judicial proceeding.¹⁸

Application for execution.—This section does not apply to applications for execution containing false averments.¹⁹

The Special Marriage Act, III of 1872.—Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in this section (s. 21). The offence contemplated in s. 21 of the Special Marriage Act (III of 1872) only deals with the declaration of a profession of want of belief in the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh, or Jain religion at the time when the declaration is made. A person may be born to parents professing one of these religions and may even have been practising the tenets of one of them up to the time of his marriage, but if at the time when he contracts a marriage under the Special Marriage Act (III of 1872) he makes a declaration that he does not profess any of these religions, then it cannot be said against him that, because he was born into the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion and had not formally renounced any of these religions before he made his declaration, he is guilty of an offence under this section. Where, therefore, there is no evidence adduced on behalf of the prosecution to show that when the accused made her declaration that she did not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion, she was making any declaration which she knew to be false or believed to be false or did not believe to be true, she could not be convicted under s. 21 of the Special Marriage Act read with this section.²⁰

¹² *Ismail*, (1914) 8 B. L. T. 82, 15 Cr. L. J. 603, [1914] AIR (LB) 30.

¹³ *Janki Rai*, (1927) 49 All. 482.

¹⁴ *Asgarali*, [1943] Nag. 547.

¹⁵ *Chhote Ram Swarup Sha*, [1937] 1 Cal. 504.

¹⁶ *Aiyasami Aiyar v. Aiyasami Aiyar*, (1917) 33 M. L. J. 545, 6 L. W. 241, 18 Cr. L. J. 636, [1918] AIR (M) 627. See *Ganeshi*, (1905) 2 A. L. J. R. 203, 2 Cr. L. J. 100; *Qutubuddin*, (1936) 17 P. L. T. 692, [1936] P. W.

N. 577, 38 Cr. L. J. 216, [1937] AIR (P) 211.

¹⁷ *Manlayak Singh v. Ram Kirit*, [1940] P. W. N. 745, (1940) 41 Cr. L. J. 702, [1940] AIR (P) 631.

¹⁸ *A Vedamuttu*, (1868) 4 M. H. C. 185.

¹⁹ *Bapuji Dayaram*, (1886) 10 Bom. 288; *Anandi Prasad*, (1933) 11 O. W. N. 87, 35 Cr. L. J. 390, [1934] AIR (O) 65.

²⁰ *Mrs. M. J. Walter*, (1934) 9 Luck. 561.

PRACTICE.

Evidence.—Prove (1) that the accused made, or subscribed the declaration in question.

(2) That a Court of Justice, etc., was bound or authorized to receive such declaration as evidence.

(3) That the accused made the statement in question contained in such declaration.

(4) That such statement is false.

(5) That such false statement touched a point material to the object of such declaration.

(6) That when making such false statement, the accused knew that it was false, or believed it to be false, or did not believe it to be true.²¹

A conviction for an offence under this section may be passed primarily on circumstantial evidence.²²

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.²³ There must be proper materials before an action is taken.²⁴

Charge.—The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of a charge of perjury.²⁵

The charge should run thus :—

I (*name and office of Magistrate, etc.*,) hereby charge you (name of accused) as follows :—

That you, on or about the——day of——, at——, in a declaration made (or subscribed) by you before——, made a false statement, which you knew (or believed) to be false (or did not believe to be true), touching a point material to the object for which the declaration was made, to wit——, and which declaration was by law receivable as evidence, and thereby committed an offence punishable under s. 199 of the Indian Penal Code and within [my cognizance] (or) [cognizance of the Court of Session].

And I hereby direct that you be tried [by the said Court] on the said charge.

200. Whoever corruptly uses or attempts to use as true any

Using as true such declaration knowing it to be false.

such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

COMMENT.

This section bears the same relation to the last section as s. 198 does to s. 197 or s. 196 to ss. 193, 194 and 195. The person who uses a false declaration is made liable as one who makes it.

PRACTICE.

Evidence.—Prove (1) that the declaration is false.

(2) That a Court of Justice, etc., was bound or authorized by law to receive the same in evidence.

²¹ *Shahzad Khan*, (1933) 14 P. L. T. 679, 34 Cr. L. J. 912, [1933] AIR (P) 513.

²² *Ganwar Bangul*, [1944] Kar. 138.

²³ Criminal Procedure Code, s. 195. See ss. 476-478, 487; *Kedar Nath Sen v. Amulya Ratan*

Sanyal, [1942] 1 Cal. 278.

²⁴ See *Abdul Wahid Khan v. Abdullah Khan*, (1923) 21 A. L. J. R. 211, 24 Cr. L. J. 197, [1924] AIR (A) 1.

²⁵ *Ibid.*

- (3) That such declaration is false in a material point.
- (4) That the accused made such false declaration, or attempted to do so.
- (5) That he did as in (4) corruptly.
- (6) That when he so used or attempted to use the same, he knew of the falseness thereof.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.¹

Charge.—See s. 199.

Punishment.—As for whipping, see the Whipping Act (IV of 1909).

201. Whoever, knowing or having reason to believe that an offence has been committed,¹ causes any evidence of the commission of that offence to disappear, with the intention of screening the offender² from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,³

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

ILLUSTRATION.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

COMMENT.

Object.—This section relates to the disappearance of any evidence of the commission of an offence, and includes also the giving of false information with the intention of screening an offender. Sections 202 and 203 relate to the giving or omitting to give such information, and s. 204, to the destruction of documentary evidence. There are three groups of sections in the Code relating to the giving of information. Firstly, ss. 118-120 deal with concealment of design to commit an offence; secondly, ss. 176, 177, 181, 182 deal with omission to give information and with giving of false information; and, thirdly, ss. 201-203 deal with causing disappearance of evidence.

This section is intended to reach acts to which ss. 193-195 do not extend, and not to include acts falling under those sections.² This section is an attempt to define the position known in English law as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact.³

¹ Criminal Procedure Code, s. 195.

² *Mussammatt Sharina*, (1884) P. R. No. 42 of 1884.

³ *Sumanta Dhupi*, (1915) 20 C. W. N. 166, 23 C. L. J. 333, 17 Cr. L. J. 4, [1916] AIR (C) 919.

Principle.—Whenever an offence has actually been committed, any person knowing or having reason to believe that it has been committed, and intending to screen the offender from legal punishment, (a) causes any evidence of the commission of the offence to disappear, or (b) gives any information respecting the offence which he knows or believes to be false, shall be punishable under this section.

Scope.—This section presumably contains the principle of the English law that a principal cannot be convicted as an accessory after the fact; the word “offender” in the section refers to an offender other than the accused person himself.

The Bombay High Court has held that a person cannot be convicted, under this section, of causing evidence of the commission of an offence by himself to disappear, nor can he be convicted of the abetment of such an act.⁴ A conviction of the accessory offence under this section is, however, not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed the principal offence.⁵ A person can be charged with the offence of murder, and, in the alternative, with the offence of causing evidence to disappear with the intention of screening the offender.⁶

The Allahabad High Court has held, differing from its earlier decisions, that a person who has actually committed a crime himself is none the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence.⁷ Where it is not established by the evidence on the record that a person is the murderer or one of the murderers, although there are circumstances of grave suspicion that he is such and he was charged as being such, his conviction under this section of the offence of causing evidence of the murder to disappear is not vitiated by the existence of such circumstances.⁸ The mere fact that the accused is probably or possibly the principal offender does not prevent his conviction under this section.⁹ Where an accused person has been acquitted of a charge of committing a crime, the fact that he had been suspected and tried for the principal offence would not prevent his conviction under this section, if there is clear proof that he has caused evidence to disappear in order to screen some unknown offender from legal punishment.¹⁰

The Calcutta High Court was once of the opinion that this section applies merely to the person who screens the principal or actual offender, and not to the principal or actual offender himself.¹¹ But it has laid down subsequently that where, notwithstanding circumstances of grave suspicion, it is impossible on the record to hold that a person is a murderer, his conviction under this section or s. 203 is not vitiated by the existence of such circumstances.¹² In view of the Privy Council ruling in *Begu v. The King Emperor*¹³ the earlier Calcutta decisions are no longer of any authority. In the Privy Council case five persons were charged under s. 302 with murder, and two of them were convicted. The evidence established that the other three had assisted in removing the body, knowing that a murder had been committed. Without any further charge being made, they were convicted under this section of causing the disappearance of evidence. It was held that the conviction without a further charge having been made was warranted by s. 237 of the Code of Criminal Procedure. The Calcutta High Court has now held that in a trial of charges under ss. 302 and 201, there is no legal bar to an acquittal under s. 302 and conviction under this section.¹⁴

⁴ *Kashinath Dinkar*, (1871) 8 B. H. C. (Cr. C.) 126; *Ghanasham Ramachandra Mantri*, (1906) 3 Bom. L. R. 538, 4 Cr. L. J. 89; *Ghasia Kewat*, (1899) 12 C. P. L. R. (Cr.) 17.
⁵ *Limbya*, (1895) Cr. R. No. 56 of 1895, Unrep. Cr. C. 799; *Fakir-ud-din*, (1877) P. R. No. 4 of 1877; *Ramaswami Gounden*, (1903) 27 Mad. 271; *Ahmed*, (1924) 1 Lah. C. 454; *Kundaon*, (1925) 21 N. L. R. 86, 27 Cr. L. J. 60. [1925] AIR (N) 407.

⁶ *Haimappa Rudrappa*, (1923) 25 Bom. L. R. 231, 25 Cr. L. J. 1349, [1923] AIR (B) 262.

⁷ *Har Piari*, (1926) 49 All. 57; *Ajog Narain*, [1936] A. L. J. R. 1310, 38 Cr. L. J. 193, [1937] AIR (P) 14. Contra, *Krishna*, (1880) 2 All. 713; *Lalli*, (1885) 7 All. 749; *Dangur*, (1886) 8 All. 252.

⁸ *Sohan*, (1932) 54 All. 792. This is also the view of the Chief Courts of the Punjab and

Oudh : *Nazru*, (1902) P. R. No. 6 of 1902; *Mata Din*, (1929) 5 Luck. 255.

⁹ *Nga Aung Kyaw Zan*, (1902) 1 L. B. R. 816.

¹⁰ *Bucha*, (1903) P. R. No. 1 of 1904, 1 Cr. L. J. 113; *Ramun*, (1926) 7 Lah. 84.

¹¹ *Torap Ali*, (1895) 22 Cal. 638; *Behala Bibi*, (1881) 6 Cal. 789; *Sumanta Dhupi*, (1915) 20 C. W. N. 166, 23 C. L. J. 333, 17 Cr. L. J. 4, [1915] AIR (C) 919. See *Muzammal*, (1908) P. W. R. No. 8 of 1909, 10 Cr. L. J. 321.

¹² *Teprinessa*, (1918) 46 Cal. 427; *Andal Shah*, (1924) 18 S. L. R. 185, 26 Cr. L. J. 909 (2), [1925] AIR (S) 306; *Nga Aung Kyaw Zan*, (1902) 1 L. B. R. 316.

¹³ (1925) 52 I. A. 191, 6 Lah. 226, 27 Bom. L. R. 707; *Umed Sheikh*, (1926) 30 C. W. N. 816, 45 C. L. J. 581, 27 Cr. L. J. 1011.

¹⁴ *Durlaw Namasudra*, (1931) 59 Cal. 1040.

The Madras High Court has held that ss. 201 to 203 are applicable to a person who is guilty of the main offence, though in practice a Court will not convict an accused both of the main offence and under these sections.¹⁵ Where two persons, charged with murder and with causing the disappearance of evidence with the intention of screening the offender from legal punishment under s. 302 and this section, are acquitted under s. 302 on the ground that the evidence is not sufficient to establish that both of them took such part in causing the death as would justify the conviction of each of them of murder, they can be convicted under this section, even though the Court is of opinion that one or other of them, if not both, must have committed the murder. Neither the circumstance that neither of them has been convicted of the main offence nor the fact that the Court is not satisfied that they are innocent of the main offence is a bar to the conviction under this section. Where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under this section merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal culprit.¹⁶ The recovery of the body of a person murdered on its being pointed out by the accused would be very strong evidence of an offence under this section.¹⁷

The Patna High Court once expressed the view that this section does not relate to the principal offender but to persons other than the actual criminal who, by causing the evidence of the offence to disappear, assist the principal to escape the consequences of his crime. Where, however, it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under this section merely because he has been charged also with the principal offence or because there are grounds for suspicion that he might be the principal culprit.¹⁸ Subsequently the Patna High Court adopted the view of the Allahabad and the Madras High Courts holding that a person who has actually committed a crime himself cannot be said to be any the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. In practice no Court will convict an accused both of the main offence and under this section. But if the commission of the main offence is not brought home to him, then he can be convicted under this section.¹⁹ In a recent case, in which this decision has not been referred to, Rowland, J., has held that there is no law preventing the main offender being convicted under this section, and s. 203, but in practice no Court will convict an accused both of the main offence and under these sections. But Shearer, J., holds that a person who, having committed an offence, subsequently causes evidence of the commission of that offence to disappear, does not, in so doing, commit another separate and distinct offence for which the Courts have in strict law jurisdiction to impose a separate punishment.²⁰

The Lahore High Court has followed the Calcutta High Court and held that this section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself.²¹ But where the disposal of a body is a separate transaction from the actual murder, the conviction of the principal offender under this section in addition to the conviction under s. 302 is not illegal.²²

1. 'Knowing or having reason to believe that an offence has been committed'.—It must be proved that an offence, the evidence of which the accused is charged with causing to disappear, has actually been committed;²³ and that the accused knew, or had information sufficient to lead him to believe, that the offence had been committed.²⁴ "Under the Penal Code no man can be tried for any delusion or misconception of mind, however culpable and criminal such delusion or misconception

¹⁵ *Chinna Gangappa*, (1930) 54 Mad. 68; *Public Prosecutor v. Venkatamma*, (1932) 56 Mad. 63; *Rama Goundan*, [1941] M. W. N. 874, (1941) 54 L. W. 561, 43 Cr. L. J. 543, [1942] AIR (M) 275 (2).

¹⁶ *Public Prosecutor v. Venkatamma*, *ibid.*

¹⁷ *Koricha Venkataswami*, (1938) 39 Cr. L. J. 977.

¹⁸ *Rup Narain Kurmi*, (1930) 10 Pat. 140.

¹⁹ *Nebti Mandal*, (1939) 19 Pat. 369.

²⁰ *Mahadeo Nath Khetri*, (1940) 42 P. L. R. 1035, 42 Cr. L. J. 603, [1941] AIR (P)

550.

²¹ *Ahmad*, (1924) 27 Cr. L. J. 109, [1926] AIR (L) 209.

²² *Ghulam Mohammad*, (1942) 44 P. L. R. 448, 44 Cr. L. J. 77, [1942] AIR (L) 271.

²³ *Abdul Kadir*, (1880) 3 All. 279, F.B.; *Adho*, (1925) 19 S. L. R. 6, 26 Cr. L. J. 897, [1925] AIR (S) 257.

²⁴ *Matuki Misser*, (1885) 11 Cal. 619; *Mathuranath De*, (1932) 33 Cr. L. J. 657, [1932] AIR (C) 850.

may appear to be".²⁵ "The terms used in the section 'knowing or having reason to believe' conclusively negative and preclude the view that its provisions are applicable in cases in which an offence has not been committed. For it is impossible for anyone to know or to have reason, or sufficient cause, to believe that an offence has been committed when it has not been committed. A person may fancy that he knows or has reason to believe an offence to have been committed when it has not been committed, but he is mistaken in so fancying. He may, under the influence of such a mistake, remove something which he imagines to be evidence of the offence which he supposes to have been committed, and he may be morally blamable for so doing. But it is beyond the province of criminal legislation to punish a man for a delusion, or even for an act which has not caused any actual harm to the public or any individual member of society".¹

As to the word 'offence' see Explanation to s. 203, *infra*.

2. 'Causes any evidence of the commission of that offence to disappear, with the intention of screening the offender'.—The expression 'any evidence of the commission of that offence' clearly refers, not to evidence in the extensive sense in which that word is used in the Indian Evidence Act, but to evidence in its primary sense as meaning anything that is likely to make the crime evident such as the existence of a wounded corpse, or blood stains, fabricated documents or similar material objects indicating that an offence has been committed. The statements of a witness and *panchnamas* do not constitute such evidence.² Removal of the corpse of a murdered man from the place of murder to another place is not causing the disappearance of some evidence of commission of the murder and thus does not come under this section which requires the causing the disappearance of some evidence of the commission of an offence.³ The act committed must have been done with the intention of screening the offender from legal punishment: mere knowledge that it is likely to do so is not sufficient.⁴ A person cannot be convicted of screening an offender when the offender himself has been tried and acquitted of the offence,⁵ or when the offence is that of suicide.⁶ It is not necessary that the accused should be aware of the identity of the offender whom he intends to screen.⁷ Nor need the offender himself have been convicted.⁸ A person who secretly buries the headless body of a man just murdered is *prima facie* guilty under this section unless he can establish that his act was innocent.⁹ A burial of a corpse of a murdered man if done with the intention of concealing the fact that there were marks of violence on it is an offence under this section.¹⁰ Where the only evidence against the accused is the production of the corpse and the presence of motive to commit murder, a conviction under this section is maintainable.¹¹ Where it appeared from the statement of the accused that he took from the man who, according to him, committed the murder, a jewel which was unquestionably the property of the deceased and he hid it and produced it later, it was held that the accused, when he hid the jewel, had the intention of screening the offender, whoever he was, from legal punishment, and so was guilty of an offence under this section.¹²

Where there is clear and independent proof that a person has caused evidence to disappear in order to screen some person or persons unknown, the fact that he had been tried and acquitted of the offence of murder would not, in itself, prevent his conviction under this section.¹³

²⁵ Per Stuart, C. J., in *Abdul Kadir*, (1880) 3 All. 279, 280, F.B.

¹ Per Pearson, J., in *Abdul Kadir*, (1880) 3 All. 279, 280, 281, F.B.

² *Awerkhan Mahamadkhan*, (1921) 23 Bom. L. R. 823, 22 Cr. L. J. 609, [1921] AIR (B) 115.

³ *Nagendra Bhakta*, (1932) 37 C. W. N. 348, 35 Cr. L. J. 535, [1934] AIR (C) 144; *Upendra Chandra*, (1941) 45 C. W. N. 633, 42 Cr. L. J. 796, [1941] AIR (C) 456.

⁴ *Toolshee Rai*, (1873) 5 N. W. P. 186; *Pelkoo Nushyo*, (1865) 2 W. R. (Cr.) 43; *Mir Afzal*, (1881) P. R. No. 25 of 1881.

⁵ *Abdul Kadir*, (1880) 3 All. 279, F.B.

⁶ *Musammam Thakri*, (1911) P. W. R. (Cr.) No. 17 of 1911, 12 Cr. L. J. 425.

⁷ *Rino*, (1912) 6 S. L. R. 76, 13 Cr. L. J. 721; *Tajan*, (1927) 21 S. L. R. 206, 28 Cr. L. J. 674, [1927] AIR (S) 241.

⁸ *Bulaqi*, (1928) 9 Lah. 671, 677.

⁹ *Nawab Din*, (1933) 34 P. L. R. 637, 34 Cr. L. J. 683, [1933] AIR (L) 516.

¹⁰ *Rino*, (1911) 5 S. L. R. 123; *Sheoraja*, (1888) 1 O. D. 204.

¹¹ *Farzand Ali*, (1927) 29 P. L. R. 33, 29 Cr. L. J. 252; *Jiwan Singh*, (1932) 34 P. L. R. 866, 35 Cr. L. J. 352, [1934] AIR (L) 23.

¹² *Public Prosecutor v. Munisami*, [1941] Mad. 503.

¹³ *Ditta*, (1928) 10 Lah. 213; *Chinna Gangappa*, (1930) 54 Mad. 68; *Savanta*, (1931) 33 Cr. L. J. 283, [1932] AIR (A) 71

Where a person, through fear, did not interpose to prevent the commission of a murder, and afterwards helped the murderers, in concealing the body, it was held that he was not guilty of abetment of murder, but was guilty of an offence under this section.¹⁴ A person who assists the actual murderers in removing the corpse of their victim to a distance from the place where the murder was committed is guilty of an offence under this section.¹⁵ But where the accused was ordered by her husband to help him to remove the dead body of a murdered man, it was held that she was not guilty under this section as her acts were not voluntary nor done with the intention of screening the offender from punishment.¹⁶ Where the accused, finding in her house the dead body of a girl, who had been murdered by her son, locked the outer door without moving the corpse or concealing it, it was held that she was not guilty of an offence under this section.¹⁷ Where the only acts proved against the first accused were that he caught hold of the tuft of the deceased before the second accused fatally stabbed him and that he took part in subsequently tying the deceased with a rope and dragging him along for some distance, it was held that the acts proved did not render the first accused liable to be convicted for an offence under this section.¹⁸

The weapon with which an offence is committed is a very valuable piece of evidence of its commission. The blood-stained weapon in a murder case affords a primary evidence of the offence and not an evidence in the extensive sense in such a case, and if a person conceals that weapon with a view to screen the offender, he thereby commits an offence under this section.¹⁹

Keeping out of way witness to commission of offence.—Where the accused having reason to believe that a murder had been committed and that B, the wife of the murdered man, was aware of the fact, took B away from the village where it was likely that inquiries would be made, and kept her out of the way lest she should give information, it was held that the taking of measures to keep a person out of the way who was possessed of knowledge of the occurrence of a crime and who was likely to communicate that knowledge to others, did not amount to causing disappearance of evidence within the meaning of the law.²⁰

3: 'Gives any information respecting the offence which he knows or believes to be false'.—The information need not be given to the police or the Magistrate and it is immaterial whether that information was volunteered or given in reply to enquiries.²¹

PRACTICE.

Evidence.—Prove (1) that an offence has been committed.²² Mere remour or suspicion is not sufficient.²³

(2) That the accused knew, or had reason to believe, that such offence had been committed.²⁴

(3) That the accused caused evidence thereof to disappear; or gave false information respecting such offence, knowing or having reason to believe the same to be false.²⁵

(4) That the accused did as in (3) with intent to screen the offender from legal punishment.¹

The following must be proved as an aggravating circumstance :—

(5) That the offence in question was punishable with death, or transportation for life, or with imprisonment extending to ten years.

¹⁴ *Goburdhun Bera*, (1868) 6 W. R. (Cr.) 80; *Zahid Beg*, [1937] A. L. J. R. 1253, (1937) 39 Cr. L. J. 864, [1937] AIR (A) 91.

¹⁵ *Autar*, (1924) 47 All. 306.

¹⁶ *Bakhtawari*, (1929) 31 Cr. L. J. 37, [1930] AIR (A) 45.

¹⁷ *Rajan*, (1905) P. R. No. 53 of 1905.

¹⁸ *Periaswami Thevan*, (1934) 67 M. L. J. 631, [1934] M. W. N. 1281, 40 L. W. 770, 36 Cr. L. J. 143, [1935] AIR (M) 36.

¹⁹ Per Teja Singh, J., in *Lal Singh*, (1946) 48 Cr. L. J. 786, Mohammad Sharif, J., held to the contrary.

²⁰ *Muhammad Baksh*, (1882) P. R. No. 21 of 1882.

²¹ *Pattammal*, [1940] 2 M. L. J. 315, 52 L. W. 349, [1940] M. W. N. 803, (1940) 41 Cr. L. J. 950, [1940] AIR (M) 898.

²² *Mula Singh*, (1895) P. R. No. 19 of 1895.

²³ *Kandipuri Lakshman*, (1883) 1 Weir 180.

²⁴ *Tara Chand*, (1867) P. R. No. 7 of 1867.

²⁵ (1865) 2 W. R. (Cr. L.) 1; *Hurdut Surma*, (1867) 8 W. R. (Cr.) 68.

¹ *Sudramayya Pillai*, (1866) 3 M. H. C. 251, 1 Weir 179; *Mir Afzal*, (1881) P. R. No. 25 of 1881.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, in cases falling under the first clause; by Court of Session, or Presidency Magistrate, or first class Magistrate, in cases falling under the second; and by Magistrate, Presidency or first class, or by Court by which the offence is triable in cases falling under the third.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, knowing (*or having reason to believe*) that certain offence, to wit—, punishable with—, has been committed, did cause certain evidence of the said offence to disappear, to wit—, [*or knowingly gave false information, to wit—*] with the intention of screening the said (*name of the person committing the offence*) from legal punishment, and thereby committed an offence punishable under s. 201 of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session*).

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901). •

For the purpose of calculating the punishment to be awarded under this section, it is necessary for the Court to decide not so much what offence—the evidence of which has been concealed—has been committed, as what offence the accused knew or had reason to believe had been committed.²

202. Whoever, knowing or having reason to believe that an offence has been committed,¹ intentionally omits to give any information respecting that offence which he is legally bound² to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Intentional omission to give information of offence by person bound to inform.

COMMENT.

This section punishes the illegal omissions of those who are by some law bound to give information, when such omissions are intentional. It is analogous to s. 176. The offence under it will generally be committed by public servants and private persons bound to give information under ss. 44 and 45 of the Criminal Procedure Code.

1. 'Knowing or having reason to believe that an offence has been committed'.—Under this section, where the *corpus delicti* is not established, there can be no conviction for intentional omission to give information respecting an offence which has not been proved to have been committed.³

As to the definition of 'offence', see Explanation to s. 203, *infra*.

Where a Police Patel failed to report the arrival at his village of dacoits and supplied them with food and drink, it was held that he could not be convicted under this section as there was nothing to show that an offence was committed by persons who visited the village.⁴ Where, from the fact of the Police Patel ordering the kulkarni to write a report regarding a suspicious death in his village, his good faith was apparent, and it did not appear that he had an intention to omit the report, it was held illegal to convict him of an intention to evade the law about the first report.⁵

2. 'Legally bound'.—See s. 43, *supra*.

PRACTICE.

Evidence.—Prove (1) that the offence, which was not informed about, has been committed.⁶

(2) That the accused knew, or had reason to believe, that such offence had been committed.⁷

² *Chinna Gangappa*, (1930) 54 Mad. 68.

³ *Ram Rachea Singh*, (1865) 4 W.R. (Cr.) 29.

⁴ *Bala*, (1881) Unrep. Cr. C. 160.

⁵ *Mhatu Balaji*, (1895) Unrep. Cr. C. 783,

Cr. R. 44 of 1895.

⁶ *Ramaswami Udayan*, (1894) 1 Weir 181.

⁷ *Nga Saw*, (1904) 11 Burma L. R. 8, 15, 2 Cr. L. J. 133.

- (3) That he omitted to give information thereof.
- (4) That such omission was intentional.
- (5) That the accused was legally bound to give information which he omitted to give.⁸

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Summary trial.

See Criminal Procedure Code, ss. 44, 45.

203. Whoever,¹ knowing or having reason to believe² that an offence has been committed,³ gives any information respecting that offence which he knows or believes to be false,⁴ shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—In sections 201 and 202 and in this section the word 'offence' includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460..

COMMENT.

Principle.—A person who knowing that an offence has been committed volunteers information which he knows or believes to be false, obstructs justice, and is therefore punished whether any intention to screen the offender can be proved against him or not, and whatever be the offence which the latter has committed.

Object.—The object of the Legislature is not to insure general veracity or the making of correct statements in regard to supposed offences, or offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which were actually committed, and which the person charged knew, or had reason to believe, had been actually committed.⁹

1. 'Whoever'.—That is, a person other than the offender.

2. 'Reason to believe'.—See s. 26, *supra*. A belief that an offence has very probably been committed is not enough.

3. 'An offence has been committed'.—It must be proved not only that the person charged had reason to believe that the offence had actually been committed, but that the offence had actually been committed, and that the accused knew or had reason to believe that such an offence had actually been committed.¹⁰

The word 'offence' here denotes a thing punishable under the Code or any special or local law (s. 40).

4. 'Gives any information... which he knows or believes to be false'.—The wilful giving of false information in respect of the commission of an offence is made punishable. The expression "gives information" means volunteers information.¹¹

Where, notwithstanding circumstances of grave suspicion, it is impossible on the record, as it stands, to hold that a person is the murderer or one of the murderers, his conviction under this section for giving false information is not vitiated by the existence of such circumstances.¹²

Where a body was found with wounds on the neck and throat which indicated that the deceased had met with foul play, and a village watchman having inspected the body informed at the *thana* that the deceased had died of cholera and there was nothing

⁸ *Woodoy Chand Mookhopadhyaya*, (1872) 18 W. R. (Cr.) 31, 9 Beng. L. R. (Appx.) 31; *Sher Muhammad*, (1887) P. R. No. 20 of 1887; *Mir Afzal*, (1881) P. R. No. 25 of 1881.

⁹ *Joyarain Patro*, (1873) 20 W. R. (Cr.) 66. *Akhtiar*, (1912) 6 S. L. R. 143, 14 Cr. L. J. 252.

¹⁰ *Joyarain Patro*, *ibid.*; (1865) 2 W. R. (Cr.) L. 1.

¹¹ *Akhtiar*, (1912) 6 S. L. R. 143, 14 Cr. L. J. 252.

¹² *Teprinessa*, (1918) 46 Cal. 427.

suspicious in the appearance of the body, he was held guilty of an offence under this section.¹³

Statement to police.—This section does not apply to the case of a person who gives false evidence as a witness to the police in the course of their investigation in reply to questions put to him. It only contemplates information volunteered by some person. Where the accused, while being examined by the police in answer to questions put to him, falsely stated that certain persons had committed theft and melted stolen property, it was held that he could not be convicted under this section.¹⁴

Explanation.—The Explanation to this section was added by the Indian Criminal Law Amendment Act (III of 1894), s. 7.

PRACTICE.

Evidence.—Prove (1) that an offence has been committed.

(2) That the accused knew, or had reason to believe, that such offence had been committed.

(3) That he gave the information.

(4) That such information was with respect to that offence.

(5) That the information so given is false.

(6) That when he gave such information he knew or believed it to be false.¹⁵

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, knowing that on or about the——day of——, at——, the offence of——was committed by——gave information respecting the said offence, to wit——, which you knew or believed to be false, and thereby committed an offence punishable under s. 203 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

204. Whoever secretes or destroys any document¹ which he may be lawfully compelled to produce as evidence in a Court of Justice,² or in any proceeding lawfully held before a public servant,³ as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence⁴ before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Destruction of document to prevent its production as evidence.

COMMENT.

This section may be compared with s. 175 as it is merely an aggravated form of the offence described in that section.

Scope.—The section applies whether the proceeding is of a civil or criminal nature. Special and local laws requiring production of documents and containing penalties for destruction or obliteration of such documents are not affected by it.

1: 'Secretes or destroys any document'.—See s. 29, *supra*, as to the definition of 'document'. A person may secrete a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. But it is not necessarily enough to

¹³ *Cheetour Chowkeedar*, (1864) 1 W. R. (Cr.) 18.

¹⁴ *Sarju Sonar*, (1910) 7 A. L. J. R. 1150, 11 Cr. L. J. 438; *Nga Po Lwin*, (1920) 3 U. B. R.

204, 21 Cr. L. J. 700, [1920] AIR (UB) 20; *Akhtiar*, (1912) 6 S. L. R. 143, 14 Cr. L. J. 252.

¹⁵ (1868) 9 W. R. (Cr. L.) 2.

show that, upon an occasion on which it became his duty to produce the document, he failed to discharge that duty, though it may be a cogent piece of evidence. The fact that a man perjures himself by denying the existence of a document which, to his knowledge, is in his custody would be a still more cogent piece of evidence.¹⁶

Secreting document.—Where the plaintiff in a suit referred to arbitration by consent, with a view to prevent a witness from referring to an endorsement on a bond, snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that he had committed this offence.¹⁷

Destroying document.—Where a police-officer took down at first the report of the commission of dacoity made to him, but subsequently destroyed that report and framed another and a false report of the commission of a totally different offence, he was held guilty of this offence.¹⁸ He had secreted or destroyed the first signed report.

The accused, a police-officer, drew up a *panchnama* and had it signed by a *punch*. But finding that it was disfigured by interlineations and scratches, he had the document fairly written out again in textually the same form and had it signed by the same *punch*. The rough document was thereupon destroyed. For doing this act, the accused was convicted of an offence punishable under this section. It was held that the accused had committed no offence under it, for the fair document which he preserved and ultimately presented to the Court must be regarded as the only document which he was lawfully compelled to produce as evidence; and the former writing must be regarded merely as rough notes designed for the preparation of the fair document.¹⁹

The complainant purported to have committed an offence under s. 477, by wilfully and dishonestly destroying two documents, one said to be a written contract, by which the complainant's firm sold to the accused or to his firm certain quantity of shellac, and another spoken of sometimes as a tender and sometimes as a delivery order bearing endorsement in favour of the complainant's firm made by a certain person. It was held that if the documents were found not to be valuable security within the meaning of s. 477, still this section was applicable to the case.²⁰

2. 'Court of Justice.'—See s. 20, *supra*. 3. 'Public servant.'—See s. 21, *supra*.

4. 'With the intention of preventing the same from being produced... as evidence.'—The act must have been done with the intention of preventing the document from being produced or used as evidence. Where a *putwari* was convicted under this section for destroying a leaf out of the Register of Mutations of a village which he might be lawfully compelled to produce in evidence, the conviction was set aside.²¹

There is no question here of the materiality of the evidence. Whether material or not, it must not be secreted or destroyed to evade production in a judicial or other proceeding, if the production may be lawfully compelled.

PRACTICE.

Evidence.—Prove (1) that the accused secreted or destroyed the document; or that he obliterated, or rendered illegible, the whole, or any part of such document.

(2) That he was lawfully compellable to produce the same as evidence (a) in a Court of Justice; or (b) in proceedings lawfully held by a public servant.

(3) That he did as in (1), with the intention of preventing the same from being produced or used as such evidence; or that he did as in (1) after he had been lawfully summoned or required to produce the same for that purpose.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Charge.—I (name and office of Magistrate, etc.) hereby charge you (name of accused) as follows :—

That you, on or about the—day of—, at—, [secreted (or destroyed) a document, to wit—, which you may be lawfully compelled to produce as evidence

¹⁶ *Susenbihari Ray*, (1930) 58 Cal. 1051, S.B.

¹⁷ *Subramania Ghanapati*, (1881) 3 Mad. 291.

¹⁸ *Muhammad Shah Khan*, (1898) 20 All. 307.

¹⁹ *Gangaram Tukaram*, (1912) 14 Bom. L. R.

1163, 13 Cr. L. J. 912.

²⁰ *Debendra v. Bhagirathi*, (1921) 38 C. L. J.

158, 25 Cr. L. J. 167.

²¹ *Amir Chand*, (1889) P. R. No. 24 of 1889.

in a Court (or any proceeding lawfully held before a public servant, to wit—)] (or) [obliterated (or rendered illegible) the whole (or a part) of such document with the intention of preventing the same from being produced (or used) as evidence before a Court (or in any proceeding lawfully held before a public servant, to wit—)] (or) [obliterated (or rendered illegible) the whole (or a part) of such document after you were lawfully summoned (or required) to produce the same], and thereby committed an offence punishable under s. 204 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

205. Whoever falsely personates¹ another, and in such assumed character² makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution,³ shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

False personation for purpose of act or proceeding in suit or prosecution.

COMMENT.

The offence punishable under this section is not merely cheating by using a fictitious name, but by falsely assuming to become other real person and in that character making an admission, confessing judgment, or causing any process to be issued, etc.

The offence of false personation is dealt with in ss. 140, 170, 171, 171D, 416 and this section.

1. 'Personates.'—Personation is an assumption of the name and character of another, a pretence of being another. To 'personate' means to pretend to be a particular person.²²

Where A personated B at a trial with B's consent, which was given to save himself from the trouble of making an appearance in person before the Magistrate, it was held that A was guilty of an offence under this section, and B was guilty of abetment.²³ Where A presented a petition in the name of B who was ill, it was held that A was not guilty, because the mere fact as above disclosed was insufficient to show any intention on the part of A to falsely personate B.²⁴ Where a person was charged and convicted under this section for falsely personating himself as a servant of one H and as such causing a notice under s. 158B of the Bengal Tenancy Act to be served on H by writing before the civil Court process-server "*apne malik ke nam ka notice paia*", it was held that the conviction was bad inasmuch as it was not a case of falsely personating another person within the meaning of this section.²⁵

2. 'Assumed character.'—It is necessary that the accused should have assumed the name and character of the person he is charged with having personated.¹

3. 'Any suit or criminal prosecution.'—Proceedings under the Indian Succession Act are not acts in any suit within the meaning of this section. A false personation during such proceedings is not punishable under this section.² A prosecution under Act III of 1852 is a criminal prosecution within the meaning of this section.³

Fraudulent gain.—This offence is committed, even though the individual personated consents to the personation. Any fraudulent gain or benefit to the offender is not an essential element of this offence.⁴

Personation of imaginary person.—There is a conflict of decisions on the point whether a person commits an offence under this section by personating a purely

²² Per Crompton, J., in *Hague*, (1864) 4 B. & S. 715, 720.

²³ *Suppakon*, (1868) 1 M. H. C. 450, 1 Weir 182.

²⁴ *Narain Acharj*, (1867) 8 W. R. (Cr.) 80.

²⁵ *Qutubuddin*, (1936) 17 P. L. T. 692, [1936] P. W. N. 577, 38 Cr. L. J. 216, [1937] AIR (P) 24.

¹ *Narain Acharj*, (1867) 8 W. R. (Cr.) 80.

² *Oudh Behari Lal*, (1940) 22 P. L. R. 683, 42 Cr. L. J. 275, [1940] AIR (L) 514.

³ *Ganga*, (1871) Unrep. Cr. C. 59.

⁴ *Suppakon*, (1868) 1 M. H. C. 450, 1 Weir 182; *Andi Servai*, (1863) 1 Weir 182; *Kalya Nava Patil*, (1903) 5 Bom. L. R. 138.

imaginary person. The Calcutta High Court has in an old case held that a person by such personation commits this offence.⁵ The Madras High Court, dissenting from the above ruling, has held that "it is not enough to shew the assumption of a fictitious name. It must also, we think, appear that the assumed name was used as a means of falsely representing some other individual. It is not an uncommon thing for men to pass under names not their own for the purpose of disguise, in some instances from blameless, and in other instances indifferent or bad motives—'*incog.*' as the disguise is often termed in the former, and 'with or under an alias' in the latter instances. But whatever the motive, the use of an assumed name without more is not a criminal offence. It only becomes a crime when connected by proof with some other act or piece of conduct; and the gist of the offence of false personation under s. 205, we think, is the feigning to be another known person... There are sections of the Penal Code, under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person. Such are the ss. 140, 170, 171 and 416, but they have no application to the present case, and the last section is made applicable to personation of an imaginary person by an express enactment."⁶

According to the English law such an assumption of an imaginary person does not amount to an offence. One Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin, in the presence of the prosecutor upon a bank at which he had no account, and gave it to the prosecutor as his own cheque drawn in his own name. At the time he drew the cheque he knew that it would be dishonoured. It was held that he was not guilty of forgery.⁷

PRACTICE.

Evidence.—Prove (1) that the accused falsely personated the person in question.

(2) That he made the admission, etc.

(3) That he made such admission, etc., in such assumed character.

(4) That such admission, etc., was made in a suit or a criminal prosecution.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.⁸

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, falsely personated (*name*) in (*specify the suit or criminal proceeding*) before (*office of Judge*) and in such assumed character (*specify the admission of statement made, or judgment confessed, or process caused to be issued, or bail or security given, or any other act done*), and that you thereby committed an offence punishable under s. 205 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.⁹

206. Whoever¹ fraudulently² removes,³ conceals, transfers⁴ or

Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.

delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture⁵

or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice⁶ or other competent authority, or from being taken in execution of a decree or order⁷ which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit,

⁵ *Bhitto Kahar*, (1862) 1 Ind. Jur. O. S. 123.

⁶ *Kadar Ravuttan*, (1868) 4 M. H. C. 18, 19.

⁷ *Martin*, (1879) 5 Q. B. D. 34.

⁸ Criminal Procedure Code, s. 195. See ss.

476-478, 487.

⁹ (1867) 8 W. R. (Cr. L.) 18; (1866) 5 W. R. (Cr. L.) 6.

shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section and ss. 207 and 208 have the effect of rendering criminal all collusive modes by which creditors, or lawful claimants, may be defeated of their just remedies. Sections 421-424 deal with fraudulent transfers.

The concealment or removal of property contemplated in this section must be to prevent the property from being taken. Where the property is already taken and the removal is subsequent, no offence under this section is committed.¹⁰

Object.—The section awards a punishment for fraudulently removing or concealing property to prevent its seizure as a forfeiture in satisfaction of a fine or from being taken in execution of a decree. The Law Commissioners observe : “If...it is an offence against justice in a culprit to escape from custody in order to avoid execution of a sentence of imprisonment, and an offence to harbour or assist him, and that such offences are fit subjects of punishment, we think he [Mr. Norton] ought to allow upon the same grounds that the removal or concealment of property, or any dealing with it in order to prevent the execution of a sentence, of fine, for example, instead of imprisonment, is an offence against justice and a fit subject of punishment.”¹¹

Scope.—A civil suit must be actually pending before a Court and not merely intended to be filed, before a person can prosecute another under this section and s. 207 for a fraudulent transfer of property likely to be taken in execution of the civil decree that is passed or likely to be passed.¹²

1. ‘Whoever.’—The offence may be committed by any one and not necessarily by the owners of the property.

2. ‘Fraudulently.’—There must be a fraudulent removal, sale, or transfer of property, or of some interest therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a fine.¹³ If the act of the accused is dishonest but not fraudulent, no offence is committed under this section. Where the accused, who was guardian of the judgment-debtor, forestalling the action of the Court in sending its official to harvest the crop which was attached, on behalf of a decree-holder, went openly to the field and harvested the crop himself, it was held that he was not guilty of an offence under this section as his act was dishonest but not fraudulent.¹⁴

There is nothing to prevent a judgment-debtor from disposing of his interest in an attached debt. The Court should not presume a fraudulent intention because he does what he is entitled to do.¹⁵ A person who, to protect his own property not legally liable for the decree from confusion with property which is so liable, makes it over to another person, does not commit an offence under this section.¹⁶ A person who fraudulently removes property, intending thereby to prevent that property from being taken in execution of a decree made by a Collector, commits an offence under this section.¹⁷ Where the accused forcibly cut the crops and removed them in spite of the remonstrances of a peon, and there was no trace of any fraudulent removal or concealment, no offence under this section was held to have been committed.¹⁸

As to the definition of ‘fraudulently’, see s. 25, *supra*.

3. ‘Removes.’—The cutting and carrying of crops, which the accused knew to be under attachment, in execution of a certificate under the Public Demands Recovery Act,¹⁹ was held to be an offence under the latter part of this section.²⁰

¹⁰ *Murli*, (1888) 8 A. W. N. 237.

¹¹ 2nd Rep., s. 162, p. 390.

¹² *M. S. Ponuswami*, (1930) 8 Ran. 268.

¹³ *Balmokoond Brojobasi*, (1872) 18 W. R. (Cr.) 65; *Ramaswamy Ambalam v. Nagasubramania Iyer*, [1936] M. W. N. 1150.

¹⁴ *Kothandarama Reddi v. Balarami Reddy*, [1937] M. W. N. 462, [1937] 2 M. L. J. 802, 46 L. W. 139, 39 Cr. L. J. 711, [1937] AIR (M) 713.

¹⁵ *Ram Narain v. Jokhai Ram*, (1905) 3 A. L. L. C.—33

J. R. 1, 3 Cr. L. J. 92.

¹⁶ *Basappa Shivappa*, (1917) 19 Bom. L. R. 535, 18 Cr. L. J. 784, [1917] AIR (B) 265.

¹⁷ *Gaurchandra Chuckerbutty v. Krishna Mohan Sing*, (1868) 2 Beng. L. R. (S. N.) iv, 10 W. R. (Cr.) 46; see also *Murli*, (1888) 8 A. W. N. 237.

¹⁸ *Mahabir Sah*, (1940) 22 P. L. T. 662, 42 Cr. L. J. 251, [1941] AIR (P) 136.

¹⁹ Beng. Act I of 1895.

²⁰ *Sunder Dasadh v. Sital Mahto*, (1900) 28 Cal. 217.

4. 'Transfers.'—This word is not defined in the Code, but it has the same meaning as 'transfer of property' defined in s. 5 of the Transfer of Property Act, IV of 1882. 'Transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, and 'to transfer property' is to perform such act. A creditor commits no fraud, who anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor.²¹ Similarly, the assignment by the decree-holder of a decree obtained upon the basis of a debt which is under attachment does not *per se* amount to the commission of this offence inasmuch as such assignment cannot affect the rights of the attaching creditors.²² Where the accused, who was judgment-debtor, gave an undertaking to the executing Court not to alienate certain property pending the disposal of a claim petition but immediately thereafter executed a registered deed of conveyance transferring the property to his own son and he was thereupon prosecuted for an offence under this section, it was held that the object of the transfer by the accused in breach of his undertaking was to deceive his creditor, that the ingredient of secrecy was not negated by reason of the registration of the deed of transfer, and that the accused was liable to be convicted for an offence under this section.²³

5. 'From being taken as a forfeiture.'—The word 'taken' has been used in the sense of 'seized' or 'taken possession of.'²⁴ The forfeiture must be under a sentence pronounced by a Court of Justice or other competent authority. The distraint of property by a Collector in the collection of land revenue cannot be described as forfeiture under a sentence pronounced or likely to be pronounced. Two tents were distrained under the orders of a revenue authority for the recovery of an arrear of land revenue, and were committed to the care of the accused. When the time fixed for the sale of the property arrived, the accused produced two other tents of inferior value and concealed or removed those distrained. It was held that they were not guilty under this section.²⁵

6. 'Court of Justice.'—See s. 20, *supra*.

7. 'From being taken in execution of a decree or order.'—The words "taken in execution" mean something equivalent to appropriated towards execution or utilised effectively in aid of execution. Where cattle were attached in execution of a decree and the accused removed them from the possession of the complainant, in whose possession the cattle had been left, it was held that the accused was guilty under this section and s. 379.¹ But the mere harvesting of attached crops by a judgment-debtor will not bring him within the scope of this section, unless it is shown that he did it with the fraudulent intention of preventing crops from being taken in execution of the decree and not merely with the idea of saving them.²

PRACTICE.

Evidence.—Prove (1) that the sentence of fine had been, or was, to the knowledge of the accused, likely to be, pronounced; or that the decree or order had been, or was, to the knowledge of the accused, likely to be, made.

(2) That it was a Court of Justice or other competent authority pronouncing or about to pronounce such sentence; or that it was a Court of Justice making or about to make such decree or order in a civil suit.

(3) That the property in question or interest therein had become, or was likely to become, liable to be taken as a forfeiture of such fine, or taken in execution of such decree or order.

(4) That the accused removed, concealed, transferred or delivered such property or interest therein with intent thereby to prevent such property from being taken.

(5) That he did as above with intent to defraud.

²¹ *Appa Malliya*, (1876) Unrep. Cr. C. 110.

²² *Ram Narain v. Jokhai Ram*, (1905) 3 A. L. J. R. 1, 3 Gr. L. J. 92.

²³ *Crown Prosecutor v. Sellamuthu*, [1940] M. L. J. 761, 51 L. W. 744, [1938] M. W. N. 1248, (1938) 41 Cr. E. J. 397, [1940] AIR (M) 271.

²⁴ *Sahebrao Baburao*, (1936) 38 Bom. L. R. 1192, 38 Cr. L. J. 272, [1937] AIR (B) 46.

²⁵ *Murli*, (1888) 8 A. W. N. 237.

¹ *Sidhayyan v. Chinnamathayyan*, [1936] M. W. N. 212.

² *Sheikh Dawood Rowther v. Abdul Kadar Rowther*, (1938) 48 L. W. 411, [1938] M. W. N. 1009, [1938] 2 M. L. J. 843, 40 Cr. L. J. 312, [1938] AIR (M) 976.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.³

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you fraudulently removed (*or concealed, or transferred, or delivered to* —) your property (*specify it*) intending thereby to prevent the said property from being taken as a forfeiture (*or fine*), under the sentence which had been pronounced (*or which you knew to be likely to be pronounced*) by (*specify the Court of Justice, etc.*,) in criminal case No. — [(*or from being taken in execution of the decree which had been made by (specify the Court) in Civil Suit No. —*)], and that you thereby committed an offence punishable under s. 206 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

207. Whoever¹ fraudulently² accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced by a Court of Justice³ or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fraudulent claim to property to prevent its seizure as forfeited or in execution.

COMMENT.

This section deals with the receiver, acceptor, or claimer of property to prevent its seizure as a forfeiture. It punishes the accomplice just as the preceding section punishes the principal offender.

1. 'Whoever.'—See s. 206, *supra*.
2. 'Fraudulently.'—See s. 25, *supra*.
3. 'Court of Justice.'—See s. 20, *supra*.

PRACTICE.

Evidence.—Prove (1) that the sentence of fine had been, or was, to the knowledge of the accused, likely to be, pronounced; or that the decree or order had been, or was, to his knowledge, likely to be, made:

(2) That it was a Court of Justice, or other competent authority, pronouncing, or about to pronounce, such sentence; or that it was a Court of Justice making, or about to make, such decree or order in a civil suit.

(3) That the property in question or interest therein had become, or was likely to become, liable to be taken as a forfeiture for each such fine; or taken in execution of such decree or order.

(4) That the accused accepted, received or claimed such property or interest with intent to defraud; or that he practised a deception touching the right thereto.

(5) That he then had no right or rightful claim thereto.

(6) That he then knew he had no right or rightful claim thereto.

(7) That he did as above in order to prevent such property or interest from being so taken.

³ Criminal Procedure Code, s. 195. See also ss. 476-478, 487. See *Bahrumal*, (1895) Unrep. Cr. C. 803, Cr. R. No. 59 of 1895; *Sunder Dasadh v. Sital Mahto*, (1900) 28 Cal. 217; *Palanisami*

Gounder v. Bhagavati Gounder, [1942] 2 M. L. J. 246, (1941) 55 L. W. 518, [1942] M. W. N. 492, (1941) 44 Cr. L. J. 129, [1942] AIR (M) 675 (1).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.⁴

208. Whoever¹ fraudulently² causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied,³ or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATION.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

COMMENT.

This section prevents the abuse of getting some one to file a collusive suit for recovery of the whole property and suffering a decree to be passed. It punishes persons making fictitious claims in order to secure the property of the defendant against persons to whom he may become indebted in future.

1. 'Whoever.'—See s. 206, *supra*.
2. 'Fraudulently.'—See s. 25, *supra*. Fraud is the essence of the offence under this section.
3. 'Satisfied.'—See s. 210, *infra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused, or suffered, the decree or order to be passed against him.

(2) That such decree or order was for a sum not due by the accused; or for a sum larger than was due; or for property or interest therein to which the decree-holder was not entitled.

(3) That the accused did as in (1) with intent to defraud.

Or prove the following points :—

(1) That a decree against the accused had been satisfied.

(2) That he, afterwards, caused or suffered such decree or order to be executed against him.

(3) That such execution was for that in respect of which it had been so satisfied.

(4) That the accused did as above with intent to defraud.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, fraudulently caused (or suffered) a decree (or order), to wit—, in Suit No.—of the Court of—

to be passed against you, and which was for a sum not due [or for a larger sum than is due] to such person or for any property or interest in property to which the decree-holder was not entitled or fraudulently caused (or suffered) a decree (or order), to wit—, decree No.—, in Suit No.—, decided by the Court—on—, to be executed against you after it had been satisfied, and thereby committed an offence under s. 208 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

209. Whoever fraudulently¹ or dishonestly,² or with intent to injure³ or annoy any person,⁴ makes in a Court of Justice⁵ any claim which he knows to be false,⁶ shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

COMMENT.

This section relates to false and fraudulent claims in a Court of Justice.⁶ It is much wider than the last section as it applies to a person who is acting fraudulently or dishonestly. Not only the claim must be false within the knowledge of the person making it, but the object of it must be to defraud, to cause wrongful loss or wrongful gain, to injure or to annoy. The section punishes the making of a false claim. The offence will be complete as soon as a suit is filed. If a person applies for the execution of a decree which has already been executed, his act is an offence under the next section.

1. 'Fraudulently.'—See s. 25, *supra*. 2. 'Dishonestly.'—See s. 24, *supra*.

3. 'Injure.'—See s. 44, *supra*.

4. 'Any person.'—It is not necessary that the party to whom the offender intends to cause wrongful loss or annoyance should be the party against whom the suit is instituted (explanation to clause 196 in the Draft Code).⁷ The object of the suit may be to defraud a third party.

5. 'Court of Justice.'—See s. 20, *supra*. "Many bodies are not Courts although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality."⁸ A manager dealing with a claim under the Chota Nagpur Encumbered Estate Act, 1876, is not a Court.⁹

It is immaterial whether the Court in which the false claim was instituted had jurisdiction to try the suit or not. The words in the section are "a Court of Justice", and not "a Court of Justice having jurisdiction."¹⁰

6. 'Any claim which he knows to be false.'—A person who brings a claim in the civil Court which he knows to be false commits an offence under this section.¹¹ He does not by so doing, if he succeeds, commit the offence of extortion or, if he fails, of attempting to commit extortion.¹² The ordinary remedy for a person who has had a false suit brought against him, is to apply to the Court to prosecute the plaintiff under this section. In such a case there will be the benefit of the Court's opinion whether the plaintiff was acting with any sinister or improper motive.¹³ An attempt to execute a decree which has been satisfied cannot correctly be described as a false claim.¹⁴

The section is not limited to cases where the whole claim made by the defendant is false. The accused brought a suit against a person to recover Rs. 88-11-0 alleging that the whole of the amount was due from the defendant. The defendant produced a receipt purporting to have been made by the plaintiff for a sum of Rs. 71-3-3, and this

⁶ *Beegun Mahtoon*, (1869) 12 W. R. (Cr.) 37. There appears to be a slip in the judgment reported, and consequently the latter part of the head-note is inaccurate.

⁷ 2nd Rep., s. 166, p. 391.

⁸ Halsbury's Laws of England (2nd Edn.) Vol. VIII, s. 1, p. 526.

⁹ *Kewal Ram*, (1935) 15 Pat. 69.

¹⁰ *Badri*, (1919) 20 Cr. L. J. 698.

¹¹ *Hikmat-ullah Khan v. Sakina Begam*, (1930) 53 All. 416.

¹² *Khushal*, (1917) 20 O. C. 129, 18 Cr. L. J. 651, [1917] AIR (O) 117.

¹³ *Gangoomal*, (1924) 18 S. L. R. 83, 26 Cr. L. J. 941, [1925] AIR (S) 268.

¹⁴ *Begun Mahtoon*, (1869) 12 W. R. (Cr.) 37 *Bismilla Khan*, [1946] Nag. 686.

amount was proved to have been paid to the accused. The accused was thereupon prosecuted and convicted under this section. It was contended on his behalf that because a part of the accused's claim was held to be well-founded and due and owing, he could not be convicted under this section. It was held that the conviction was right. Straight, J., said: "...if that view were adopted, a man having a just claim against another for Rs 5, may make claim for Rs. 1,000, the Rs. 995 being absolutely false, and he may escape punishment under this section."¹⁵

A person cannot be convicted both of fraudulently and dishonestly making a false claim in a Court of Justice and of falsely attesting the plaint in the false case the latter being an essential ingredient of the former offence.¹⁶ Because the verification of the plaint was a part of the proceeding under which the claim was brought, and did not constitute a separate act which could be treated as a separate offence.

PRACTICE.

Evidence.—Prove (1) that the claim in question was made in a Court of Justice.

(2) That the accused made such claim.

(3) That such claim was a false one.

It is not enough to show that the plaintiff in the civil suit failed to discharge the burden of proof or that in the evidence adduced for the plaintiff there were discrepancies or improbabilities which made it impossible for the Court to rely with confidence on their evidence or even which made it improbable that the fact alleged was true. In a prosecution based on the allegation that a false claim was wilfully presented the prosecution will have to prove affirmatively that the case was false.¹⁷

(4) That the accused when making such claim knew it to be false.¹⁸

(5) That he made such claim, intending to defraud, or to cause wrongful gain or loss, or annoy the person in question.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.¹⁹

The complaint must be made by the Court before which the plaint for the false claim is filed and not by the Court to which the case is transferred after setting aside of the *ex parte* decree.²⁰

Where a plaintiff is called upon to show cause why he should not be prosecuted under this section, he should be afforded every opportunity of adducing evidence in support of his claim and to remove any doubt in the mind of the Court as to the falsity of the case.²¹

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, fraudulently (*or dishonestly or with intent to injure or annoy any person*) made a claim, to wit—(*state the particulars of the claim*) in Suit No.—of—in the Court of—and which you knew to be false, and thereby committed an offence under s. 209 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

210. Whoever fraudulently obtains a decree or order¹ against

Fraudulently obtaining decree for sum not due. any person for a sum not due, or for a larger sum than is due; or for any property or interest in property to which he is not entitled, or fraudulently

causes a decree or order to be executed² against any person after it has been satisfied³ or for anything in respect of which it has been

¹⁵ *Bulaki Ram*, (1889) 10 A. W. N. 1, 2.

¹⁶ *Zar Muhammad Khan*, (1901) 21 A. W. N. 187.

¹⁷ *Hiralal Sarda*, (1932) 13 P. L. T. 370, 38 Cr. L. J. 860, [1932] AIR (P) 243.

¹⁸ *Baisakhi*, (1888) P. R. No. 38 of 1888.

¹⁹ Criminal Procedure Code, s. 195.

²⁰ *Hiralal Sarda*, (1932) 13 P. L. T. 370, 38 Cr. L. J. 860, [1932] AIR (P) 243.

²¹ *Chakauri Rai*, (1919) 21 Cr. L. J. 158.

satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is a counterpart of s. 208 in respect of fraudulent decrees, just as s. 207 is the counterpart of s. 206 in respect of fraudulent transfers and conveyances; the object of the Code being to penalise both parties alike. This section taken together with s. 208 will enable both plaintiff and defendant in a fraudulent or collusive suit or execution to be dealt with alike: Section 208 punishes the fraudulent defendant, this section, the fraudulent plaintiff.

1. **'Fraudulently obtains a decree or order.'**—See s. 25, *supra*, as to the definition of 'fraudulently.' In this and in the corresponding s. 208 the intention to defraud is essential. The offence is committed when a decree or order (e.g. order for attachment)²² is fraudulently obtained for a sum not due. The fact that the decree has not been set aside, though admissible to prove that there was no fraud, is not a bar to a prosecution under this section.²³ It is immaterial whether the Court had or had not, power to pass the decree.²⁴ If there is a mistake through misunderstanding but not fraud, no offence under this section is committed.²⁵

2. **'Causes a decree or order to be executed.'**—The mere presentation of an application for execution of a decree already executed will not be sufficient. The accused must have caused the decree to be executed against the opposite party 'after it has been satisfied.'²¹ When a decree-holder does not want to proceed with the execution and gets his execution application dismissed he cannot be convicted under this section for fraudulently causing it executed after it has been satisfied.² 'The decree or order' must be that of a civil or revenue Court. The orders of a criminal Court are merely declaratory and do not, therefore, come within this section.

3. **'After it has been satisfied.'**—Where a person applies for the execution of a decree which has already been executed, he commits an offence under this section.³ The words "after it has been satisfied" indicate only the fact of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognize it, not being certified to the Court, does not prevent the decree-holder from being properly convicted of an offence under this section.⁴ The words 'any Court' in s. 258 (O. XXI, r. 2), Civil Procedure Code, have no application to a criminal Court, investigating a charge of fraudulently executing a decree under this section. These words do not bar any criminal remedy which an injured judgment-debtor may have against a fraudulent decree-holder, whether by a prosecution under ss. 193, 210, 406, or any other section of the Code.⁵

The word 'satisfied' in this section is to be understood in its ordinary meaning and not as referring to decrees, the satisfaction of which has been certified to the Court.⁶

M obtained a decree for the sale of half of certain property. He executed the decree thrice. First, he applied for the sale of the half but in his second application, which was infructuous, he applied for the sale of the whole property and actually got the same sold by his third application. On the judgment-debtor's objection, part of the property was exempted and the decree-holder was put on his trial for an offence under s. 193 which in appeal was changed to this section. It was held that the facts proved did not establish a criminal intention.⁷

When offence is complete.—The offence of fraudulently causing a decree, wholly or in part satisfied, to be executed is completed when an application for execu-

²² *Hikmat-ullah Khan v. Sakina Begam*, (1930) 53 All. 416.

²³ *Molla Fuzla Karim*, (1905) 33 Cal. 193.

²⁴ *Badri*, (1919) 20 Cr. L. J. 698.

²⁵ *Daya Ram*, (1914) 15 P. L. R. 197, 15 Cr. L. J. 263, [1914] AIR (L) 254.

¹ *Shama Charan Das v. Kasi Naik*, (1896) 23 Cal. 971. See *Begun Mahtoon*, (1869) 12 W. R. (Cr.) 37; *Lalu*, (1885) P. R. No. 7 of 1885.

² *Bismilla Khan*, [1946] Nag. 686.

³ *Begun Mahtoon*, (1869) 12 W. R. (Cr.) 37.

⁴ *Madhub Chunder Mozumdar v. Novodeep Chunder Pundit*, (1888) 16 Cal. 126; *Mutturaman Chetti*, (1881) 4 Mad. 325; *Pillala*, (1885) 9 Mad. 101, followed in *Munshi Ram v. Dera Mul*, (1899) 1 U. B. R. (1897-1901) 278.

⁵ *Bapuji Dayaram*, (1886) 10 Bom. 288.

⁶ *Ibid.*

⁷ *Mangat Rai*, (1909) 7 A. L. J. R. 93, 11 Cr. L. J. 202.

tion has been presented and upon it the judgment-debtor has been summoned to show cause why it should not be executed. In such a case the offence is not complete until either the judgment-debtor has appeared and made no objection, or has made an objection which has been overruled, and the Court has thereupon proceeded to order execution.⁸

PRACTICE.

Evidence.— Prove (1) that the accused obtained the decree or order or suffered or permitted the same to be done in his name.

(2) That such decree or order was for a sum not due ; or that it was for a sum larger than what was actually due ; or that it was for property, or an interest therein, to which he was not entitled.

(3) That the accused did as above with intent to defraud.⁹

Or prove the following points :—

(1) That the accused obtained the decree or order.

(2) That he obtained satisfaction thereof.

(3) That, after obtaining such satisfaction, he caused such decree or order to be executed, or suffered, or permitted the same to be so done in his name.

(4) That such execution was so obtained, etc., for that in respect of which it had been so satisfied.

(5) That the accused did as above with intent to defraud.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.¹⁰

Where the facts primarily and essentially disclose an offence under this section, the other offences alleged being merely subsidiary to the main offence, the complainant cannot be permitted to evade the provisions of s. 195, Criminal Procedure Code, by omitting this section from the complaint.¹¹

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, fraudulently obtained a decree (*or order*) in Suit No.— of—against you for Rs.—which was not due (*or was a larger sum than was due*) [*or for any property or interest in property to which you are not entitled*] [*or fraudulently caused a decree (*or order*) to be executed against—after it had been satisfied (*or fraudulently suffered or permitted any such act to be done in your name*)*], and thereby committed an offence punishable under s. 210 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

211. Whoever, with intent to cause injury to any person,¹ institutes or causes to be instituted any criminal proceeding² against that person, or falsely charges any person with having committed an offence,³ knowing that there is no just or lawful ground for such proceeding or charge⁴ against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ;

and if such criminal proceeding be instituted⁵ on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

⁸ *Naurang Mal*, (1902) P. R. No. 13 of 1902.

⁹ *Hari Ram*, (1929) 30 P. L. R. 392, 30 Cr. L. J. 666, [1929] AIR (L) 676.

¹⁰ Criminal Procedure Code, s. 195; *Sadhuram v. Chimandas*, [1940] Kar. 275.

¹¹ *Tarachand Wadhwal*, (1943) 46 Cr. L.J. 97, [1944] AIR. (S) 180.

COMMENT.

The section includes two distinct offences, namely, (1) actually instituting or causing to be instituted false criminal proceedings, and (2) preferring a false charge.¹² The former assumes the latter, but the latter may be committed where no criminal proceedings follow. Difference is made in punishment according as the charge relates to offences punishable with imprisonment which may extend to seven years or more or otherwise. But under the second paragraph there should be an actual institution of a criminal proceeding on a false charge. The mere making of a false charge would be punishable under the first paragraph. Thus two conditions are necessary before the enhanced punishment provided in the second paragraph could be inflicted: (1) proceedings on the false charge should have been actually instituted; and (2) the false charge must be in respect of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards.

Sections 182 and 211.—The Bombay High Court has held that the criminal law makes a clear distinction between a false charge which comes under s. 211 and false information given to the police, in which latter case the offence falls under s. 182. A person prosecuting another under s. 182 need not prove malice and want of reasonable and probable cause, except so far as they are implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an inquiry under s. 211, on the other hand, proof of the absence of just and lawful ground for making the charge is an important element.¹³ The action which s. 211 renders penal is action entailing very serious consequences and therefore the more serious consideration is required on the part of the individual who takes it. It is sufficient, therefore, in such cases, for the prosecution to establish that there was no just or lawful ground for the action taken and that the accused knew this. But something more is required under s. 182. The prosecution must prove not merely absence of reasonable or probable cause for giving the information, but a positive knowledge or belief of the falsity of the information given.¹⁴ If the information conveyed to the police amounts to the institution of criminal proceedings against a defined person or amounts to the falsely charging of a defined person with an offence, then the person giving such information is guilty of an offence under s. 211. In such a case s. 211 is, and s. 182 is not, the appropriate section under which to frame a charge. Section 182, when read with s. 211, must be understood as referring to cases where the information given to the public servant falls short of amounting to an institution of criminal proceedings against a defined person and falls short of amounting to the falsely charging of a defined person with an offence as defined in the Penal Code.¹⁵ Where a person specifically complains that another man committed an offence and does so falsely with the object of causing injury to that person, he is guilty of making a false charge of an offence under s. 211 and not under s. 182.¹⁶

A petition made by a person to the police falsely stating that the petitioner suspects another person of having committed an offence and praying for an inquiry, does not amount to an institution of criminal proceedings against that person within the meaning of s. 211. The petitioner should be charged under s. 182 with having given false information with intent to cause a public servant to use his lawful power to the injury of another person.¹⁷

The Bombay High Court has held that a First Class Magistrate cannot give himself jurisdiction to try an offence under s. 211 by treating it as an offence under s. 182.¹⁸ The Calcutta, the Madras and the Allahabad High Courts differ from the view of the Bombay High Court.

The Calcutta High Court has ruled that a prosecution for a false charge may lie under s. 182 or s. 211, but if the false charge is a serious one, the gravest s. 211 should

¹² *Jan Muhammad Husen*, (1885) P. R. No. 1 of 1886; *Nobokisto Ghose*, (1867) 8 W. R. (Cr.) 87; *Rampat*, (1900) P. R. No. 26 of 1900.

¹³ *Raghavendra v. Kashinathbhai*, (1894) 19 Bom. 717.

¹⁴ *Ramkrishna Yeshwant Adarkar*, (1906) 9 Bom. L. R. 33, 31 Bom. 204, followed in *X*, (1924) 19 S. L. R. 91 25 Cr. L. J. 1358, [1925]

AIR (S) 184.

¹⁵ *Apaya Tatoba Munde*, (1913) 15 Bom. L. R. 574, 14 Cr. L. J. 491.

¹⁶ *Arjun*, (1882) 7 Bom. 184; *Arjun*, (1863) 1 B. H. C. 87.

¹⁷ *Gopal Bhikaji*, (1873) Unrep. Cr. C. 72.

¹⁸ *Lakshman*, (1893) Cr. R. No. 30 of 1893 Unrep. Cr. C. 670.

be applied and the trial should be full and fair.¹⁹ An offence under s. 211 includes an offence under s. 182; it is, therefore, open to a Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211.²⁰ Where a false charge is made to the police of a cognizable offence, the offence committed by the person making the charge falls within the meaning of s. 211 and not s. 182.²¹

The Madras High Court has taken the same view as the High Court of Calcutta. It has held that there is no error in a conviction under s. 182, when the false charge made before the police is punishable under the final clause of s. 211. The High Court may quash the conviction and sentence for the minor offence and direct a trial before a tribunal having jurisdiction for the graver; but whether it will do so, or not, is a question not of law, but of expediency on the facts of the particular case.²² A person making a false charge of theft to the police is liable to be punished both under ss. 182 and 211, though his primary object in making the charge may have been to protect himself rather than to injure the person falsely charged.²³ In a later case, however, it has held that for an offence under s. 182 it is only necessary that the information given by the accused to a public servant should be false to his knowledge, whereas to constitute an offence under s. 211, it is necessary that the accused should institute or cause to be instituted some criminal proceedings against another person or should falsely charge him with having committed an offence.²⁴ When a complaint sets forth certain facts disclosing a minor offence and also a graver offence the prosecution should ordinarily be for the graver offence and if in entertaining such a complaint there is a legal bar to taking cognizance of the graver offence by reason of the want of a complaint by the Magistrate, the legal consequence should not be allowed to be evaded by confining the case to the minor offence alone and disposing of it accordingly.²⁵ Where, when all the facts of a complaint were considered, it was clear that the only section which was appropriate and which must be applied was this section, and a complaint under that section could, in the circumstances of the case, be made by a private person, it was held that the Court must regard the complaint as being one under this section primarily and that it was not debarred from trying the case under that section simply because the complaint also disclosed a minor offence under s. 182 of the Code for which a written complaint from a public servant was necessary.¹

The Allahabad High Court once held that where a specific false charge was made, the proper section, for proceedings to be adopted under, was s. 211.² But this view is modified in a subsequent case in which Edge, C. J., said: "Although it is difficult to see what case could arise under s. 211 to which s. 182 could not be applied yet s. 182 would apply to a case which might not fall under s. 211. The offence under s. 182 is complete when false information is given to a public servant by a person who believes it to be false, but who intends thereby to cause such public servant to institute criminal proceedings against a third person. The offence is complete although the public servant takes no step towards the institution of such criminal proceedings... it is in such a case not at all necessary that the public servant should take any step whatever on the false information before instituting and prosecuting to a conclusion a charge under s. 182 against the person who had given such false information.... In cases to which s. 211 especially applies, and in which a criminal proceeding has been instituted, a Court should... as a rule proceed to determine such criminal proceeding instituted in it and should give the person instituting such proceeding, a reasonable opportunity of supporting his case before proceeding against him for an offence under s. 211. We are unable to ascertain that there is any restriction imposed by the Indian Penal Code or by the Criminal Procedure Code of 1882 upon the prosecution of an

¹⁹ *Sarada Prosad Chatterjee*, (1904) 32 Cal. 180, followed in *Gati Mandal*, (1905) 4 C. L. J. 88, 4 Cr. L. J. 99. *Raffee Mahomed v. Abbas Khan*, (1867) 8 W. R. (Cr.) 67, is no longer of any authority.

²⁰ *Bhokteram v. Heera Kolita*, (1879) 5 Cal. 184.

²¹ *Giridhari Naik*, (1901) 5 C. W. N. 727; *Tofazel Hoosain v. H. C. Hunt*, (1930) 34 C. W. N. 556, 32 Cr. L. J. 110, [1930] AIR (C) 711.

²² (1872) 7 M. H. C. Appx. 5.

²³ *Public Prosecutor v. D. Venkata Reddi*, (1898) 1 Weir 120.

²⁴ *Mallela Obiah of Owk*, [1917] M. W. N. 875, 19 Cr. L. J. 38.

²⁵ *Dholiah*, (1931) 54 Mad. 1018.

¹ *Muthuveelu Kudumburam*, (1936) 59 Mad. 1083.

² *Jugal Kishore*, (1886) 8 All. 382.

offence either under s. 182 or 211. It appears to us that it has been left to the discretion of the Court to determine when and under what circumstances prosecutions should be proceeded with under ss. 182 and 211.³ In a later case, however, the same High Court observed incidentally that s. 211 was not intended to apply to anything except charges preferred in Court to a Magistrate, and s. 182 was intended to apply where false information was given to the police.⁴ The soundness of this view is doubted in subsequent cases.⁵ Where the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police, or leaving the police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorized to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that Court proceedings be taken against him, amounts to making a charge.⁶ Thus, where the accused laid a clear and definite information before the police to the effect that there was a dacoity in his house and that certain particular persons had taken part in it, and it was found that no dacoity had taken place and that, at any rate, the persons mentioned by the accused never took part in the dacoity, it was held that the accused was guilty of an offence under s. 211.⁷ When either of the sections 182 or 211 is applicable at the instance of a Police Superintendent or a Magistrate, the discretion or power of one or the other to proceed is not limited in any way whatever by the discretion vested in the other.⁸

The Patna High Court has adopted the view of the Calcutta High Court. It has held that an offence under s. 211 must always include an offence under s. 182 and the Court is competent to proceed and convict for the minor offence under s. 182 even though the major offence under s. 211 has been committed.⁹ Even if a Magistrate is disentitled by a statutory bar to take cognizance of an offence under s. 182, he can take cognizance of an offence under s. 211. He may take cognizance of an offence under s. 211 on the complaint of the investigating police-officer though he is not also an officer referred to under s. 190 (1) (a), Criminal Procedure Code, but if the charge under s. 211 fails, there cannot by reason of s. 190 (1) (a) be a conviction under s. 181.¹⁰

The former Chief Court of the Punjab had expressed its opinion similar to that of the Bombay High Court in a case where A falsely, and with intent to injure, informed the police that B had stolen property in his house. The police searched B's house, and the information proved to be false. It was held that A had instituted criminal proceedings and he was guilty of an offence under this section and not under s. 182.¹¹ The Lahore High Court has held that an offence under s. 182 is included in the more serious offence falling under s. 211, and a prosecution for a false charge may be either under s. 182 or s. 211 though clearly if s. 211 does apply and the false charge is serious, prosecution should be under the more serious section s. 211. But this does not mean that where an offence under s. 182 is complete and the prosecution is lodged under s. 182, the proceedings under s. 182 must subsequently be quashed merely because the accused, not content with the false report to the police, had subsequently made a false complaint to a Magistrate in addition, and thereby exposed himself to a prosecution under s. 211. A repetition of the same complaint to a different person and under different circumstances, would not render the person, who made the false complaint, free from liability to prosecution for an offence which he had already committed and which was complete in itself.¹²

³ *Raghu Tiwari*, (1898) 15 All. 336, 337, 338.

⁴ *Hardwar Pal*, (1912) 34 All. 522, 527.

⁵ *Kashi Ram*, (1924) 46 All. 906; *Samokhan*, (1924) 26 Cr. L. J. 594, [1925] AIR (A) 472.

⁶ *Kashi Ram*, (1924) 46 All. 906.

⁷ *Samokhan*, (1924) 26 Cr. L. J. 594, [1925] AIR (A) 472.

⁸ *Jang Bahadur Singh*, (1928) 26 A. L. J. R. 533, 30 Cr. L. J. 272, [1928] AIR (A) 342.

⁹ *Daroga Gope*, (1925) 5 Pat. 33.

¹⁰ *Kantir Missir*, (1929) 11 P. L. T. 88, 30 Cr. L. J. 710, [1930] AIR (P) 98.

¹¹ *Muthra v. Roora*, (1870) P. R. No. 16 of 1870. See *Todur Mal v. Mussammat Bholi*, (1882) P. R. No. 14 of 1882.

¹² *Nota Ram*, [1942] Lah. 675, overruling *Shah Mohammad*, (1941) 43 P. L. R. 191, 42 Cr. L. J. 667, [1941] AIR (L) 216.

The former Chief Court of Lower Burma had adopted the view of the Calcutta, the Allahabad and the Madras High Courts.¹³ The Rangoon High Court has held that an offence under s. 211 includes an offence under s. 182, but the converse does not hold good. The accused laid a false charge of robbery and hurt in an information before the police, which was thrown out. Subsequently, he lodged a complaint in Court which was dismissed by the Magistrate. It was held that the accused should be prosecuted under s. 211 on a complaint by the Court.¹⁴ This case has been dissented from in a subsequent case in which the accused laid a false charge of robbery in an information before the police, who after investigation threw out the case. The accused thereafter lodged a complaint in Court for the same offence but the complaint was dismissed. It was held that the accused had committed two distinct offences under s. 182 and this section, and could be prosecuted for either offence, though in the ordinary way if a prosecution takes place it should be for the more serious of the two offences committed.¹⁵ Subsequently it has held that where a person does not confine himself to reporting what he knows of the facts, stating his suspicions and leaving the matter to be further investigated by the police, but definitely alleges his belief in the guilt of certain men and insists on proceedings being taken against them, it amounts to a charge within the meaning of this section. And as soon as the charge is made, the offence under this section is complete and the injured party can file a complaint against the informant under this section irrespective of the fact that the latter files a complaint subsequently.¹⁶

Ingredients.—The necessary ingredients to constitute a false charge under this section are three :—

1. An intention to cause injury to a particular person.
2. Such injury should have been intended—
 - (a) by instituting or causing to be instituted criminal proceedings against that person, or
 - (b) by falsely charging him with having committed an offence.
3. Knowledge that there is no just or lawful ground for such proceedings or charge against that person.

1. 'Whoever with intent to cause injury to any person.'—The word 'whoever' indicates that the section applies to anyone who contravenes its provisions. The section applies not only to a private individual, but also to an officer who brings a false charge of an offence with intent to injure.¹⁷ 'Intent to cause injury' is an essential part of the offence.¹⁸ The phrase is precisely the same as the English legal term 'maliciously.' 'Injury' denotes any harm whatever, illegally caused to any person in body, mind, reputation or property (s. 44).

2. 'Institutes or causes to be instituted any criminal proceedings.'—The term 'institution' means the institution either by the accused himself, or by the police or others in consequence of the accused's action, in some criminal Court.¹⁹ Institution of a criminal proceeding means laying of an information before a Magistrate.²⁰ The laying of an information which the police-officer has power to investigate and the causing of that officer to investigate the information amounts to institution of criminal proceedings.²¹

Under this section, 'instituting a criminal proceeding' may be treated as an offence in itself apart from 'falsely charging' a person with having committed an offence.²² There are two modes in which a person aggrieved may seek to put the criminal law in motion : (1) by giving information to the police,²³ and (2) by lodging a complaint before a Magistrate.²⁴ A person who sets the criminal law in motion by

¹³ *Ma Saw Yin*, (1921) 11 L. B. R. 43, 23 Cr. L. J. 55, [1921] AIR (LB) 43.

¹⁴ *Rambrose*, (1928) 6 Ran. 578; *Maung Pe v. Maung Chaw*, (1928) 29 Cr. L. J. 1044, [1928] AIR (R) 243. The same is the view of the Judicial Commissioner's Court in Sind : *Ramchand*, (1928) 30 Cr. L. J. 399, 23 S. L. R. 225, [1929] AIR (S) 115.

¹⁵ *Ma Paw*, (1930) 8 Ran. 499.

¹⁶ *Nga Ba Shein*, (1938) 35 Cr. L. J. 1259, [1934] AIR (R) 21.

¹⁷ *Nabodeep Chunder Sirkar*, (1869) 11 W. R.

(Cr.) 2.

¹⁸ *Gopal Dhanuk*, (1881) 7 Cal. 96.

¹⁹ *Muhammad Hayat*, (1921) P. W. R. No. 6 of 1922, 23 Cr. L. J. 82, [1922] AIR (L) 133; *Mi Wa*, (1915) 8 L. B. R. 534, 18 Cr. L. J. 758.

²⁰ *Boaler*, [1914] 1 K. B. 122, 131.

²¹ *Nanhkoo Mahtoon*, (1936) 17 P. L. T. 472, [1936] P. W. N. 276, 37 Cr. L. J. 862, [1936] AIR (P) 358.

²² *Nobokisto Ghose*, (1867) 8 W. R. (Cr.) 87.

²³ Section 154, Criminal Procedure Code.

²⁴ Sections 190, 200, *ibid*.

making to the police a false charge in respect of a cognizable offence institutes criminal proceedings under the first part of this section; and it is not necessary that the complaint should be made to a Magistrate.²⁵ But as the police have no power to take any proceedings in *non-cognizance* cases without the orders of a Magistrate, a false charge of such offence, made to the police, is not an institution of criminal proceedings but merely a false charge.¹ The distinction between cognizable and non-cognizable offences relates to the powers of the police only, and it will, therefore, seem that the false charge of any offence, whether cognizable or non-cognizable, before a Magistrate, is an institution of criminal proceedings.

When once information is given to police about a cognizable offence, any statement subsequently made by another person to the police is a statement made in police investigation and cannot be made the foundation of a prosecution under this section though it is false.²

If a person files an information before a Magistrate, disclosing circumstances of a civil nature, he cannot be proceeded with under this section if the circumstances alleged by him are found to be false.³ Where a complainant prefers a criminal charge before a Magistrate who neither examines him on oath nor takes down his statement in writing, he cannot be proceeded against under this section even if the charge turns out to be a false one.⁴

A person who answers questions put to him by a police-officer making an investigation under s. 161, Criminal Procedure Code, does not institute or cause to be instituted criminal proceedings within the meaning of this section.⁵

3. 'Falsely charges any person with having committed an offence.'— "The words 'falsely charging'...must be construed along with the words which speak of the 'institution of proceedings.' These latter words are obviously used in a technical and exclusive sense, and by parity of reasoning the same restricted sense must be given to the words which relate to a false charge."⁶ The words 'falsely charges' must be restricted to a charge made to some person in authority, that is to say, to some person who is in a position to get the offender punished. The charge must be embodied either in a complaint to a Magistrate or in a report of a cognizable offence to a police-officer,⁷ or to an officer who has statutory authority over his subordinate against whom the allegations are made.⁸ The word 'charges' means something different from 'gives information.' The true test seems to be, does the person, who makes the statement which is alleged to constitute the 'charge' do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made.⁹ A petition was presented with the object of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings. It was held that the petition did not amount to a 'charge' within the meaning of this section.¹⁰ A false petition to the Superintendent of Police, praying for the protection of the petitioners from the oppression of a Sub-Inspector, which may be effected by a departmental action, does not amount to such

²⁵ *Jijibhai Govind*, (1896) 22 Bom. 596; *Karim Buksh*, (1888) 17 Cal. 574. F.B.; *Bhika Lala*, (1890) Cr. R. No. 55 of 1890, Unrep. Cr. C. 524; *Bonomally Sohail*, (1866) 5 W. R. (Cr.) 32; *Parahu*, (1883) 5 All. 598; *Nanjunda Rau*, (1896) 20 Mad. 79.

¹ *Karim Buksh*, supra.

² *Patil Subba Reddi*, (1935) 43 L. W. 261, [1935] M. W. N. 1197, 37 Cr. L. J. 357, [1936] AIR (M) 160.

³ *Raghoo*, (1865) Unrep. Cr. C. 3.

⁴ *Pampappa Ballalrao Desai*, (1926) 28 Bom. L. R. 490, 27 Cr. L. J. 740, [1926] AIR (B) 284.

⁵ *Veerapalli Penchalugadu*, (1902) 1 Weir 193.

⁶ Per Ranade, J., in *Karigowda*, (1894) 19 Bom. 51, 69.

⁷ *Gaya Barhai*, (1922) 26 O. C. 44, 23 Cr. L.

J. 641, [1923] AIR (O) 4; *Cheddi Upadhya*, (1922) 4 P. L. T. 703, 24 Cr. L. J. 316; *Banti Pande*, (1929) 12 P. L. T. 109, 32 Cr. L. J. 210, [1932] AIR (P) 550; *Ram Rakha*, (1937) 39 P. L. R. 238, 38 Cr. L. J. 1070, [1937] AIR (L) 624.

⁸ *Government Advocate, Bihar v. Kumar Singh*, (1937) 16 Pat. 571.

⁹ *Rayan Kutti*, (1903) 26 Mad. 640, 643; *Solaimuthu Pillai v. Marungath Mooppen*, [1915] M. W. N. 272, 16 Cr. L. J. 423, [1916] AIR (M) 639; *Zorawar Singh*, (1911) 8 A. L. J. R. 1106, 12 Cr. L. J. 433; *Nihala*, (1872) P. R. No. 14 of 1872; *Bhawani Sahai*, (1932) 13 Lah. 566.

¹⁰ *Rayan Kutti*, (1903) 26 Mad. 640, 643; *Zorawar Singh*, (1911) 8 A. L. J. R. 1106, 12 Cr. L. J. 433.

a false charge. For an allegation to amount to a false charge, it must be made with the intention and object of setting the criminal law in motion.¹¹

Two out of three Judges comprising a full bench of the Madras High Court have held that the words 'false charge' must not be understood in any technical or restricted sense, but in their ordinary meaning of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities; and the institution of criminal proceedings includes the setting of the criminal law in motion. A complaint to a Village Magistrate, in such a case, amounts to a 'charge' and is also an institution of criminal proceedings. It would be otherwise if the offence complained of is one in regard to which the information need not, under s. 45 of the Code of Criminal Procedure, be passed to the higher authorities.¹² A complaint made to an executive officer as such which contains certain imputations against a person is not making a false charge.¹³

In the first part of this section the expressions "institutes or causes to be instituted any criminal proceeding" and "falsely charges" are used, and in the second part the expression "if such criminal proceeding be instituted" is only used. From this it was argued in a full bench case of the Calcutta High Court that the Legislature must have meant different things when it spoke of "instituting proceedings" and "making a charge", and that only what fell within the former phrase was within the latter part of the section. Wilson, J., who delivered the judgment of the full bench, said: "I agree in this reasoning in one sense and not in another. I agree that we must take it that the Legislature did not regard the two phrases as co-extensive in meaning, but considered that there were, or might be, cases to which the one would apply and not the other. But I do not think we are to suppose that the Legislature meant the phrases to be mutually exclusive in meaning, so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. This cannot, I think, be for two reasons. First, because there is no mode by which a private accuser can institute criminal proceedings except by making a charge; and if he does not do it by the charge, he never does it at all, to whatever length the proceedings may go. And secondly, because the last part of the section speaks of 'proceedings instituted on a false charge'".¹⁴ There is no distinction between the first and second parts of this section between proceedings before the Police and proceedings before the Magistrate. The second part of s. 211 must be read with the first part and the second part refers to "such criminal proceedings." Obviously these criminal proceedings are the criminal proceedings referred to in the first part. The criminal proceedings are just as much instituted within the meaning of the section when first information of a cognizable offence is given to the Police under s. 154, Criminal Procedure Code, as when a complaint is made direct to a Magistrate under s. 200. The words "be instituted" in the second part of this section do not denote the past tense as is sometimes contended. The words denote the passive mood.¹⁵

It is enough if it appear that the charge was deliberately made before an officer of police with a view to its being brought before a Magistrate. It is not necessary that the charge must have been fully heard and dismissed.¹⁶ It is enough that a false charge is made though no prosecution is instituted thereon;¹⁷ but the charge should not be pending at the time of the offender's trial.¹⁸ It is not necessary that summons should be issued upon such complaint;¹⁹ or that the statement made by the accused to the police-officer should be reduced to writing in accordance with s. 154 of the Criminal Procedure Code.²⁰

¹¹ *Abdul Hakim Khan Chaudhuri*, (1931) 59 Cal. 334.

¹² *The Sessions Judge of Tinnevely Division v. Sivan Chetti*, (1909) 32 Mad. 258, F.B., per Benson and Munro, JJ., *Sankaran Nair, J., dissentiente, Ramana Gowd*, (1908) 81 Mad. 506, in which under similar facts it was held that a prosecution under this section did not lie, overruled.

¹³ *Zain-ul-Abdin v. Mistri Nawab Din*, (1908) 10 P. L. R. 148, 9 Cr. L. J. 152.

¹⁴ *Karim Buksh*, (1888) 17 Cal. 574, 578, F.B.

¹⁵ *Dharamdas Hiranand*, (1938) 40 Cr. L. J.

¹², [1938] AIR (S) 213.

¹⁶ *Subbanna Gaundan*, (1862) 1 M. H. C. 30, 1 Weir 184.

¹⁷ *Abdul Hasan*, (1877) 1 All. 497; *Chenna Malli Gowda*, (1903) 27 Mad. 129; *Bhairab Chandra Barua*, (1919) 46 Cal. 807.

¹⁸ *Subbanna Gaundan*, sup.; *Salik*, (1877) 1 All. 527; *Gati Mandal*, (1905) 4 C. L. J. 88, 4 Cr. L. J. 68; *Bishoo Barik*, (1871) 16 W. R. (Cr.) 67 [77]; *Manga Ram*, (1886) P. R. No. 28 of 1886.

¹⁹ *Hardeo Singh v. Hanuman Dat Narain*, (1903) 26 All. 244, F.B.

²⁰ *Mallappa Reddi*, (1903) 27 Mad. 127.

Bare statement is not false charge.—A statement to the police of a suspicion that a particular person has committed an offence is not a charge within the meaning of this section, nor does it amount to an institution of a criminal proceeding, and a conviction cannot be had on proof that the suspicion was unfounded.²¹ The mere despatch of a telegram falsely stating that a dacoity had been committed without mentioning the names of any persons alleged to have been concerned or suspected of complicity in the offence, does not amount to the institution of a false charge.²² A made a report to the police that his buffalo had been poisoned and that he suspected G of having administered the poison. The police made an inquiry and reported that there was no case of poisoning and the charge was struck out. G then brought a complaint under this section against A. It was held that the report to the police did not amount to a charge of a criminal offence.²³ Something more is requisite than merely to falsely impute against a person that he has committed an offence. The 'charge' contemplated in this section appears both from the context and from the position of the section to be a charge made in order to the institution of criminal proceedings.²⁴ If the statement is followed up by active steps against the person said to be suspected that is a charge.²⁵

False charge should be made to Court or officer having jurisdiction to investigate.—The false charge must be made to a Court or to an officer who has power to investigate and send it up for trial.¹ It must be an accusation made with the intention to set the law in motion.² Where the tribunal before whom the complaint was made was not competent to take any action direct or indirect to punish the persons complained against, it is not possible to hold that the accused "charged" such persons with any offence or that his intention necessarily was that action should be taken against them, as he might well have intended to secure some advantage to himself.³ One G sent a registered letter to the Superintendent of Police complaining that the Sub-Inspector had exacted a bribe. An inquiry was made by the Prosecuting Inspector, after which he moved the Court by means of a letter to prosecute G under this section. It was held that no offence under this section was committed as the section contemplated that the charge should be made to some person in authority who was in a position to get the offender punished.⁴

A woman appeared before the Station Staff Officer and accused a non-commissioned officer of rape; and, after a military inquiry, the military authority held that the charge was false and directed the complainant to be prosecuted under this section. The conviction was set aside.⁵ Where the petitioner laid a charge of mischief by fire at a *thana*, which was reported to be false, and the District Magistrate, upon the receipt of a report to the same effect from a Deputy Magistrate, to whom he had sent the case for a judicial inquiry, passed the final order in the police report in these terms :—"Enter false, s. 436; Indian Penal Code. Prosecution under s. 211, Indian Penal Code, sanctioned. To Babu M. N. Mukerjee for trial." It was held that the order of the District Magistrate was bad as the matter of the false charge had not come before him in the course of a judicial proceeding.⁶

A person made a complaint to a District Registrar against the conduct of a subordinate officer, a Sub-Registrar, alleging that the latter had misappropriated a sum of money paid to him on account of fees for a commission, and the District Registrar after holding a departmental inquiry was satisfied as to the falsity of the complaint and made a report to himself as District Magistrate, and in this latter capacity passed the following order : "Read report of District Registrar. Prosecution of EB under ss. 211 and 182 of the Indian Penal Code sanctioned. Summon EB : ss. 182 and 211, Indian Penal Code." It was held that it was not clear from the record whether

²¹ *Bramanund Bhattacharjee*, (1881) 8 C. L. R. 233; *Karigowda*, (1894) 19 Bom. 51; *Karim Bakhsh*, (1904) P. R. No. 12 of 1905, 1 Cr. L. J. 506; *Saminatha Thevan*, [1912] M. W. N. 1125, 13 Cr. L. J. 303.

²² *Nandamuri Anandayya*, (1914) 1 L. W. 355, [1914] M. W. N. 382, 15 Cr. L. J. 622.

²³ *Abdul Ghafur*, (1924) 6 Lah. 28.

²⁴ *Ghulam Hussain*, (1878) P. R. No. 14 of 1879.

²⁵ *Hunooman Lall*, (1872) 19 W. R. (Cr.) 5;

Muthra v. Roora, (1870) P. R. No. 16 of 1870.

¹ *Jamoon*, (1881) 6 Cal. 620; *Brojobashi*

Panda, (1908) 13 C. W. N. 398, 11 Cr. L. J. 4.

² *Mathura Prasad*, (1917) 39 All. 715.

³ *Bhawani Sahai*, (1932) 13 Lah. 568.

⁴ *Gaya Barhai*, (1922) 26 O. C. 44, 23 Cr. L. J. 641, [1923] AIR (O) 4.

⁵ *Jamoon*, supra; *Subban Samhan*, [1944] M. W. N. 271, (1943) 57 L. W. 275.

⁶ *Haibat Khan*, (1905) 33 Cal. 30.

the District Magistrate purported to act under s. 195 or s. 476 of the Criminal Procedure Code. If he purported to act under s. 195, then the sanction would be without jurisdiction as to s. 182, Indian Penal Code, inasmuch as he was not the public officer concerned or the public officer to whom he was subordinate; and so far as the sanction related to this section it was equally without jurisdiction as there was no offence committed in or in relation to any proceedings in Court.⁷

A peon sent a telegram to the Collector saying that the Tahsildar and certain others in his absence entered his house and forcibly inoculated his wife and children. The Collector sent the telegram to a Magistrate who examined the peon and certain witnesses who stated that they had heard that the complainant's house was forcibly entered into. Finding the statement false he directed the prosecution of the complainant and his witnesses. It was held that the complaint was no complaint in law and a prosecution could not be maintained against the peon under this section.⁸

Statement under s. 162, Criminal Procedure Code.—A statement under s. 162 of the Criminal Procedure Code in answer to questions put by a police-officer making an investigation under s. 161 of that Code cannot be made the basis of a prosecution under this section.⁹ Such a statement is not a complaint or charge and cannot be made the basis of a prosecution for an offence under this section.¹⁰

'Offence' means a thing punishable under the Code or under any special or local law (s. 40). The criminal proceedings and false charges contemplated by this section mean proceedings instituted and charges made according to the provisions of criminal law in force in British India.¹¹

4. 'Knowing that there is no just or lawful ground for such proceeding or charge.'—This expression is the equivalent of the English technical phrase "without reasonable or probable cause", which means "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be : first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."¹² "Unless the person making a charge actually knows that there is no just or lawful ground for it, he is not guilty of the offence, and cannot properly be convicted of it. It is not enough to find that he has acted in bad faith, that is, without due care or inquiry, or that he has acted maliciously, or that he had no sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it, or scrutinising its sources, actual malice towards the persons charged, these are all relevant evidence, more or less cogent, but the ultimate conclusion must be, in order to satisfy the definition of the offence, that the accused knew that there was no just or lawful ground for proceeding. It may be difficult to prove this knowledge, but however difficult it may be, it must be proved, and unless it is proved the informer must be acquitted."¹³

A person may in good faith institute a charge which is subsequently found to be false, or he may, with intent to cause injury to an enemy, institute criminal proceedings against him, believing there are good grounds for them, but in neither case

⁷ *Elahi Bux*, (1909) 11 C. L. J. 111, 11 Cr. L. J. 212; *Government Advocate, Bihar v. Kumar Singh*, (1937) 16 Pat. 571.

⁸ *Chedi*, (1910) 7 A. L. J. R. 618, 11 Cr. L. J. 351.

⁹ *Ramana Gowd*, (1908) 31 Mad. 506; *Veruputti Penchalugaddi*, (1902) 11 Cr. L. J. 164; *Kodangi*, [1931] M. W. N. 1138, 61 M. L. J. 860, 34 L. W. 858, 33 Cr. L. J. 178, [1932] AIR (M) 24.

¹⁰ *Krishna Baipadithaya*, (1909) 20 M. L. J. 182, 11 Cr. L. J. 286.

¹¹ *Rambharthi*, (1928) 25 Bom. L. R. 772, 47 Bom. 907.

¹² Per Hawkins, J., in *Hicks v. Faulkner*, (1878) 8 Q. B. D. 167, 171.

¹³ Per Plowden, J., in *Murad*, (1893) P. R. No. 29 of 1894, p. 97; *Mirza Hassan Mirza, v. Musst. Mahbub*, (1913) 18 C. W. N. 391, 15 Cr. L. J. 355.

has he committed an offence under this section. To constitute this offence it must be shown that the person instituting criminal proceedings knew there was no just or lawful ground for such proceedings.¹⁴ It is not a sufficient ground that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge or complaint upon evidence or a statement which is not or ought not to be sufficient to satisfy a reasonable mind, if in truth he did not know, at the time he made the complaint, that there was no just and lawful ground for making it.¹⁵

The failure to prove a case by the complainant is not the same thing as the institution of a maliciously false case, so as to make him liable for an offence under this section.¹⁶

In the absence of any special circumstances to rebut it, the judgment of one competent tribunal against the complainants affords a very strong evidence of reasonable and probable cause.¹⁷

5. 'If such criminal proceedings be instituted.'—There is a divergence of view between the Calcutta, the Madras and the Patna High Courts on the one hand, and the Allahabad and the Bombay High Courts on the other, as to the question whether the latter part of this section applies to such cases of complaints to the police which are disposed of without a formal magisterial inquiry. This divergence of view is due to the fact that a Magistrate has no jurisdiction to try certain offences under the second portion of the section, but only the Court of Session. A full bench of the Calcutta High Court¹⁸ has held that the latter part of this section would apply to such cases when the charge related to the more serious offence. This full bench case is followed by the Madras High Court in *Queen-Empress v. Nanjunda. Rao*¹⁹ in which the Court said: "We are unable to find any warrant for holding that the words 'the institution of criminal proceedings' should be limited to the bringing of a charge before the magistrate, or to action by the magistrate or police against the person charged. It seems to us that when, as in this case, a charge of a cognizable offence is made to the police against a specified person, criminal proceedings within the meaning of the section have been instituted just as much as if the charge had been made before the magistrate." "The test to apply is,—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made."²⁰

The Patna High Court has followed the Calcutta ruling.²¹ Where a person who gives false information as to the commission of an offence merely states that he suspects a certain other person to be the offender, it may be that he would not be liable under this section, but where it is clear that the informant's intention was not merely that the police should follow up a clue but that they should put the alleged offender on trial, the informant is guilty of an offence under this section.²²

The Oudh Chief Court has also adopted the view of the Calcutta High Court.²³

The Allahabad High Court has, on the other hand, held that to constitute the offence defined in the second paragraph of this section, it is necessary that criminal proceedings should be instituted. Where the offence committed does not go further than the making of a false charge to the police, the making of such a charge does not amount to an institution of criminal proceedings, and the offence committed will fall within the first paragraph, notwithstanding that the offence so falsely charged may be one of those referred to in the second paragraph.²⁴ The words "*if such criminal proceedings be instituted* on a false charge of an offence punishable with death, etc.", compared

¹⁴ *Chidda*, (1871) 3 N. W. P. 327.

¹⁵ *Pran Kissen Bid*, (1866) 6 W. R. (Cr.) 15; *Vridachella Pillai*, (1883) 1 Weir 185.

¹⁶ *Chhedi Upadhyay*, (1922) 4 P. L. T. 703, 24 Cr. L. J. 316; *Mukti Narain Gir*, (1939) 20 P. L. T. 947.

¹⁷ *Parimi Bapirazu v. B. Chinna Venkayya*, (1866) 3 M. H. C. 238; *Reynolds v. Kennedy*, (1748) 1 Wilson (K. B.) 232.

¹⁸ *Karim Buksh*, (1888) 17 Cal. 574, F.B., overruling *Karim Buksh*, (1887) 14 Cal. 633. See *Ram Logan Lal*, (1903) 7 C. W. N. 556.

¹⁹ (1896) 20 Mad. 79, 81.

²⁰ *Mallappa Reddi*, (1903) 27 Mad. 127, 128.

²¹ *Parmeshwar Lal*, (1925) 4 Pat. 472.

²² *Ibid.*

²³ *Balak Ram*, [1941] O. W. N. 1072, (1941) 42 Cr. L. J. 833, [1942] AIR (O) 100.

²⁴ *Bisheshar*, (1893) 16 All. 124; *Niaz Ali*, (1907) 4 A. L. J. R. 361, 5 Cr. L. J. 396; *Barkatullah v. Sadho Kalwar*, (1912) 10 A. L. J. R. 429, 13 Cr. L. J. 855. See *Jagmohan*, (1909) 6 A. L. J. R. 989, 11 Cr. L. J. 54, in which it is held, following the first two authorities, that if the Magistrate commits the accused for trial to the Court of Session only on the ground that the offence charged falls within the second paragraph of that section, and does not say that the fine or sentence which he can impose will not be adequate to meet the ends of justice, the commitment is bad in law.

with the phraseology of the first part of the section, leave no doubt that the *actual institution* of criminal proceedings on a false charge is essential to the application of the latter part of this section and that if the offence of the accused stops at making a false charge, his case falls under the first part of the section irrespective of the fact that the false charge relates to 'an offence punishable with death, transportation for life, or imprisonment for seven years or upwards'.²⁵ Both these cases have been dissented from by a Division Bench of the same High Court, which has adopted the view of the Calcutta, the Madras and the Patna High Courts. In this case it was held that a man who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of this section, and if the offence falls within the description in the latter part of the section, he is liable to the punishment there provided. Making of a false charge to the police of a cognizable offence is the institution of criminal proceedings within the meaning of this section.¹

The Bombay High Court has agreed with the view of the Allahabad High Court in *Bisheshar's* case and held that in order to bring a case within the second part of this section criminal proceedings must be instituted in a Court on a false charge. The giving of information to the police of a cognizable offence does not amount to institution of criminal proceedings within the meaning of the second part of the section; and if the case gets no further than a police inquiry, it falls within the first part of the section. In this case the accused complained to the police stating that certain persons had been guilty of dacoity, an offence punishable under s. 395. The police inquired into the matter and came to the conclusion that the charge was false. The accused having been charged with having committed an offence under this section, the Magistrate convicted him of the offence. The District Magistrate took the view that the offence fell under the second part of this section, and being triable by the Court of Session, the First Class Magistrate had no jurisdiction to try it. It was held that the case fell within the first part of this section and, therefore, the First Class Magistrate had jurisdiction to try the case.²

The former Chief Court of the Punjab held similar to the earlier view of the Allahabad High Court: "The first part of Section 211 deals with two kinds of acts by an accused, (a) the institution, or causing the institution, (*not an attempt* to cause the institution) of any criminal proceeding; (b) the making of a false charge: and however grave may be this charge, it is only when criminal proceedings are actually instituted that a special punishment is provided by the latter part of the section. Any charge of a cognizable offence must be followed by some enquiry by the Police, and if such enquiry alone were to be considered a criminal proceeding within the first part of the section, there would seem to be no reason for the distinction between the institution of proceedings and the making of a false charge. It seems to us clear that the 'institution' referred to in this section is the institution, either by the accused himself, by the Police or others, in consequence of accused's action, in some *Criminal Court*. It also appears to us that although the moral guilt of the accused may be the same in each case, yet as regards the effect of his act, it makes the very greatest difference whether the persons whom he charges are disgraced by being dragged—probably in custody—before a Criminal Court, or whether they are merely put to the inconvenience of answering a few questions by the Police and supporting their answer by evidence ready to their hand".³ Following this case the same Court held that the submission of a petition containing a false charge of bribery to the Inspector-General of Police against a Sub-Inspector is punishable under this section.⁴

The Former Judicial Commissioner's Court at Nagpur⁵ had adopted the view of the Allahabad High Court in *Bisheshar's* case.⁶

The Rangoon High Court has adopted the earlier view of the Allahabad High Court as laid down in the cases of *Pitam Rai*, *Parahu*, and *Bisheshar*, and has differed from the views of the Calcutta, the Madras, and the Patna High Courts. It holds that this

²⁵ *Pitam Rai*, (1882) 5 All. 215, 216, approved of in *Parahu*, (1883) 5 All. 598, and *Bisheshar*, (1893) 16 All. 124.

¹ *Johri*, [1931] A. L. J. R. 177, 33 Cr. L. J. 256, [1931] AIR (A) 269.

² *Karsan Jesang*, (1941) 43 Bom. L. R. 858, [1941] Bom. 22.

³ Per Roe, J., in *Sultan*, (1887) P. R. No.

3 of 1888. See *Khan Bahadur*, (1888) P. R. No. 26 of 1888.

⁴ *Hamayun*, (1907) P. R. No. 26 of 1908, 7 Cr. L. J. 291.

⁵ *Sultan Ahmed*, (1931) 27 N. L. R. 275, 32 Cr. L. J. 1009, [1931] AIR (N) 134, F.B.

⁶ (1893) 16 All. 124.

section refers to three matters; (1) falsely charging a person, (2) instituting criminal proceedings against that person, and (3) causing to be instituted criminal proceedings against that person. If an offender has merely falsely charged a person with any offence whatsoever by making a report to the police, and the police refuse to initiate proceedings, then what has been done is merely that a false charge has been made. The offence comes within the first part of the section punishable with two years' imprisonment or fine or both, and the case is triable by a first class magistrate. If the offender files a complaint before a magistrate under s. 190 of the Criminal Procedure Code, he has instituted criminal proceedings; if on the offender's report the police send up a case for trial he has caused criminal proceedings to be instituted within the meaning of this section.

If criminal proceedings have been instituted or caused to be instituted by the offender before a Court and his offence comes under the second part of this section, he is liable to a heavier punishment and the case can only be tried by a Court of Session if he has falsely accused his opponent of an offence punishable with death or transportation for life.⁷

False charge of arson.—Where a man burnt his own house and charged another with the act, it was held that he had committed an offence under this section and not under s. 195.⁸

False charge of dacoity.—Where a false charge of dacoity was made to a police-officer, who referred it to a Magistrate as false, and the Magistrate ordered the charge to be dismissed without taking any action against the parties implicated, and the person who preferred the charge was tried under this section, it was held that he had instituted criminal proceedings within the meaning of this section.⁹

False charge of theft.—Where A falsely and with intent to injure B informed the police that B had stolen property in his house, and the police searched B's house, and the information proved to be false, it was held that A had instituted criminal proceedings, and that he was therefore guilty of an offence under this section and not under s. 182.¹⁰

False charge of hurt.—Where a charge of voluntarily causing hurt contained in a petition of complaint was wilfully false, and made with intent to injure another, the complainant was held guilty of this offence.¹¹

False charge in petition which is not complaint.—Where the accused submitted a petition to the Deputy Commissioner while he was on tour, making certain complaints against a manager of the Court of Wards, and the accused was convicted of an offence under this section for making a false charge against the manager of the Court of Wards, it was held that the petition submitted by the accused not being a complaint within the meaning of s. 4 (h) of the Criminal Procedure Code and there being no institution of criminal proceedings, the conviction was illegal.¹²

False report by police-officer.—Where a head constable falsely reported to his superior that certain persons were in the habit of dealing in stolen goods and they were prosecuted but acquitted, it was held that he was guilty of an offence under this section.¹³ But where a police-officer made a false report regarding a certain offence, which the Magistrate found, after hearing the evidence, to be false, it was held that he could not be prosecuted under this section as he had not instituted criminal proceedings against any person.¹⁴

Partly false and partly true complaint.—The section contemplates a charge which is indivisible in its nature; to judge whether a complaint, part of which is true and part of which is false, falls under the section, the nature of the complaint or charge made by the accused has to be considered: in other words, whether the complaint is

⁷ *Ma Ban Gyi*, [1938] Ran. 236.

⁸ *Bhugwan Ahir*, (1867) 8 W. R. (Cr.) 65.

⁹ *Nanjynda Rau*, (1896) 20 Mad. 79.

¹⁰ *Muthra v. Roora*, (1870) P. R. No. 16 of 1870. See *Hunooman Lall*, (1872) 19 W. R. (Cr.)

¹¹ *Mata Dyal*, (1872) 4 N. W. P. 6.

¹² *Ahmad Khan*, (1904) 5 P. L. R. 397, 1 Cr. L. J. 957. See also *Jagobundhoo Karma-kar*, (1902) 30 Cal. 415.

¹³ *Rhedoy Nath Biswas*, (1865) 2 W. R. (Cr.) 44.

¹⁴ *Thakur Tewari*, (1900) 4 C. W. N. 347.

substantially true or whether it is substantially false, no precise rule or principle can be laid down in respect of the question, and each case must depend upon its own circumstances.¹⁵

Vexatious charge.—To bring a vexatious charge is not an offence under this section.¹⁶

Compounding.—The fact that an offence alleged to have been committed had been compounded is no conclusive answer to a charge made against the prosecutor under this section.¹⁷

Abetment.—A person cannot be convicted of abetment of a false charge solely on the ground of his having given evidence in support of such charge.¹⁸

Civil remedy.—A person aggrieved by a false charge may, if he choose, sue in a civil Court for damages for malicious prosecution, instead of taking criminal proceedings under this section. (For civil remedy, see the authors' "Law of Torts", Ch. XV). A criminal prosecution for an offence under this section is not a condition precedent to the right to sue for damages.¹⁹

PRACTICE.

Evidence.—Prove (1) that the accused instituted or caused to be instituted criminal proceedings; or

That he made a charge of an offence.

(2) That there were no just or lawful grounds for such proceedings; or that such charge was false.

It is the duty of the prosecution to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge.²⁰

(3) That the accused then knew such criminal proceedings, or charge to be without just or lawful grounds.²¹

(4) That he did as above with intent to cause injury to the person in question.²²

It is for the prosecution to make out a distinct case against the accused; not for the accused in the first instance to show that he had just or lawful grounds.²³ If the prosecution fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular witness will not imply the guilt of the accused.²⁴ The party accused should be allowed to show the information on which he acted and the Judge ought not only to be satisfied that the facts alleged as the grounds for making the charge are in themselves untrue and insufficient, but also that they were known to be such to the accused when the charge was made by him.²⁵

Failure on the part of the complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false; and to secure a conviction in this class of cases it must further be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence.¹

In a case under this section the complainant cannot be confronted with the statements made by him as accused during the previous police investigation into the offence alleged to be committed by him.²

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class: by Court of Session, Magistrate, Presidency

¹⁵ *Giridhari Naik*, (1901) 5 C. W. N. 727; *Sahadeo Karan Singh*, [1937] P. W. N. 243, 38 Cr. L. J. 462, [1937] AIR (P) 84.

¹⁶ *Tatia Hari*, (1899) 1 Bom. L. R. 11.

¹⁷ *Atar Ali*, (1884) 11 Cal. 79.

¹⁸ *Ram Panda*, (1872) 9 Beng. L. R. Appx.

¹⁹ *Jugut Mohini Dassee*, (1881) 10 C. L. R. 4.

²⁰ *Viranna v. Nagayyah*, (1881) 3 Mad. 6; *Shama Churn Bose v. Bhola Nath Dutt*, (1886) 6 W. R. (Civ. Ref.) 9.

²¹ *Mirza Hassan Mirza v. Musst. Mahbub*, (1913) 18 C. W. N. 391, 15 Cr. L. J. 365.

²² *Vridachella Pillai*, (1883) 1 Weir 185; *Murad*, (1893) P. R. No. 29 of 1894; *Tomij alias Tomijuddin Pramanick*, (1897) 1 C. W. N.

301; *Chidda*, (1897) 20 All. 40; *Muthooraper-shad Panday*, (1865) 2 W. R. (Cr.) 9.

²³ *Jan Muhammad Husen*, (1885) P. R. No. 1 of 1886.

²⁴ *Nobokisto Ghose*, (1867) 8 W. R. (Cr.) 87; *Sankaram Servai*, (1928) 30 Cr. L. J. 167, [1929] AIR (M) 496.

²⁵ *Mirza Hassan Mirza v. Musst. Mahbub*, (1913) 18 C. W. N. 391, 15 Cr. L. J. 355.

¹ *Navaimal valad Umedmal*, (1866) 3 B. H. C. (Cr. C.) 16.

² *Ram Prosad*, (1912) 17 C. W. N. 379, 16 C. L. J. 453, 13 Cr. L. J. 897.

³ *Parmu*, [1940] Nag. 320.

or first class, if the offence charged be punishable with imprisonment for seven years or upwards; by Court of Session alone if the offence charged be capital or punishable with transportation for life.

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which such Court is subordinate, is required for a prosecution under this section.³ The Court must make a complaint and cannot directly order prosecution. The complaint must set forth the offence, the precise facts on which it is based, and the evidence available for proving it.⁴ A Court should not make a complaint where there are not sufficient materials before it to show that there is a *prima facie* case against the accused. The mere fact that a complaint was dismissed by a Magistrate summarily under s. 203, Criminal Procedure Code, will not throw the burden on the complainant to prove that the complaint was a reasonable and honest one, and justify a complaint by the Court.⁵

A prosecution of a charge under this section should not be launched as a matter of course, but only when the complainant can satisfy the Court, that the interests of justice require a prosecution, and there is a strong *prima facie* case against the accused.⁶ The fact that the complainant fails to prove his case is by itself not sufficient.⁷ Where a case was taken on file after investigation by the police, the subsequent discharge of the accused would not justify the making of a complaint under this section.⁸ Great delay in proceedings under this section will not be tolerated.⁹

Where a complaint made by a person is referred to by the police and the complainant does not appear before the Magistrate there is no proceeding in any Court and a complaint by the Magistrate is not necessary for the prosecution of the complainant in respect of a cognizable offence.¹⁰

When a false complaint is made to a Magistrate and the complainant is proceeded against under this section with respect to the complaint, the Magistrate to whom the complaint was made is not himself competent to inquire into the offence.¹¹

False charge made to police and not to Magistrate.—Where a false charge has been made only to the police, or when the person making the false charge has not applied to the Magistrate and where no Court proceedings whatever have been caused, then no complaint is necessary.¹² Where the offence consists in giving false information to the police and the case does not go further than a police inquiry the offence falls within para. 1 of the section and not within para. 2. In such a case it is competent to the Magistrate to proceed on the report of the police without any formal complaint under s. 476 of the Criminal Procedure Code.¹³ But if a complaint is made to a Court and then a statement is made to a police-officer, the police cannot proceed against the complainant without a complaint by the Court.¹⁴

The Calcutta High Court has held that where an information to the police is followed by a complaint to the Court, based on the same allegations and the same charge, and such complaint has been investigated by the Court, the complaint of the Court itself is necessary even for a prosecution of the informant under this section in respect of the false charge made to the police.¹⁵ The Madras High Court¹⁶ has held likewise. The Patna High Court has even further held that in respect of a false charge made to the police, which alone is the subject-matter of the complaint under s. 211, the complaint of the Court itself would be necessary for taking cognizance of it if a complaint was

³ Section 195, Criminal Procedure Code.

⁴ *Ram Prasad*, (1927) 49 All. 752.

⁵ *Din Mohammad*, (1926) 27 Cr. L. J. 1845, [1927] AIR (A) 107.

⁶ *Jokhi Mian v. Mahub Dadar*, (1927) 10 P. L. T. 77, 40 Cr. L. J. 545, [1929] AIR (P) 92; *Bachu Singh v. Tribeni Sah*, [1938] P. W. N. 904.

⁷ *Bhuan Kahar*, (1924) 6 P. L. T. 355, 26 Cr. L. J. 141, [1925] AIR (P) 329.

⁸ *Seshadri Iyengar*, [1941] M. W. N. 463 (1), (1941) 43 Cr. L. J. 32.

⁹ *Murugappa Chettyar v. Raman Chettyar*, (1935) 37 Cr. L. J. 243, [1935] AIR (R) 485.

¹⁰ *Public Prosecutor, Madras v. Salma Beevi*, [1941] M. W. N. 222, (1940) 53 L. W. 358, 42 Cr. L. J. 640, [1941] AIR (M) 579.

¹¹ *Ambika Singh*, (1926) 5 Pat. 450.

¹² *Tayebulla*, (1916) 43 Cal. 1152; *Brown v. Ananda Lal Mullick*, (1916) 44 Cal. 650; *Bholu v. Punaji*, (1927) 28 Cr. L. J. 984, [1928] AIR (N) 17; *Kashi Ram*, (1924) 36 All. 906; *Muhammada*, (1928) 9 Lah. 408; *U Sein Ywet v. U Maung Gyi*, (1933) 35 Cr. L. J. 802, [1934] AIR (R) 40.

¹³ *Gaya Teli*, (1930) 32 Cr. L. J. 814, [1930] AIR (A) 818.

¹⁴ *Ghaslwan Singh*, (1928) 24 A. L. J. R. 816, 27 Cr. L. J. 1014, [1926] AIR (A) 618.

¹⁵ *Tayebulla*, supra; *Brown v. Ananda Lal Mullick*, supra; *Sheikh Samir v. Sajidar Rahman*, (1926) 53 Cal. 824.

¹⁶ *Dholiah*, (1931) 54 Mad. 1018; *Parmeshwaran Nambudri*, (1915) 39 Mad. 677.

preferred to a Magistrate for a judicial investigation even though that Magistrate did not in fact investigate the complaint.¹⁷ The Bombay High Court has adopted the view of the Calcutta, the Madras, and the Patna High Courts and has held that where an information of an offence given to the police is followed by a complaint to a Magistrate's Court based on the same allegations, in respect of a false charge made to the police, the complaint of the Court is necessary.¹⁸

The Allahabad High Court has taken a contrary view. It has held that when a false charge is made to the police an offence under this section is complete; and it cannot be said, merely because a similar complaint was subsequently made in a Court, that the offence was committed in, or in relation to, any proceedings in any Court, within the meaning of s. 195, Criminal Procedure Code. A complaint in writing of such Court is, therefore, not necessary for a prosecution for such offence.¹⁹ The Rangoon High Court has taken the same view.²⁰

The Bombay High Court has also distinguished the Calcutta decisions in a case in which a complaint was made to the police, and after prosecution under this section by the police and committal to the Court of Session, a fresh complaint was made to a Magistrate. It held that no complaint by the Court was necessary because when the committal order was made there had been no complaint made to a Magistrate.²¹

Before making complaint whether accused should be allowed to prove truth of his complaint.—The Calcutta High Court has held that a trial on a charge under this section for having lodged a false information with the police, without giving the informant an opportunity of proving the truth of the information before a Magistrate, is bad.²² Ordinarily a person should be given an opportunity to show cause before he is ordered to be prosecuted under this section.²³ A commitment for trial under the provisions of this section for knowingly instituting a false charge with intent to injure the persons accused, is not illegal, merely because the complaint which the accused made has not been judicially enquired into, but is based on the report of the police that the case was a false one.²⁴ But where the complaint has been dismissed by the Magistrate as groundless under s. 253 of the Criminal Procedure Code, and the Magistrate has before him the report of the police in support of his view it is not necessary that he should again ask the complainant to prove his case which the Magistrate has disbelieved even before he examined the complainant and his witnesses.²⁵ The Madras High Court has taken the same view. R made a complaint of theft against S to the police. The police referred the case as false to the Magistrate. The Magistrate summoned R and examined him but gave him no opportunity to prove the charge by calling the witnesses named by him. The Magistrate then ordered the case to be struck off the file and gave sanction to prosecute R. R was subsequently brought before the same Magistrate and committed to the Sessions, and convicted by the Sessions Court under this section. It was held that although R had no opportunity of proving his case before he was himself tried the conviction was not illegal.¹

The Patna High Court has held that a Magistrate does not exercise a proper discretion in ordering a complainant to be prosecuted under this section merely on the receipt of a police report that the complaint is false. The complainant should be given a reasonable time and full opportunity to prove his case before sanction is given for his prosecution.² But where, in a cognizable case, the police reported that the information given by an informant was false and made a complaint against that informant under this section, it was held that the Court was not bound, before issuing summons, to call upon the informant to show cause why he should not be prosecuted.³ Where

¹⁷ *Shaikh Muhammad Yassin*, (1924) 4 Pat. 323; *Daroga Gope*, (1925) 5 Pat. 38; *Ramdhari Gope*, (1928) 9 P. L. T. 236, 29 Cr. L. J. 660; *Subhag Ahir*, (1931) 11 Pat. 155.

¹⁸ *Bajaji Appaji*, (1945) 47 Bom. L. R. 664.

¹⁹ *Prag Datt*, (1928) 51 All. 382; *Kashi Ram*, (1924) 46 All. 906.

²⁰ *Ma Paw*, (1930) 8 Ran. 499.

²¹ *Ukka Mahadu*, (1927) 29 Bom. L. R. 1500, 29 Cr. L. J. 225, [1928] AIR (B) 22.

²² *Akshoy Kumar Chakrabarty*, (1926) 31 C. W. N. 124, 28 Cr. L. J. 152, [1927] AIR (C) 175.

²³ *Girish Chander Nundi*, (1881) 7 Cal. 87;

Shaikh Abdulla, (1931) 35 C. W. N. 1210, 33 Cr. L. J. 406, [1932] AIR (C) 287.

²⁴ *Salik Roy*, (1881) 6 Cal. 582.

²⁵ *Fazlar Rahaman*, (1930) 31 Cr. L. J. 1055, [1930] AIR (C) 515.

¹ *Ramasami*, (1894) 7 Mad. 292.

² *Tenhu Dhanuk*, (1927) 8 P. L. T. 662, 28 Cr. L. J. 639, [1927] AIR (P) 402; *Suchit Raut*, (1929) 9 Pat. 126.

³ *Maguni Padhan*, (1928) 7 Pat. 408; *Kantir Missir*, (1929) 11 P. L. T. 88, 30 Cr. L. J. 710, [1930] AIR (P) 98.

the police report that information given to them was maliciously false, and the informant takes no steps to challenge the police report by means of a petition to a Magistrate, his conviction under this section in respect of the false information cannot be contested on the sole ground that he was not afforded an opportunity of proving his case.⁴ The Magistrate filing a complaint is no worse off than a private prosecutor, and there is no necessity that there should be any preliminary inquiry before process issues. The practice of automatically issuing notice on the accused, on the filing of a complaint to show cause why he should not be prosecuted, is to be condemned as there is in effect a complete rehearsal of the real trial, yet there may be cases where it is desirable to allow the accused to appear and hear him.⁵ A person against whom a complaint of an offence mentioned in s. 195 (1), Criminal Procedure Code, is made, is no more entitled to an opportunity to show cause why the complaint should not be made than a person against whom a complaint of any other offence is made.⁶

The Lahore High Court has held that no person should be proceeded against for making a false charge against another unless he has been given an opportunity of substantiating his allegations by the tribunal before which the charge is made and which proposes to take action against him. It is the duty of the tribunal making a complaint under s. 476, Criminal Procedure Code, to come to a judicial finding that the allegations made before it are *prima facie* false.⁷

The Oudh Chief Court has held that the law does not require that an opportunity should be given to a person accused under this section on the basis of a false report to the police to substantiate the charge contained in the report before starting prosecution, nor is there any general principle of natural justice which requires the issue of a notice to the accused in such a case.⁸

Section 250 of the Criminal Procedure Code.—Where criminal proceedings have been instituted against a person with intent to cause injury to him, without lawful ground, the Magistrate should not dismiss the complaint as false and vexatious and direct the complainant to pay compensation to the person against whom the proceedings are instituted, but should take proceedings under this section.⁹

No pending proceedings.—It must be proved that the original proceedings are not pending at the time of the offender's trial.¹⁰ The original charge need not have been fully heard and dismissed, it is sufficient if it is not pending.¹¹

Finding should state nature of charge.—Where the accused is convicted of having made a false charge of an offence, the nature of the false charge should be stated in the finding and entered in the calendar.¹²

Punishment under second clause.—Where the accused is convicted under the second clause he should be sentenced to imprisonment, with or without fine, and not to fine alone.¹³

Summary proceeding.—The conviction by a Magistrate of a person for an offence under this section in a summary proceeding is improper.¹⁴

Charge-sheet by police.—In a non-cognizable case filing of a charge-sheet by a Sub-Inspector with regard to an offence punishable under this section, alleging that a false complaint had been sent to him through the village Magistrate of an offence under the Arms Act, was held to be a proper method of bringing the case before the Court.¹⁵

Misdirection to jury.—In a case of bringing a false charge of dacoity under this section, the Sessions Judge concluded his charge to the jury in these words : "If

⁴ *Sobarati Sain*, (1929) 8 Pat. 734.

⁵ *Mahabir Baijha*, (1931) 12 P. L. T. 710, 32 Cr. L. J. 1023, [1931] AIR (P) 302.

⁶ *Sulbhag Ahir*, (1931) 11 Pat. 155.

⁷ *Bhawani Sahai*, (1932) 13 Lah. 568.

⁸ *Balak Ram*, [1941] O. W. N. 1072, (1941) 42 Cr. L. J. 833, [1942] AIR (O) 100.

⁹ *Kina Karmakar v. Preo Nath Dutt*, (1901) 29 Cal. 479.

¹⁰ *Salik*, (1877) 1 All. 527; *Giridhari Mondul*, (1881) 8 Cal. 435; *Manga Ram*, (1886) P. R. No. 28 of 1886; *Gati Mandal*, (1905) 4 C. L. J. 88, 4 Cr. L. J. 68; *Gunamony Sapui*, (1899) 3

C. W. N. 758; *Lachmi Shaw*, (1931) 36 C. W. N. 15, 33 Cr. L. J. 514, [1932] AIR (C) 383.

¹¹ *Subbanna Gaundan*, (1862) 1 M. H. C. 30, 1 Weir 184.

¹² *Arjun*, (1863) 1 B. H. C. 87.

¹³ *Rama bin Rabhaji*, (1863) 1 B. H. C. 34.

¹⁴ *Parsi Hajra v. Bandhi Dhanuk*, (1900) 28 Cal. 251. This case is overruled on quite a different point in *Beni Madhav Kurmi v. Kumud Kumar Biswas*, (1902) 30 Cal. 123, F.B.

¹⁵ *Public Prosecutor v. Munusamy Naidu*, (1941) 55 L. W. 63 (1), [1942] M. W. N. 224, (1941) 43 Cr. L. J. 775.

you believe the charge of dacoity to be false, then you should find the prisoner guilty under s. 211; otherwise you should acquit him." It was held that the charge was erroneous and defective. The Judge should, in the operative part of the charge, instead of directing as he did, have prominently placed before the jury, one of the most essential elements of the charge under this section, namely, that in instituting the false charge of dacoity there was no just or lawful ground for the charge, and the jury should have been asked to say whether the charge was false and whether in instituting that charge there was no just or lawful ground.^{1a}

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, with intent to cause injury to one——[instituted criminal proceedings before——charging the said——with having committed an offence, to wit——], (*or*) [falsely charged the said——before——with having committed an offence, to wit——], knowing at the time that there was no just or lawful ground for such proceedings (*or* charge) against the said——; and that you thereby committed an offence punishable under s. 211 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 and 12.

212. Whenever an offence has been committed,¹ whoever harbours or conceals a person whom he knows or has reason to believe to be the offender,² with the intention of screening him from legal punishment,³

Harbouring
offender—

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishment
with transportation
for life, or with im-
prisonment.

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

^{1a} *Tomij alias Tomijuddin Pramanick*, (1897) 1 C. W. N. 301.

ILLUSTRATION.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

COMMENT.

This section applies to the harbouring of persons who have actually committed certain offences under the Penal Code or an offence under some special or local law, when the thing punishable under such special or local law is punishable with imprisonment for a term of six months or upwards. It supposes that some offence has actually been committed, and that the harbourer gives refuge to one whom he knows or has reason to believe to be the offender with the intention of screening him from legal punishment. It does not apply to the harbouring of persons, not being criminals, who merely abscond to avoid or delay a judicial investigation.¹⁷

There is a difference in the wording of the fourth clause of this section and the fourth clause of s. 213. According to this clause no punishment is prescribed if the offence committed by the harboured person is not punishable with imprisonment "which may extend to one year." Under clause 4 of s. 213 such an offence is made punishable.

Harbouring escaped prisoners of war is punishable under s. 130 and harbouring a deserter from the Army, Navy, or Air Force is punishable under s. 136.

This section deals with that class of offenders who are known as 'accessories after the fact' under the English law. An 'accessory after the fact' is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon.¹⁸

Ingredients.—The section has three essentials :—

1. Commission of an offence.
2. Harbouring or concealing the person known or believed to be the offender.
3. Such concealment must be with the intention of screening him from legal punishment.

1. **'Offence has been committed.'**—It must be shown that the offence has been completed before the offender was harboured or concealed. Hawkins¹⁹ says :— "....a man shall never be construed an accessory to a felony, in respect of the receipt of an offender, who at the time of the receipt was not a felon, but afterwards becomes such by matter subsequent; as where one receives another who has wounded a person dangerously, that happens to die after such receipt. For though the offender be for special reasons adjudged to some purposes guilty of homicide *ab initio*, yet he shall not be so esteemed in respect of any others but himself; for fictions of law shall never be carried further than the reasons which introduce them necessarily require." Under the Penal Code such a person is liable to be convicted of harbouring one who had committed grievous hurt.

2. **'Harbours or conceals a person whom he knows or has reason to believe to be the offender.'**—See s. 52A, *supra*, as to the meaning of 'harbour'. A person who employs another to harbour the offender may be convicted as 'accessory after the fact' though he himself did no act of relieving, etc.²⁰ A person can be supposed to 'know' where there is a direct appeal to his senses. The word 'offender' means a person who has contravened the provision of any criminal law, which is punishable either with death, transportation, imprisonment or fine.²¹

Where a person, being charged with an offence, absconded, and his father, being appointed a special police-officer and directed to produce his son, failed to do so, and long afterwards a police-officer having called at the house and demanded the production of the son, the father handed him over as soon as he returned from a walk, and the father was convicted of harbouring on the finding that he knew of the whereabouts of the son and had neither produced him nor given information to the police. It was

¹⁷ *Ramrajchaudhury*, (1945) 24 Pat. 604.

¹⁸ 2 Hawk. P.C., c. 29, s. 1.

¹⁹ *Ibid.*, s. 35.

²⁰ *Jarvis*, (1837) 2 M. & Rob. 40.

²¹ *Latoor*, (1929) 81 Cr. L. J. 288, [1930] AIR (A) 88.

held that the father was not guilty of "harbouring" within the meaning of this section.²² This decision is of doubtful authority as it refers to the case of *Emperor v. Husain Bakshi*²³ which has been expressly overruled by the Legislature. See s. 52A, *supra*.

'Knows.'—It is necessary that the harbourer at the time when he assists, or comforts the offender, should have notice, express or implied, that he had committed a crime.²⁴

'Reason to believe.'—See s. 26, *supra*.

3. 'Intention of screening him from legal punishment.'—The harbouring or concealing must be with intent to save the offender from punishment.

Exception.—The Exception only extends to the cases where harbour is afforded by a wife or husband. No other relationship can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a brother his brother, a master his servant, or a servant his master. The law in England is to the same effect.

In a case in England a woman was charged with comforting, harbouring, and assisting a man who had committed a murder, and it appeared that she considered herself as his wife, and lived with him as such for years, it was held that she was entitled to be acquitted even though the marriage was in some respects irregular and probably invalid.²⁵

Amendment.—The clause defining 'offence' under this section was introduced by the Indian Criminal Law Amendment Act (III of 1894), s. 7.

PRACTICE.

Evidence.—Prove (1) that an offence has been committed by the person harboured.

(2) That such offence is punishable with (a) death, or (b) transportation for life or imprisonment not exceeding ten years, or (c) imprisonment from one to ten years.

(3) That the accused has harboured or concealed the offender.

(4) That the accused then knew him to be an offender, or had reason to believe him to be so.

(5) That the accused thereby intended to screen such offender from legal punishment.¹

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or by Magistrate, Presidency or first class, if the case falls under the first or second clause; by Magistrate, Presidency or first class, or by Court by which the offence is triable, if the case falls under the third clause.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That on or about the—day of—the offence of (*specify it*) was committed at (*specify the place*) by AB, and that you on or about the—day of—at—harboured (*or* concealed) the said AB, knowing (*or* having reason to believe) at the time of the said harbouring (*or* concealing) that the said AB had committed the said offence—; and that you thereby committed an offence punishable under s. 212 of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

²² *Jagadish Chandra Maity*, (1984) 39 C. W. N. 317.

²³ (1903) 25 All. 261.

²⁴ 2 Hawk. P. C., c. 29, s. 32.

²⁵ *Good*, (1842) 1 C. & K. 185.

¹ *Fateh Singh*, (1889) 12 All. 432; *Kala Singh*, (1867) P. R. No. 21 of 1867.

213. Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person,¹ in consideration of his concealing an offence or of his screening any person from legal punishment² for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which, if a capital offence ; may extend to seven years, and shall also be liable to fine;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

COMMENT.

This section is applicable when the person accepting the gratification is not a public servant. If he is a public servant, there would appear to be no advantage in referring to this section and the offence might more properly be dealt with as one under s. 161 or 162.²

The compounding of a crime by some agreement not to bring the criminal to justice, if the property is restored or a pecuniary or other gratification is given is the offence punished by this and the following sections. This section does not apply where the compounding of an offence is legal. It is the duty of every State to punish criminals. No individual has, therefore, a right to compound any crime because he himself is injured and no one else.

Object.—This section and s. 214 are intended to prevent the suppression of prosecutions in cases in which the public is thought to be deeply interested in the punishment of the offender. They impose penalties on transactions entered into with this view.

Ingredients.—The section has two essentials :—

1. A person accepting or attempting to obtain any gratification or restitution of property for himself or any other person.

2. Such gratification must have been obtained in consideration of (a) concealing an offence, or (b) screening any person from legal punishment for an offence, or (c) not proceeding against a person for the purpose of bringing him to legal punishment.

1. 'Whoever accepts...gratification for himself or any other person, or any restitution of property, etc.'—The offence of compounding a larceny may be committed by a person other than the owner of the goods stolen or a material witness for the prosecution.³

'Gratification'.—See s. 161, *supra*.

2. 'In consideration of his concealing an offence or of his screening any person from legal punishment.'—See s. 214, *infra*. This section applies only where there has been an actual concealment of an offence, or screening of a person from legal punishment, or abstention from proceeding criminally against a person, and as

² *S. B. Hoosain, (1946) 47 Cr. L. J. 623.*

³ *Burgess, (1885) 16 Q. B. D. 141.*

consideration for the same; there has been an acceptance of, or attempt to obtain, or agreement to accept, any gratification or restitution of property. It has no application where only an acceptance of, or attempt to obtain, or agreement to accept, any gratification or restitution on a promise to conceal, screen, or abstain, is proved, and nothing more.⁴

This section is applicable only when it is proved that the person screened or attempted to be screened from legal punishment has been guilty of an offence,⁵ and not when there is merely a suspicion of his having committed some offence.⁶ A person complained to the accused, who were Panchayats, that A had stolen his fishing cage and concealed it in a tank near his house. The accused came to A's house and found the cage in the tank. They then took him into custody and threatened to send him up to the *thania*. Eventually they took from him Rs. 5 and did not proceed against him. The accused were charged with and found guilty of an offence under this section. It was held that the conviction was wrong as there was merely a suspicion of A having committed theft.⁷ G entrusted certain jewellery to M, who pledged the same with S under circumstances which constituted such pledging the offence of criminal breach of trust. The jewellery was later on returned by S to G on the latter's undertaking not to prosecute M for the offence of criminal breach of trust. M was accused of criminal breach of trust, but was acquitted. S and G were also charged with offences under this and the following sections, in that they took and offered restitution of property in consideration of screening an offence. The trying Magistrate convicted S and G of the offences charged, on the ground that for the purposes of the present case M must be held guilty. On appeal it was held, acquitting the accused, (1) that there could be no screening of an offence, which offence was not proved to have been committed; (2) that the trying Magistrate was bound to proceed on the footing that no criminal breach of trust had been committed, since the prosecution could not make it appear that such an offence had been committed.⁸

The word 'offence' denotes a thing punishable under the Code or any special or local law (s. 40).

Exception.—See Exception to s. 214, *infra*.

PRACTICE.

Evidence.—Prove (1) the commission of the offence concealed.

(2) That the accused (a) concealed such offence; or (b) screened the offender from legal punishment; or (c) omitted to proceed against such offender so as to bring him to punishment.

(3) That the accused accepted, or attempted to obtain, or agreed to accept the gratification or restitution, as described in the section.

(4) That the accused so accepted, etc., in consideration of such concealment, etc., as in (2).

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, if the case falls under the first clause; by Court of Session, or Magistrate, Presidency or first class, if it falls under the second; by Magistrate, Presidency or first class, or by Court empowered to try the offence screened, if it falls under the third.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That on or about the _____ day of _____, at _____, one AB committed the offence of _____, punishable with _____, and that you on or about the _____ day of _____, at _____, accepted (*or attempted to obtain, or agreed to accept*) a certain gratification, to wit _____, [*or certain property, to wit _____*] for yourself (*or for _____*) in consideration of your concealing the said offence of _____ [*or screening the said AB from legal punishment for the said offence, or not proceeding against the said AB for the purpose of bringing him to legal punishment*]; and that you thereby

⁴ *Hemchandra Mukherjee*, (1924) 52 Cal. 151.

⁷ *Ibid.*

⁵ *Sanalal Lalubhai*, (1913) 15 Bom. L. R.

⁸ *Sanalal Lalubhai*, *supra*.

⁶ 894, 37 Bom. 658.

⁶ *Girish Myte*, (1896) 23 Cal. 420.

committed an offence punishable under s. 213 of the Indian Penal Code, and within my cognizance (or cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person,¹ or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment² for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.³

ILLUSTRATIONS.—(*Repealed by Act X of 1882*).

COMMENT.

The last section punished the receiver of a gift in consideration of compromising an offence : this section punishes the offerer of the gift.

Scope.—The offence of giving a gratification to any person in consideration of that person concealing any offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, may be committed not only in respect of a completed offence, but also in respect of an offence, which it is proposed to commit.⁴

Ingredients.—This section has two essentials :—

1. Offering any gratification or restoration of property to some person.
2. Such offer must have been in consideration of that person's (a) concealing an offence, or (b) of his screening any person from legal punishment for an offence, or (c) of his not proceeding against a person, for the purpose of bringing him to legal punishment.

1. 'Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person.'—This section makes it an offence not only to give a gratification, but also to agree to give it in consideration of the donee screening any person from legal punishment for any offence, and the use of the word 'agree' involves the idea of something of the nature of a demand.¹⁰ Such agreement is also void under the Indian Contract Act.

'Gratification to any person'—See s. 161, *supra*.

2. 'In consideration of that person's concealing an offence, or of his screening any person from legal punishment, etc.'—The terms 'concealing an offence' and 'screening any person from legal punishment for any offence' appear to presuppose the actual commission of an offence, or the guilt of the person screened from punishment. It is not the intention of the Legislature to punish the giving of gratification, under a delusion that an offence had been committed or that a person was guilty of such an offence. The intention was to discourage malpractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders. In this case the accused had agreed to give Rs. 10 to S in consideration of his not giving evidence against K, who was charged with the offences of house-breaking by night and theft in a building. S gave evidence against K who was acquitted. The accused was thereupon charged under this section. It was held that he had committed no offence under it.¹¹ Where two of the accused offered a gratification to a public servant in consideration of his not proceeding against them and the other accused, whose books and papers he had seized, it was held that they were guilty under this section and not under ss. 109 and 161.¹²

This section includes the offer of a bribe by the person who has committed the offence that it is desired to screen.¹³ The Calcutta High Court has dissented from this view.¹⁴

3. 'Compounded.'—"Compounding an offence...supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition."¹⁵ If the offence is a compoundable one, then even if the gratification is offered to a person who has no right to compound it is immaterial.¹⁶

Under s. 345 of the Criminal Procedure Code, offences punishable under certain sections of the Penal Code may be compounded by certain persons mentioned therein.

Amendment.—The Exception was substituted by the Indian Penal Code Amendment Act (VIII of 1882), s. 6; and the Illustrations to the section were repealed by Act X of 1882.¹⁷

PRACTICE.

Evidence.—Prove points (1) and (2) as in s. 213; and further—

(3) That the accused gave or caused or offered to give or cause the gratification, etc., as stated in the section.

(4) That he so gave or caused, etc., in consideration of such concealment, etc.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, if the case falls under the first clause; by Court of Session, or Magistrate, Presidency or first class, if it falls under the second; by Magistrate, Presidency or first class, or by Court empowered to try the offence screened, if it falls under the third.

A Court dealing with a charge under this section is not entitled to question or review the correctness of the decision of another Court acquitting a person charged with having committed the offence which the person before it is charged with having attempted to conceal.¹⁸

¹¹ *Saminatha*, (1890) 14 Mad. 400; *Joynarain Patro*, (1873) 20 W. R. (Cr.) 66, followed in *Sanal Lal Lalubhai*, (1913) 15 Bom. L. R. 694, 37 Bom. 658. See s. 213 where the facts are set out.

¹² *Megraj*, (1880) P. R. No. 13 of 1881.

¹³ *Karuppannen*, (1882) 1 Weir 194.

¹⁴ *Hemchandra Mukherjee*, (1924) 52 Cal. 151.

¹⁵ *Per Trevelyan, J.*, in *Murray*, (1893) 21

Cal. 103, 115.

¹⁶ *Kya Sone*, (1912) 6 L. B. R. 48, 13 Cr. L. J. 574.

¹⁷ The case of *Rahimat*, (1876) 1 Bom. 147, is no longer of any authority.

¹⁸ *Baleshwar Bhagat*, [1945] P. W. N. 176, 47 Cr. L. J. 817, [1946] AIR (P) 101.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That on or about the day of——, at——, you gave (*or caused or offered to give*) a gratification, to wit——, to AB in consideration of the said AB's concealing the offence of——under s.——of——and which offence is punishable with—— [*or of his screening you (or any person, to wit——) from legal punishment for the said offence of——*] [*or of his not proceeding against you or any person, to wit—— for the purpose of bringing you (or him) to legal punishment*], and thereby committed an offence under s. 214 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [*by the said Court (omit these words when tried by the Magistrate)*] on the said charge.

215. Whoever takes or agrees or consents to take¹ any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code,² shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence,³ be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Taking gift to help to recover stolen property, etc.

COMMENT.

Object.—This section is primarily aimed at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money, etc., for the recovery of stolen property, without making any effort to bring the offenders to justice.¹⁹ The Madras²⁰ and the Lahore²¹ High Courts have held that this section was not intended to apply to the actual thief but to some one who, being in league with the thief, received some gratification on account of helping the owner to recover the stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence. The Allahabad High Court once was of this view, but in a full bench case it has held that an actual thief or a person suspected to be the thief can be convicted under this section.²² The section would, however, apply to cases of persons taking rewards offered in advertisements for the return of stolen property; and such advertisements might amount to abetments of the offence punishable under this section. The Allahabad High Court has, after considering previous cases, laid down that the clear meaning of the section is that it is an offence to receive money for helping any person to recover property stolen or misappropriated and that there is an exception only in favour of a man who can show that he used all means in his power to cause the apprehension of the offender. There is nothing in the section that requires, as an essential ingredient, knowledge on the part of the accused as to who was the thief or other offender who deprived the owner of the movable property.²³ The Rangoon High Court has also held that the wording of this section makes it apply in the majority of cases to offenders other than the actual thief, but a thief may offer to restore the stolen property for a gratification and thereby render himself liable under this section.²⁴

Ingredients.—This section has three essentials:—

1. Taking or agreeing or consenting to take any gratification under pretence or on account of helping any person to recover any movable property.

¹⁹ M. & M. 178; *Mangu*, (1927) 50 All. 186.

²⁰ *Nalli Veera Thevan*, (1914) 26 M. L. J. 598, 15 Cr. L. J. 471, [1914] AIR (M) 121; *Kudumbam*, (1895) 1 Weir 196.

²¹ *Kehr Singh*, (1925) 26 P. L. R. 303, 26 Cr. L. J. 1121, [1925] AIR (L) 563; *Godha*, (1926) 8 Lah. 263.

²² *Deo Suchit Rai*, [1947] A. L. J. 48, F.B., 48 Cr. L. J. 640, overruling *Muhammad Ali*, (1900) 23 All. 81, *Mangu*, (1927) 50 All. 186, and *Ram*

Naresh Rai, [1932] A. L. J. R. 107, *Mukhtara*, (1924) 46 All. 915, overruling *Muhammad Ali*, (1900) 23 All. 81, *Gul wd. Sumar*, (1928) 22 S. L. R. 450, 29 Cr. L. J. 736, [1928] AIR (S) 168.

²³ *Yusuf Mian*, [1938] All. 681.

²⁴ *Po Nyein*, [1941] Ran. 582, *Muhammad Ali*, (1900) 23 All. 81, and *Twet Pe*, (1907) 4 L. B. R. 199, F.B., dissented from.

2. The owner of such property must have been deprived of it by an offence punishable under the Penal Code.

3. The person taking the gratification must not have used all means in his power to cause the offender to be apprehended and convicted of the offence.

1. 'Takes or agrees or consents to take'.—These words "imply that the person taking the gratification and the person giving it have agreed, not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take...if a person has actually taken a gratification from another, it must be assumed that he agreed to take, and the other to give it in that particular form or shape; but where the gratification has not actually passed and there is a disagreement as to the form or shape that the gratification is to take the idea of agreement or consent is negated".²⁵

2. 'Property of which he shall have been deprived by any offence punishable under this Code'.—It must be proved that a person has been deprived of movable property by means of an offence punishable under the Code.¹ A lost a cow from his grazing ground. Some days later he heard that B had it. A went to him. B took Rs. 12 from him and promised to return the cow in ten days' time. He did not, however, keep his promise and subsequently refused to return either the cow or the money. It was held that B was guilty of an offence under this section.² The word "deprive" is not confined in its meaning to "take out of the possession" of the owner, but includes the preventing of the owner from getting possession. Where, therefore, a bullock was tied up during the night in the owner's house and was missing next morning, and three days later the accused, who promised to return the bullock for a sum of money and who were paid that sum, took the owner direct to a spot in the jungle and pointed out the bullock tied up to a tree, it was held that as the tying up of the bullock in the jungle prevented the bullock from going back to the owner's house, which it would normally do if it had only strayed and not been stolen, the accused were guilty of an offence under this section.³

3. 'Unless he uses all means in his power to cause the offender to be apprehended, etc.'.—The offence under this section is only committed if the person accepting gratification has failed to use all means in his power to cause the offender to be apprehended. The Calcutta High Court has held that the words "unless he uses all means in his power to cause the offender to be apprehended" is a saving clause and an exception. Once the elements of an offence under this section have been established by evidence, the onus of proving that the accused is entitled to the benefit of the exception is on him. The accused must show that he is not liable to punishment because of having used all means in his power to secure the arrest and conviction of the offender.⁴

Attempt.—An "attempt to take a gratification within the meaning of section 215...necessarily includes the idea of a concurrence of will between the giver and taker; with this much superadded thereto, that some act has been done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement or consent and the actual taking".⁵ Thus, where two persons offered to secure the return of bullocks stolen from a third person for Rs. 30, and that third person refused but offered Rs. 15, which offer was rejected by the two persons, it was held that they had committed no offence.⁶ This case has been dissented from in a later case where Rafiq, J., observed: "I think that if an attempt to take a gratification within the meaning of s. 215 of the Indian Penal Code necessarily includes the idea of a giver and taker, it is no more an attempt to commit an offence but a substantive offence, on the language of the section. In an offence like the one specified in s. 215 of the Indian Penal Code, an attempt to commit it could only be under circumstances similar to those of the present case". In

²⁵ Chittar, (1898) 20 All. 389, 391.

¹ *G. Venkataratnam v. D. Ramasastrulu*, [1939] M. W. N. 1256, (1939) 41 Cr. L. J. 903; *Radha Mohan Ahir*, (1940) 41 Cr. L. J. 922, [1941] AIR (P) 138.

² *Sharfa*, (1914) P. R. No. 9 of 1915, 16 Cr. L. J. 541, [1914] AIR (L) 551; *Hemraj*, (1910) 11 Cr. L. J. 95; *Akbar*, (1930) 32 P. L. R. 38, 32 Cr. L. J. 729, [1931] AIR (L) 157; *Bage-*

shwari Ahir, (1931) 11 Pat. 392.

³ *Yusuf Mian*, [1938] All. 681.

⁴ *Arman Ullah v. Jainulla*, (1932) 34 Cr. L. J. 1015, 37 C. W. N. 360, [1933] AIR (C) 599; *Ramanand Teli*, (1938) 17 Pat. 677; *Yusuf Mian*, supra.

⁵ Chittar, supra.

⁶ *Ibid*.

this case S had some of his buffaloes stolen. H proposed to S that if S gave him Rs. 200 and promised to take no steps to prosecute the thieves he could procure the restoration of the stolen cattle. S, however, would not agree to this proposal and reported the matter to the police. It was held that H was guilty of an attempt to commit the offence under this section.⁷ The former Chief Court of Lower Burma, dissenting from *Chittar's* case, held that in order to constitute an attempt to commit an offence under this section it is not necessary that the person who is willing to take and the person who is willing to give the illegal gratification should agree both as to the object for which the gratification is to be given and also as to the shape or form the gratification is to take. When once a proposal has been made for the payment of an illegal gratification whether it is completed by an agreement or not the offence of an attempt to commit an offence under this section is complete.⁸

PRACTICE

Evidence.—Prove (1) that the owner of the property was deprived of it by an offence under the Code.

(2) That the accused took, or agreed, or consented to take, the gratification.

(3) That such gratification was under the pretence of, or on account of, helping to recover such property.

(4) That the accused failed to use all means in his power to cause the offender to be apprehended and convicted.

The prosecution need not prove point (4).⁹

It is not necessary to show that the accused had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the Court that he had some corrupt and improper design when he received the money; and did not bona fide intend to use such means as he could for the detection and punishment of the offender.¹⁰

A person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under this section.¹¹ The Rangoon High Court has held that a person charged with the theft of a bullock can in the alternative be charged with demanding an illegal gratification for its return. The Court can convict the accused of either offence even if he is not charged with it. The appellate Court can alter the finding and maintain the sentence.¹² It has also held that there is nothing illegal in the double conviction of the actual thief of moveable property who also takes an illegal gratification for its return to the owner, but it is only in exceptional cases that a more severe sentence should be passed for both offences than would have been inflicted for the theft alone.¹³

Procedure—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Charge.—Where the question is likely to arise whether a person who has accepted a gratification for the return of stolen property is the actual thief or not, alternative charges should be framed under s. 236 of the Code of Criminal Procedure.¹⁴

216. Whenever any person convicted of or charged with an offence,¹ being in lawful custody for that offence, escapes from such custody,

Harbouring offender who has escaped from custody or whose apprehension has been ordered—

or whenever a public servant,² in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence,³ whoever, knowing of such escape or order for apprehension,⁴ harbours or conceals that person with the intention of preventing him from being apprehended,⁵ shall be punished in the manner following, that is to say,

⁷ *Hargayan*, (1922) 45 All. 159, 161.

⁸ *Nga Nyo*, (1904) 2 L. B. R. 310, 1 Cr. L. J. 1116; *Maung Hla Pe*, [1941] Ran. 395.

⁹ *Arman Ullah v. Jainulla*, (1932) 34 Cr. L. J. 1015, 37 C. W. N. 360.

¹⁰ *John King*, (1844) 1 Cox 36.

L.C.—35

¹¹ *Ramanand Teli*, (1938) 17 Pat. 377.

¹² *Maung Hla Pe*, [1941] Ran. 395.

¹³ *Po Nyein*, [1941] Ran. 582.

¹⁴ *Twet Pe alias Shan Gale*, (1907) 4 L. B. R. 199, 7 Cr. L. J. 464, F.B.

if the offence for which the person was in custody or is ordered to be apprehended is punishable⁶ with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if the offence is punishable with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

and if the offence is punishable with imprisonment which may extend to one year⁷ and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition,⁸ or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India, and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

COMMENT.

This section should be compared with s. 212. Section 212 deals with the offence of harbouring an offender who having committed an offence absconds. This section deals with harbouring an offender who has escaped from custody, after being actually convicted of or charged with the offence, or whose apprehension has been ordered; this latter offence is in the eye of the law more aggravated, and a heavier punishment is therefore awarded to it. It is thus an aggravated form of the offence punishable under s. 212.

1. 'Offence'.—This word denotes here anything made punishable by the Code, or by any special or local law, when the thing made punishable by such law is punishable with imprisonment for six months or upwards (s. 40). It has been held by the Chief Court of Oudh that this definition cannot affect the clear provision made in this section for the punishment of a person who harbours an offender. The section provides for the punishment of harbourers only where the person harboured is wanted for an offence for which a maximum sentence of at least one year's imprisonment is provided. No provision is made for the punishment of a harbourer where the person harboured is wanted for an offence punishable with imprisonment of less than one year.¹⁵

2. 'Public servant'.—See s. 21, *supra*.

3. 'Orders a certain person to be apprehended for an offence'.—This expression only means that the offence is the *causa sine qua non* of the apprehension. It is an offence under this section to harbour or conceal a person for whose apprehension an order has been passed by a public servant, even when such apprehension is sought to be made not for the purpose of trying him for an offence that he may have committed, but for enforcing a punishment already inflicted on him for having committed the offence.¹⁶ It is sufficient to show that against the person harboured, orders of

¹⁵ *Deo Baksh Singh*, (1942) 18 Luck. 617.

¹⁶ *Satanji Koer*, (1909) 11 C. L.J. 109, 11 Cr. L. J. 95.

apprehension had issued for an offence alleged against him, and the subsequent acquittal of the person harboured cannot affect the legality of a conviction under this section.¹⁷

4. 'Whoever, knowing of such escape or order for apprehension'.—The Privy Council has held that the word 'knowing' means something more than and different from the words 'had reason (or sufficient cause) to believe'. The latter words might be satisfied though no warrant had in fact been issued. 'Knowing' however implies a fact which can be shown. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. It must be proved by legal evidence that an order for the arrest of the person alleged to have been harboured was made and that the accused knew of the order and harboured the person concerned with such knowledge.¹⁸

5. 'Harbours or conceals that person with the intention of preventing him from being apprehended'.—See s. 52A, *supra*, as to the definition of 'harbour'. The word 'harbour' does not only mean to provide shelter, food and clothing but includes the assisting of a person in any way to evade apprehension.¹⁹ Where a proclaimed offender was arrested in the act of cooking his meals at the place of a village Zemindar and the Zemindar was present at the time of the arrest, he was held to have harboured the offender with the knowledge that he was such and with the intention of preventing his apprehension within the meaning of this section.²⁰ A warrant for the arrest of the accused's brother and a proclamation under s. 87, Criminal Procedure Code, were issued. In answer to inquiries by the police at the house of the accused he replied that his brother was in the house and promised to produce him. He then went inside the house and after some delay returned with his brother's son and said that he had made a mistake and that it was the son who had come to the house the preceding evening. On search the accused's brother was found concealed in hiding in the thatch of the roof. It was held that the accused was guilty under this section.²¹ The accused was found sleeping at his threshing floor on the same charpoy with a proclaimed offender and, when questioned by the police, replied that his companion was his guest and nephew. This information was false and was given in order that the offender might not be arrested. It was held that the accused was guilty under this section. The Court observed: "When a person gives false information to the police with respect to a proclaimed offender or warns him of the approach of the police, in order that the said offender may make good his escape, he is guilty of the offence of harbouring him".²² Making a sign to a person on the approach of the police to escape would fall within the purview of this section.²³ The mere giving of a meal to a proclaimed offender is not an offence within the meaning of this section in the absence of any evidence to the effect that the intention of the accused was to prevent the offender from being apprehended.²⁴

The word 'harbour' must be construed liberally. A man charged with an offence might to-day be found in the house of another, and although he might be living in the house owned by that other person, yet if for all practical purposes the harbouring was at the instance of some person not owning the house but visiting him, then this last person is, in law, a person harbouring the accused.²⁵ Where after the police had informed the accused that a certain person who was in the accused's house was a proclaimed offender, the accused denied the fact that that person was in his house and gave prevaricating answers with the object of enabling him to escape, it was held that the conduct of the accused amounted to an offence under this section.¹

6. 'Punishable'.—This word is used merely for the purpose of describing particular classes of offences in relation to which the punishment indicated in the section

¹⁷ *Rangasami Goundar*, (1928) 52 Mad. 73.

¹⁸ *Easwaramurthi Goundan*, (1944) 71 I. A. 83, 46 Bom. L. R. 844.

¹⁹ *Sarwan Singh*, (1922) 24 Cr. L. J. 659, [1923] AIR (L) 223.

²⁰ *Mathura Singh*, (1909) 6 A. L. J. R. 127 (n).

²¹ *Muchi Mian*, (1917) 21 C. W. N. 1062, 26 C. L. J. 141, 18 Cr. L. J. 731, [1918] AIR (C) 826; *Balkaran Singh*, (1925) 2 O. W. N. 260, 26 Cr. L. J. 1288, [1925] AIR (O) 428.

²² *Tara Singh*, (1925) 7 Lah. 30, 31.

²³ *Balkaran Singh*, (1925) 26 Cr. L. J. 1288, 2 O. W. N. 260, [1925] AIR (O) 432; *Akbar Ali*, (1923) 24 Cr. L. J. 485.

²⁴ *Hukam Singh*, (1924) 26 Cr. L. J. 410, [1925] AIR (L) 289; *Nga Myai Gyi*, (1883) S. J. L. B. 174.

²⁵ *Bhujabali Akappa Gorwadi*, (1912) 14 Bom. L. R. 583, 13 Cr. L. J. 701.

¹ *Vir Singh*, (1929) 31 Cr. L. J. 772, [1930] AIR (L) 99.

is to be inflicted; and it does not indicate that in a particular case the offence must have been punished.²

7. 'Punishable with imprisonment which may extend to one year'.—The section very clearly provides for the punishment of harbourers only where the person harboured is wanted for an offence for which a maximum sentence of at least one year's imprisonment is provided. No provision whatever is made for the punishment of a harbourer where the man harboured is wanted for an offence punishable with imprisonment for less than one year.³

8. 'Any law relating to extradition'.—See p. 24 where the subject of extradition is discussed.

Amendment.—The paragraph above the Exception was inserted by Act X of 1886, s. 23.

PRACTICE.

Evidence.—Prove (1) that the person in question has been convicted of, or charged with, an offence.

- (2) That such person was in lawful custody for the same.
- (3) That such person escaped from such custody.
- (4) That the accused knew of such escape.
- (5) That he with knowledge harboured,⁴ or concealed such offender.
- (6) That he did so, with intent to prevent him from being apprehended.
- (7) That the offence in question was punishable with (a) death, or (b) transportation for life or imprisonment for ten years, or (c) with imprisonment from one to ten years.

Or prove the following points:—

- (1) That a person had been ordered to be apprehended.
- (2) That such order was the order of a public servant.
- (3) That such order was in the lawful exercise of his powers.
- (4) That the accused knew of such order for apprehension.⁵
- (5) }
- (6) } As above.
- (7) }

It must be shown that the warrant to arrest the alleged offender was a legal one.⁶

It is also necessary to prove that the accused knew of the order and harboured the person concerned with such knowledge. A proclamation issued under s. 87 of the Code of Criminal Procedure, reciting that a warrant of arrest had been issued, is not legal evidence of the issue of the warrant and cannot prove the same. Nor is such a proclamation equivalent to notice of its contents either to the public or even to the inhabitants of the place where it is published. The only evidence permitted by law to prove a warrant of arrest is that defined in ss. 62, 64 and 65 of the Evidence Act, viz., either the original order or a certified copy.⁷

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class, if the case comes under the first or second clause; by Magistrate, Presidency or first class, or by Court by which the offence is triable, if the case comes under the third clause.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That on or about the—day of—, at—, one AB was charged with or convicted of an offence under s.—by the Court of—[or one AB was ordered to be apprehended for an offence punishable under s.—by—a public servant in the exercise of his lawful powers as such public servant] and that you knowing of the escape of AB (or knowing of the said order for apprehension) on the—or about—day of—, at—, harboured or concealed AB with the intention of preventing him from being apprehended, and that you thereby committed an offence punishable under s. 216 of

² *Satanji Koer*, (1909) 11 C. L. J. 109, 11 Cr. L. J. 95.

³ *Deo Baksh Singh*, (1942) 18 Luck. 617.

⁴ *Moola*, (1938) 40 P. L. R. 934, 40 Cr. L. J. 243, [1939] AIR (L) 19.

⁵ *Harnam Singh*, (1924) 26 Cr. L. J. 415,

[1925] AIR (L) 103.

⁶ *Shripad Chandavarkar*, (1927) 30 Bom. L. R. 70, 52 Bom. 151.

⁷ *Easwaraswathi Gundan*, (1944) 71 I. A. 83, 46 Bom. L. R. 844.

the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—Under the Frontier Crimes Regulation⁸ a person convicted of an offence under this, or the next section, may be sentenced, in lieu of or in addition to fine, to imprisonment or transportation for not more than seven years.

The fact that the person harboured has been acquitted, may be taken into consideration in awarding sentence.⁹

216A. Whoever, knowing or having reason to believe¹ that any persons are about to commit or have recently committed robbery² or dacoity,³ harbours⁴ them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.

Exception.—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

COMMENT.

This section was inserted by the Indian Criminal Law Amendment Act (III of 1894), s. 8. It is specially enacted with a view to enable the Court to inflict enhanced punishment where the persons harboured are robbers or dacoits or where they intend to commit robbery or dacoity. It is not enough that the person charged under this section should be harbouring dacoits in general, but he should be harbouring persons who intend to commit a particular dacoity.¹⁰

Section 212 is a general provision; and an offence under s. 216A will be an offence under s. 212. But in the case of robbers or dacoits this section must be applied.

To justify a conviction under this section both knowledge and intention are required.¹¹

When a person charged with the substantive offence of dacoity or robbery has been acquitted of that offence another person who is said to have intended to screen him from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offender under this section.¹²

1. 'Reason to believe'.—See s. 26, *supra*.

2. 'Robbery'.—See s. 390, *infra*.

3. 'Dacoity'.—See s. 391, *infra*.

4. 'Harbours'.—See s. 52A, *sup*.

PRACTICE.

Evidence.—Prove (1) that the persons in question were about to commit or had recently committed robbery or dacoity.

(2) That the accused knew this.

(3) That the accused harboured them or some of them.

(4) That the accused did so with the intention of (a) facilitating the commission of such robbery or dacoity, or (b) screening them or some of them from punishment.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

⁸ III of 1901, ss. 11 (8) (d) and 12 (2).

⁹ *Rangasami Goundar*, (1928) 52 Mad. 78.

¹⁰ *Sunderdas*, (1924) 19 S. L. R. 111, 26 Cr. L. J. 1028, [1925] AIR (S) 295.

¹¹ *Sakharam*, (1895) Cr. R. No. 39 of 1895, Unrep. Cr. C. 775.

¹² *Subramanya Ayyar*, [1947] Mad. 793.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, knew (*or having reason to believe*), that AB was about to commit robbery (*or dacoity*) [*or that he had on or about the—day of—committed robbery (or dacoity) at—*] harboured him, with the intention of facilitating the commission of robbery (*or dacoity*) by the said AB [*or of screening him from punishment*] and that you thereby committed an offence punishable under s. 216A of the Indian Penal Code and within my cognizance [*or the cognizance of the Court of Session*].

And I hereby direct that you be tried [*by the said Court*] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (d) and 12 (2).

216B. (*Repealed by Act VIII of 1942, s. 3.*)

217. Whoever, being a public servant,¹ knowingly disobeys any direction of the law² as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment,³ or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.

COMMENT.

This section and the three following sections deal with disobedience on the part of public servants in respect of official duty. Their proper place is in Chapter IX.

This section makes punishable a certain dereliction of duty quite apart from the question as to whether any bribe is paid to induce such dereliction. The dereliction must clearly, from the nature of the definition of the offence, be committed in the discharge of the functions of the person charged.¹³

1. 'Public servant'.—See s. 21, *supra*.

2. 'Direction of the law' means "a positive direction of law, such as those contained in ss. 89 and 90 of the Criminal Procedure Code, and cannot be made to extend to the more general obligation by which every subject is bound not to stifle a criminal charge."¹⁴ Before a person can be convicted under this section, it must be shown that there is a direction of law as to the way in which he is to conduct himself as such public servant, and this direction must be a direction to be found in some positive statute or some rules or regulations which are declared by statute to have the force of law.¹⁵ Where a police constable retained for himself a piece of gold in a search for stolen property but not proved to be part of the stolen property and failed to report his possession to his superior officer under s. 523 of the Code of Criminal Procedure, it was held that he was guilty of an offence under this section.¹⁶

3. 'Intending thereby to save... any person from legal punishment'.—"It appears to me quite sufficient, for the purpose of a conviction under s. 217, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment...a public servant charged under that

¹³ *S. B. Hossain*, (1946) 47 Cr. L. J. 623.

¹⁴ *Per Turner, C. J.*, in *Raminthi Nayar*, (1877) 1 Mad. 266, 267.

¹⁵ *Ram Prasad*, (1902) 22 A. W. N. 16.

¹⁶ *B. Dasappa*, (1915) 16 Cr. L. J. 453, [1916] AIR (M) 1109.

section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that person's liability to punishment".¹⁷ Thus, the actual guilt or innocence of the alleged offenders is immaterial, if the accused believes they are guilty, and intends to screen them.¹⁸ It is not necessary to establish that an offence has actually been committed.¹⁹

'Legal punishment' does not include departmental punishment.²⁰

Where several persons were apprehended at night time on suspicion of having committed culpable homicide, the police-officer tied them together by the hands, and kept them in the village in which they had been arrested, instead of at once taking them to the nearest police-station. The accused escaped in the course of the night. It was held that the police-officer did not commit an offence under this section, because his intention in keeping the accused in the village was merely to wait until it was more convenient to start, and the disobedience of the rule of law was, therefore, not such a disobedience as this section contemplates.²¹

The accused, a Police Patel, on a complaint having been made to him that an attempt had been made to commit rape on a girl, made some investigation, prepared a *panchnama* of the scene of the offence, and arrested the two persons against whom the accusation was laid. He sent them with a report to the police-station, but on the way the parties came to a settlement and all returned to the village. The complainant informed the Patel that he had no desire to continue the proceedings, whereupon the Patel tore up the *panchnama* which he had made. For this destruction the Patel was convicted of an offence under this section. It was held, acquitting the Patel, that it could not be fairly said that he knowingly disobeyed any direction of the law as to the way in which he should conduct himself or that he intended or knew it to be likely that by tearing up the *panchnama* he would save any person from legal punishment.²²

A conviction under this section of a village *vetti* for allowing a person who had been sentenced by a Village Magistrate to escape on the way to the lock-up was held to be bad.²³

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

- (2) That he conducted himself in the particular manner charged.
- (3) That such conduct was in the exercise of his duties as such public servant.
- (4) That such conduct was in disobedience to a direction of law.
- (5) That when the accused disobeyed such direction of law, he did so knowingly.
- (6) That when he was guilty of such disobedience he intended to, or knew that it was likely that he would thereby, save (a) some person from punishment, or subject some person to a less punishment than that to which he was entitled; or (b) some property from forfeiture or a charge to which it was liable; or (c) that such punishment, etc., was legally enforceable, or that such forfeiture, or charge, was a legal liability.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Charge.—It should distinctly state what the direction of law was.²⁴ It should run as follows:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That on or about the—day of—, at—, you being a public servant knowingly disobeyed the direction of the law as to the way in which you were to conduct yourself as such public servant, to wit—, (*specify the direction of law*) intending thereby to save—[or knowing it to be likely that you would thereby save—] from legal punishment (or subject him to a less punishment than that to which he was liable or with intent to save or knowing that you were likely thereby to save some property,

¹⁷ *Amiruddin*, (1878) 3 Cal. 412, 413.

¹⁸ *Hurdut Suma*, (1867) 8 W. R. (Cr.) 68.

¹⁹ *Mathuranath De*, (1932) 33 Cr. L. J. 657, [1932] AIR (C) 850.

²⁰ *Jungle Lall*, (1878) 19 W. R. (Cr.) 40.

²¹ *Ootum Chand*, (1871) P. R. No. 18 of 1871.

²² *Naranbhai Bhulabhi*, (1913) 15 Bom. L. R. 578, 14 Cr. L. J. 441.

²³ *Bodapati Pentadu*, (1882) 1 Weir 197.

²⁴ *Baban Khan valad Mhaskoji*, (1877) 2 Bom. 142.

to wit—, from forfeiture (or any charge to which it is liable by law)], and that you thereby committed an offence punishable under s. 217 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

218. Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing,¹ frames that record or writing in a manner which he knows to be incorrect,² with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person,³ or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment,⁴ or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.

COMMENT.

This section deals with the intentional preparation of a false record with the object of saving or injuring any person or property. The correctness of records is of the highest importance to the State and to the public. The intention with which the public servant does the acts mentioned in the section is an essential ingredient of the offence punishable under it.²⁵

Ingredients.—This section has three essentials :—

1. The offender must be a public servant charged with the preparation of a record or writing.
2. He must have framed that record or writing incorrectly.
3. He must have done so with intent to cause or knowing it to be likely that he will thereby
 - (a) cause loss or injury to the public or any person, or
 - (b) save any person from legal punishment, or
 - (c) save any property from forfeiture or other charge to which it is legally liable.

1. 'Whoever, being a public servant . . . charged with the preparation of any record, etc.'—The word 'charge' is not restricted to the narrow meaning of 'enjoined by a special provision of law'. So where a District Superintendent of Police usually required a first information and special diary in gambling cases, it was held that a Sub-Inspector who was given a warrant to arrest certain persons but who framed the information and the diary incorrectly to save two persons from punishment was properly convicted of having committed an offence under this section as he was charged with the preparation of such record within the meaning of it.¹ The public servant framing an incorrect record must have been charged with the preparation of it.

A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. It was held that such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under this section.²

A pay-sheet drawn up in a railway office and setting out certain sums as due by the railway to certain coolies described as working in a special gang, is a record within the meaning of this section.³

²⁵ *Shamu Churn Roy*, (1867) 8 W. R. (Cr.) 27.

¹ *Deodhar Singh*, (1899) 27 Cal. 144.

² *Mazhar Husain*, (1888) 5 All. 553; *Meharban Ali Khan v. Sita Ram*, [1929] A. L. J. R.

512, 30 Cr. L. J. 874, [1929] AIR (A) 374.

³ *Kesri Mal*, (1914) 15 Cr. L. J. 502, [1914] AIR (O) 361.

2. 'Frames that record or writing in a manner which he knows to be incorrect.'—It is essential that the record must have been incorrectly made.

3. 'With intent to cause, . . . loss or injury to the public or to any person'.—The section contemplates the wilful falsification of a public document with intent thereby to cause loss or injury and this means by the document itself or by some transaction with which it is essentially connected. The accused must not be convicted on a remote and speculative chain of possibilities, otherwise the most innocent acts might, by the exercise of a little ingenuity, be perverted into the initial steps of great crimes.⁴ Where the accused was charged with having prepared false work bills and the only evidence against him was that he had transposed some men's work from certain days to other days, it was held that the evidence was not sufficient.⁵ Where a *chowkidar* was charged with having made a false entry in a *chowkidaree* attendance book, with a view to support a charge which was made against a Sub-Inspector of having made a false report regarding the length of absence from duty of another *chowkidar*, and thereby to cause loss or injury to the Sub-Inspector, it was held that the intention was too remote to fall within this section.⁶ S was charged with the preparation of a certain record, and was in the habit of preparing it from certain abstracts made and read to him by D. D made and read false abstracts whereby an incorrect record was prepared. It was held that D could not be held to have committed this offence but was guilty of abetting it.⁷

It is not necessary that the incorrect document should be submitted to another person, or be otherwise used by the writer; it is sufficient if it is shown that it has been prepared by a public servant charged with its preparation, in a manner which he knows to be incorrect and with the knowledge that he is thereby likely to cause loss to the public. If, after such preparation, he submits the document, with intent to procure credit for a payment of more than to his knowledge is due to him, all the elements of an attempt to cheat in its simple or aggravated form (ss. 417, 418) would be present; but it does not follow that, because there was not a complete attempt to cheat, there was no complete offence.⁸ As to the definition of 'injury' see s. 44, *supra*.

4. 'With intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment'.—The words 'any person' mean a person other than the public servant or the public servant himself. If the Legislature had intended that this section should only apply when the intention was to save some person other than the public servant, it would have been easy to insert the word "other" between the words "any" and "person". A public servant who does that which, if done to save another from legal punishment, would bring the public servant within this section, has equally committed the offence punishable under this section if the person whom he intends to save from legal punishment is himself.⁹

"The gist of the section is the stifling of truth and the perversion of the course of justice in cases where an offence has been committed. It is not necessary even to prove the intention to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that some one will escape punishment for the offence."¹⁰

Actual commission of offence not necessary.—The actual guilt or innocence of the alleged offender is immaterial if the accused believes him guilty and intends to screen him.¹¹ It is necessary to prove that the accused believed or had reason to believe that the person concerned had committed an offence, though it is not necessary to prove that such an offence had, as a matter of fact, been committed. It is quite sufficient that the commission of a cognizable offence has been brought to the notice of the accused officially and that in order to screen the offender he prepared the record in a manner which he knew to be incorrect.¹²

⁴ *Ramchandra*, (1884) Unrep. Cr. C. 201.

⁵ *Ramchandra*, (1884) Unrep. Cr. C. 201.

⁶ *Jungle Lal*, (1873) 19 W. R. (Cr.) 40.

⁷ *Brij Mohal Lal*, (1875) 7 N. W. P. 184.

⁸ *Megraj*, (1880) P. R. No. 13 of 1881.

⁹ *Nand Kishore*, (1897) 19 All. 305, overruling *Gauri Shankar*, (1883) 6 All. 42.

¹⁰ *Per Pratt, J.*, in *Anverkhan Mahamadkhan*, (1921) 23 Bom. L. R. 823, 829, 22 Cr. L. J. 609, [1921] AIR (B) 115. *Fawcett, J.*, re-

frained from expressing any opinion on the point whether it is unnecessary to prove an intention to screen any particular person.

¹¹ *Krishnaji*, (1888) Unrep. Cr. C. 405, Cr. R. No. 68 of 1888; *Hurdut Surma*, (1867) 8 W. R. (Cr.) 68; *Mathuranath De*, (1932) 33 Cr. L. J. 657, [1932] AIR (C) 850.

¹² *Moti Ram*, (1925) 26 P. L. R. 594, 26 Cr. L. J. 837, [1925] AIR (L) 461.

CASES.

Public servant framing incorrect record to save a person from punishment.—A kulkarni who made a false report with reference to an offence committed in his village with intent to save the offenders from punishment was held to have committed this offence.¹³ Where it was proved that the accused's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, it was held that he had committed this offence.¹⁴

A report of the commission of a dacoity was made at a *thana*. The police-officer in charge of the *thana* took down the report which was made to him, but subsequently destroyed that report and framed another and a false report of the commission of a totally different offence to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant. It was held that the police-officer was guilty of offences punishable under s. 204 and this section.¹⁵ Where a Police Inspector had been charged with framing an incorrect record in that he entered in his diary that certain cartmen told him that "they were not beaten by dacoits", while in fact, they told him that "they were beaten by dacoits", it was held that this was not sufficient to sustain a conviction under this section. But where he, without endeavouring to inquire into the truth of the said entry in his diary, destroyed certain records which falsified it and substituted fresh note-books, his bona fides were open to question and he was deemed to have framed an incorrect public record intentionally.¹⁶ Where a Station House Officer, in order to support the Inspector, made a false entry in his diary, that the "four cartmen stated to him as they had said before the Inspector", he was held guilty of framing an incorrect public record intentionally when it appeared from the evidence that he took no action on the complaint of the cartmen, and his statement that no complaint of dacoity was made to him was falsified by his own witness.¹⁷ The accused, a head constable, whilst investigating a complaint of theft, searched the house of the suspect and found there a piece of cloth and a bodice which the complainant said belonged to him. Statements made by the complainant and his wife claiming the property to be theirs were taken down. The complainant produced from his house some clothes of his own for comparison. *Panchnamas* were made of the search and the comparison. Subsequently, these papers were suppressed, and the accused prepared statements, purporting to have been made by the complainant and his wife withdrawing the complaint; and a *panchnama* of the property produced by the complainant which was wrongly supposed to have been stolen from his house was made. The accused was charged with offences punishable under s. 201 and this section. It was held that the accused had not committed an offence under s. 201, but that he was guilty of an offence punishable under this section.¹⁸

Where a *patwari*, who was bound to make correct entries in the *khasra*, made a wrong entry knowing that it was wrong and with a criminal intent, it was held that he was guilty of this offence.¹⁹

Incorrect record framed without objects mentioned in this section.—A Village Munsif who submitted a false calendar in which he purported to have convicted certain persons of theft was held to have committed no offence under this section.²⁰

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he was charged with the preparation of record or other writing in his capacity as a public servant.

(3) That he framed such record or other writing in an incorrect manner.

(4) That he then knew that he was framing it in an incorrect manner.

¹³ *Malhar Ramchandra*, (1870) 7 B. H. C. (Cr. C.) 64.

¹⁴ *Girdhari Lal*, (1886) 8 All. 653.

¹⁵ *Muhammad Shah Khan*, (1898) 20 All. 307.

¹⁶ *Ramaswami Iyengar*, [1911] 2 M. W. N. 44,

¹⁷ Cr. L. J. 455.

¹⁸ *Pasupuleti Ramdoss*, [1911] 2 M. W. N.

64, 1 Cr. L. J. 502.

¹⁹ *Anverkhan Mahamadkhan*, (1921) 23 Bom. L. R. 823, 22 Cr. L. J. 609, [1921] AIR (B) 115.

²⁰ *Chandrabhan Lal*, [1935] A. L. J. R. 1083, 37 Cr. L. J. 131, [1935] AIR (A) 968.

²¹ *Chinakannu Udayan*, (1899) 1 Weir 197.

(5) That he did as above with the intent or with the knowledge that it was likely that he would thereby (a) cause loss or injury to the public, or any person; or (b) save a person from punishment; or (c) save some property from forfeiture or charge.

(6) That such punishment was legally enforceable, or that such charge or forfeiture was a legal liability.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That on or about the——day of——, you being a public servant charged with the preparation of a record (or writing, to wit——), framed the said record (or writing) in a manner which you knew to be incorrect (*specify the incorrect statement*) and which you made with intent to cause (or knowing it to be likely that you will thereby cause) loss (or injury) to the public [(or to any person, to wit——) (or with intent thereby to save or knowing it to be likely that you will thereby save any person from legal punishment or with intent to save or knowing that you are thereby likely to save any property, to wit——) from forfeiture to which it was liable by order of the Court in case No.——of——], and that you thereby committed an offence punishable under s. 218 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

219. Whoever, being a public servant,¹ corruptly² or maliciously³ makes or pronounces in any stage of a judicial proceeding,⁴ any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Public servant in judicial proceeding corruptly making report, etc., contrary to law.

COMMENT.

The essence of an offence under this section is (1) that there must be a judicial proceeding, that is, a proceeding actually commenced and pending, wherein a party claims relief against another and invites the decision of the Court in regard thereto and not a fictitious one where there is no party litigating, and (2) that there must be the making of a real report of a real pronouncement of an order, verdict, or decision.²²

This section must be read with s. 77; it contemplates some wilful excess of authority, in other words, a guilty knowledge superadded to an illegal act.²³

Object.—This and the next section deal with corrupt or malicious exercise of the power vested in a public servant for a particular purpose.

1. 'Public servant'.—See s. 21, *supra*.

2. 'Corruptly'.—See s. 196, as to the meaning of this word.

3. 'Maliciously'.—"Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse."²⁴ A man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another in person or property. The term 'maliciously' denotes wicked, perverse and incorrigible disposition.²⁵ It means and implies an intention to do an act which is wrongful, to the detriment of another.¹ Where any person wilfully does an act injurious to another without lawful excuse he does it 'maliciously'.² Whether a person has acted corruptly or maliciously is a question of fact and must be proved. Proof of an unlawful commitment to confinement

²² *Narapa Reddi Sesha Reddi*, [1938] 1 M. L. J. 876, [1938] M. W. N. 345, 47 L. W. 542, 39 Cr. L. J. 875, [1938] AIR (M) 595.

²³ *Narayan Babaji*, (1872) 9 B. H. C. 346.

²⁴ Per Bayley, J., in *Bromage v. Prosser*, (1825) 4 B. & C. 247, 255.

²⁵ *Ward*, (1872) L. R. 1 C. C. R. 356, 360,

361; Foster, p. 257.

¹ Per Bowen, L. J., in *Mogul Steamship Company v. McGregor, Gow, & Co.*, (1889) 23 Q. B. D. 598, 612.

² Per Blackburn, J., in *Pembilton*, (1874) L. R. 2 C. C. R. 119, 122, followed in *Piars Lal*, (1916) 15 A. L. J. R. 106, 18 Cr. L. J. 527.

will not of itself warrant the legal inference of malice.³ The words "corruptly and maliciously" are wide enough to cover confinement for the purpose of extortion. Where a Police Sub-Inspector wrongfully confined certain persons on charges of gambling in futures and extorted money from them by putting them in fear of being prosecuted in Court upon offences which he knew to be false, it was held that the offence fell under this section and not s. 347 or s. 342.⁴ Where a Village Munsif passed a decree which was contrary to law, it was held that he was guilty under this section of maliciously pronouncing a decision.⁵ The keeping in confinement even by a person who had legal authority to do so would be an offence under this section, if in the exercise of that authority a person kept another in confinement knowing that in so doing he was acting contrary to law.⁶

4. 'Judicial proceeding'.—See s. 192, *supra*. Where a Village Munsif framed an incorrect register of suits filed in his Court by making an entry therein that a certain suit had been filed when in fact it was not so filed and also by making an entry of a judgment purported to have been pronounced when in fact it was not so pronounced, it was held that he was guilty under this section as there was no judicial proceeding or pronouncement of an order.⁷

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he made or pronounced the report, order, verdict or decision.

(3) That he did as in (2) corruptly or maliciously.

(4) That such report, order, verdict, or decision was made or pronounced in the course of a judicial proceeding.

(5) That such report, etc., was contrary to law.

(6) That when the accused made or pronounced the same, he knew it to be contrary to law.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

220. Whoever, being in any office¹ which he gives him legal authority to commit persons for trial or to confinement; or to keep persons in confinement, corruptly or maliciously² commits any person for trial or confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law,³ shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.

COMMENT.

This section is a further extension of the principle laid down in the preceding section. It is general in its application whereas the last section applies to judicial officers. It is intended to prevent an illegal commitment for trial or an illegal confinement.

1. 'Being in any office'.—The section applies to those who hold certain offices and not to private persons who have, under certain circumstances, the right to confine persons accused of certain offences.⁴ Private persons, if they abuse their power, cannot be dealt with under this section.

2. 'Maliciously'.—Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice.⁵

³ *Narayan Babaji*, (1872) 9 B. H. C. 346.

⁴ *Mansharam Gianchand*, (1940) 42 Cr. L. J. 460, [1941] AIR (S) 36.

⁵ *Pierre Lal*, (1916) 15 A. L. J. R. 106, 18 Cr. L. J. 527.

⁶ *Afzalur Rahman*, [1948] F. C. R. 7.

⁷ *Narappa Reddi Sessa Reddi*, [1938] 1 M. L. J. 876, [1938] M. W. N. 345, 47 L. W. 542, 39 Cr. L. J. 875, [1938] AIR (M) 575.

⁸ See ss. 59 and 60 of the Code of Criminal Procedure.

⁹ *Narayan Babaji*, (1872) 9 B. H. C. 346.

It is only when there has been an excess, by a police-officer, of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting contrary to law. Where the arrest is legal, there can be no guilty knowledge "superadded to an illegal act", such as it is necessary to establish against the accused to justify a conviction under this section.⁹ Apart from the legality of the arrest, the keeping in confinement even by a person who had legal authority to do so would be an offence under this section, if in the exercise of that authority a person kept another in confinement knowing that in doing so he was acting contrary to law.¹⁰

3. 'Knowing that in so doing he is acting contrary to law'.—When the question is of illegal commitment knowledge that such commitment is contrary to law is a question of fact and not of law and must be proved in order to satisfy the requirement of this section.¹¹

PRACTICE.

Evidence.—Prove (1) that the accused held an office, which empowered him to (a) commit persons for trial; or (b) commit persons to confinement; or (c) keep persons in confinement.

(2) That he committed a person for trial or to confinement, or kept a person in confinement in exercise of such powers.

(3) That he, in doing as above, was acting contrary to law.

(4) That he at the time knew that he was acting contrary to law.

(5) That he when doing as in (2) also acted corruptly or maliciously.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

221. Whoever, being a public servant,¹ legally bound² as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence,³ intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say:—

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death; or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with transportation for life or imprisonment for a term which may extend to ten years; or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

⁹ *Amarsang Jetha*, (1885) 10 Bom. 506; *Begum Singh*, (1867) 7 W. R. (Cr.) 3.

¹⁰ *Afzalur Rahman*, [1948] F. C. R. 7, distin-

guishing *Amarsang Jetha*, sup.

¹¹ *Narayan Babaji*, (1872) 9 B. H. C. 346.

COMMENT.

This and the two following sections deal with the omission to apprehend the escape of offenders.

1. 'Public servant'.—See s. 21, *supra*.

2. 'Legally bound'.—See s. 43, *supra*. There must be a legal obligation to apprehend or to keep in confinement any person charged with an offence. A *chowkidar* is not legally bound as a public servant to apprehend a person accused of committing murder outside the village of which he is *chowkidar*, such a person not being a proclaimed offender, and, not having been found by him in the act of committing such murder; and consequently such *chowkidar*, if he refuse to apprehend such person on such charge at the instance of a private person, is not punishable under this section.¹² Where a village *chowkidar* caught a person committing theft at a place which was beyond the *chowkidar's* circle, and detained the thief for some time and then released him on receiving some money, it was held that the *chowkidar* could not be convicted under this section, inasmuch as it was not the statutory duty of the *chowkidar* to arrest or detain the thief. He was not legally bound under s. 54 or 59 of the Criminal Procedure Code to do so.¹³ But where a police constable allowed a man who committed murder in his presence to escape because he was afraid of arresting him, it was held that he was guilty under this section.¹⁴

3. 'Offence'.—A thing punishable under the Code or under any special or local law (s. 40).

Special Act.—Where a police-officer allowed a prisoner to escape from his custody while he was on duty as sentry, it was held that he could not be convicted under the Police Act (V of 1861), but under this section.¹⁵

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That the person in question had been charged with an offence; or that such person was liable to be apprehended for an offence.

(3) That the accused was legally bound to apprehend such person for the same.

(4) That he omitted to apprehend.

(5) That he did so intentionally.

Prove also that the offence for which such person is charged with, etc., is punishable (a) with death; or (b) with transportation for life or imprisonment up to ten years; or (c) with imprisonment for less than ten years.

Or prove the following points:—

(1) That the accused is a public servant.

(2) That the person in question was in confinement for an offence.

(3) That the accused was legally bound to keep such person in such confinement.

(4) That he suffered such person to escape, or aided such person in escaping or in the attempt to escape.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, if the case comes under the first clause; by a Court of Session, Presidency Magistrate, or first class Magistrate, if it comes under the second; by Magistrate, Presidency, first or second class, if it comes under the third.

Charge.—I (name and office of Magistrate, etc.) hereby charge you (name of accused) as follows:—

That you, on or about the—, at—, being a public servant (state the nature of office held by the prisoner so as to make him a public servant) legally bound as such public servant to keep in confinement AB charged with the offence of—, an offence punishable with (state the punishment) intentionally suffered such person to escape, and that you thereby committed an offence punishable under s. 221 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.¹⁶

¹² *Kallu*, (1880) 3 All. 60.

¹³ *Bhagwan Din*, (1929) 52 All. 208.

¹⁴ *Ram Lal*, [1936] A. L. J. R. 1006, 37 Cr.

L. J. 1019, [1936] AIR (A) 651.

¹⁵ *Futteh Khan*, (1874) P. R. No. 11 of 1874.

¹⁶ Criminal Procedure Code, Sch. V, No. xxviii.

For the second paragraph the following may be substituted :—

That you being a public servant, to wit—, and being as such public servant legally bound to apprehend (or keep in confinement) one AB, who was, on or about the—day of—, at—, charged with (or liable to be apprehended for) the offence of —, punishable with—, did intentionally omit to apprehend such person [or intentionally suffer the said AB to escape or intentionally aid the said AB in escaping or attempting to escape from such confinement;] and that you thereby committed an offence punishable under s. 221 of the Indian Penal Code, and within my cognizance (or cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

222. Whoever, being a public servant,¹ legally bound² as such

Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.

public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice³ for any offence⁴ or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids⁵ such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

with transportation for life or with imprisonment of either description for a term which may extend to fourteen years. with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death ; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or pénal servitude for life, or to transportation or penal servitude or imprisonment for a term of ten years or upwards ; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years or if the person was lawfully committed to custody.

COMMENT.

This section is similar to the last section with the exception that the person to be apprehended has already been convicted or committed for an offence. It is thus an aggravated form of the offence made punishable by the last section.

1. 'Public servant'—See s. 21, *supra*.

2. 'Legally bound'—See s. 43, *supra*.

3. 'Court of Justice'.—See s. 20, *supra*.

4. 'Offence'.—'Offence' means a thing punishable under the Code or under any special or local law (s. 40).

5. 'Intentionally aids'.—The meaning of this phrase can be learnt from s. 107, Explan. 2, where it is explained that whoever either prior to or at the time of the commission of an act does anything in order to facilitate the commission of that act and thereby facilitates the commission thereof is said to aid the doing of that act.¹⁷

¹⁷ *Maula Bakhsh*, (1929) 30 Cr. L. J. 1103, 1106, [1929] AIR (L) 631.

Amendment.—The words “or lawfully committed to custody” in the first paragraph, and “or if the person was lawfully committed to custody” at the end were inserted by the Indian Penal Code Amendment Act (XXVII of 1870), s. 8.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

- (2) That the person in question was sentenced by a Court of Justice.
- (3) That such sentence was for an offence committed.
- (4) That such person was liable to be apprehended under such sentence.
- (5) That the accused was legally bound to apprehend such person.
- (6) That he omitted to apprehend.
- (7) That he did so intentionally.

Or prove points (1), (2) and (3) as above, and further—

- (4) That such person was in confinement under such sentence.
- (5) That the accused was legally bound to keep him in such confinement.
- (6) That he suffered such person to escape, or aided him in escaping or in the attempt to escape.
- (7) That he did so intentionally.

Prove also the offence for which such person was confined.

Or prove the following points :—

- (1) That the accused is a public servant.
- (2) That the person in question had been committed to custody.
- (3) That such committal was lawful.
- (4) That the accused was legally bound to keep him in confinement under such committal.
- (5) That he suffered such person to escape, or aided him in escaping or in the attempt to escape.
- (6) That he did so intentionally.

Procedure.—Not cognizable—Warrant—Not bailable if the case is punishable under the first or second clause; bailable if under the third clause—Not compoundable—Triable by Court of Session if the case falls under the first or second clause; by Court of Session or Magistrate, Presidency or first class, if it falls under the third.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant, to wit—, and being as such public servant legally bound to apprehend (*or keep in confinement*) one AB, who was, on or about the—day of—, at—, under the sentence of the Court of—for the offence of—(*or who was lawfully committed to custody by—*) did intentionally omit to apprehend the said AB (*or intentionally suffer the said AB to escape, or intentionally aid the said AB in escaping or attempting to escape from such confinement*) and that you thereby committed an offence punishable under s. 222 of the Indian Penal Code and within my cognizance (*or cognizance of the Court of Session*).

And I hereby direct that you be tried (by the said Court (*in cases tried by Magistrate omit these words*)) on the said charge.

223. Whoever, being a public servant¹ legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody,² negligently suffers such person to escape from confinement,³ shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Escape from confinement or custody negligently suffered by public servant.

COMMENT.

This section further extends the principle laid down in the two preceding sections. It punishes a public servant who negligently suffers any person charged with an offence

to escape from confinement. The last two sections deal with intentional omission to apprehend such person.

Scope.—This section applies only to cases where the person, who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested, under civil process.¹⁸ The latter cases come under s. 225A.

Ingredients.—The section has three essentials :—

1. The offender must be a public servant.
2. He must be legally bound to keep in confinement a person charged with or convicted of an offence or lawfully committed to custody.
3. He must negligently suffer such person to escape.

1. '**Public servant.**'—See s. 21, *supra*. The expression includes a convict warder,¹⁹ or a *rakha*,²⁰ but not a village *vetti*.²¹

2. '**Legally bound . . . to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody**'.—See s. 48, *supra*, as to the meaning of 'legally bound'. The public servant must be legally bound to keep in confinement. A village policeman is nowhere authorized to take charge of convicted prisoners. Where, therefore, a convicted prisoner escaped from the custody of a village policeman, it was held that the policeman was not guilty of an offence under this section.²²

'**Any person charged with or convicted of any offence**'.—The words "charged with an offence" in this section are used only in the sense of inculcation or accusation of an offence and do not mean "against whom a charge has been framed". Where an officer who was not a police-officer, and 'therefore not legally bound' to keep in confinement a person arrested by a private person for an offence, negligently suffered that person to escape from confinement, it was held that he could not be convicted under this section.²³

'**Offence**' means a thing punishable under the Code or under any special or local law (s. 40).

'**Lawfully committed to custody**'.—Unless the custody is lawful no offence is committed. If a public servant has no right to keep a person in custody he is not guilty of an offence under this section for allowing that person to escape.²⁴ The police of a Native State arrested in British territory a person suspected of having committed an offence in that State, and made him over to a *chowkidar* from whose custody he escaped. It was held that as neither the original arrest nor the subsequent custody by the *chowkidar* was lawful, the *chowkidar* could not be convicted under this section.²⁵

3. '**Negligently suffers such person to escape from confinement**'.—Before a person can be convicted of having negligently suffered a prisoner to escape, it must be shown not only that he was guilty of negligence, but that the escape was at least the natural and probable consequence of his negligence. It must be shown that the escape was directly due to negligence. Where an officer in charge of a police-station was ordered to despatch certain prisoners and he left the station ordering the head constable to despatch them and on the way the prisoners escaped, it was held that the negligence of the officer in charge was too remotely connected with the escape and he could not be convicted under this section.¹ Where the accused, a jail warder, was placed in charge of a gang of prisoners to do agricultural work, contrary to his orders, permitted a convict warder to take two of the convicts to a cemetery to water the trees there and one of the convicts escaped owing to the negligence of the convict warder, it was held that the accused was guilty of an offence under this section.² Where

¹⁸ *Tafaulah*, (1885) 12 Cal. 190.

¹⁹ *Kallachand Moitree*, (1867) 7 W. R. (Cr.) 63 [99]; *Oodaji*, (1888) Unrep. Cr. C. 389.

²⁰ *Fula Bhana*, (1888) Cr. R. No. 40 of 1888, Unrep. Cr. C. 388.

²¹ *Bodapati Pentadu*, (1882) 1 Weir 197.

²² *Jagda*, (1899) 1 Bom. L. R. 349.

²³ *Nurul Huq v. Obayedulla*, (1941) 46 C. W. N. 163.

²⁴ *Debi*, (1907) 29 All. 377. See, to the same effect, *Choghatta*, (1891) P. R. No. 20 of 1891.

²⁵ *Ibid.*

¹ *Durga Prasad*, (1910) 7 A. L. J. R. 907, 11 Cr. L. J. 478; *Rur Singh*, (1935) 40 C. W. N. 61, 37 Cr. L. J. 918.

² *Ahsan Ali*, (1918) P. R. No. 18 of 1919, (Cr.), 20 Cr. L. J. 350, [1919] AIR (L) 229.

the accused marched a prisoner after sunset, contrary to the directions of the Magistrate, and the prisoner was rescued, it was held that no offence under this section was made out.³ Certain police constables were conveying a dangerous prisoner in a camel-cart. The constables had put on the prisoner two sets of hand-cuffs. One set bound his hands together and by the other set he was bound to a side of the camel-cart. There was also a rope round the prisoner's waist. During the course of the journey the prisoner demanded to be let down from the car to answer the call of nature. One set of hand-cuffs was taken off in order to enable the prisoner to leave the camel-cart for the purpose mentioned. The rope remained round his waist and one set of hand-cuffs remained in his hands. The prisoner raised a sudden alarm of a snake and in the momentary confusion jerked away the rope and managed to get away. The night was cloudy and the prisoner could not be caught. It was held that the policemen were not guilty of negligence, even though somewhat inefficient, and were not guilty of an offence under this section.⁴

'Escape from confinement'.—"It seems . . . that the Legislature, in ss. 220 to 225, has used the words confinement and custody as co-extensive, and indicates by them one and the same thing, regarded from different points of view".⁵ "We cannot hold that the expression 'escape from confinement' should be limited in its application to escape from the particular sort or place of confinement to which the prisoner was subjected or in which he was restrained at the time of the occurrence".⁶ The accused were keeping guard on certain cells in a jail where certain condemned prisoners were confined. When they were relieved it transpired that the prisoners under their charge were not in their cells. They were, however, subsequently discovered crouching on the roofs of their cells, and were immediately recaptured. It was held that the accused were not guilty of this offence. For "the prisoners were still in 'confinement' when crouching upon the roofs of their cells, inasmuch as they were still within the prison walls and were not at liberty. An attempt to escape from confinement had no doubt been made, but negligently suffering such an attempt is not an offence within the provision of s. 223".⁷ A Magistrate, acting upon a petition, arrested and took the statement of the prisoner. He then sent the prisoner to a police-officer for investigation and report, who allowed the prisoner to go at large. It was held that the Magistrate's order might be taken to have been passed under s. 167, Criminal Procedure Code, and therefore the prisoner was lawfully committed to the custody of the police; that the officer was bound to detain him in custody until released therefrom by due course of law, and that the officer, having negligently suffered the prisoner to escape, was guilty under this section.⁸ The accused, a *daffadar* in charge of one of the postern gates of a jail, suffered certain convicts to pass out of the gate at which he was stationed, not intending that they should escape but to allow of their having an interview with their friends. The convicts taking advantage of the accused's overconfidence effected their escape. It was held that the accused was guilty of this offence.⁹

Amendment.—The words "or lawfully committed to custody" were added by the Indian Criminal Law Amendment Act (XXVII of 1870), s. 8.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

- (2) That the person in question was charged with or convicted of an offence.
- (3) That the accused was legally bound to keep such person in confinement.
- (4) That he suffered such person to escape therefrom.
- (5) That he acted negligently when suffering such person to escape.¹⁰

Or prove (1) that the accused is a public servant.

- (2) That the person in question was committed to custody.
- (3) That such committal was lawful.

³ *The District Magistrate of Nellore*, (1909) 10 Cr. L. J. 293.

⁴ *Girdhari*, (1917) 15 A. L. J. R. 883, 19 Cr. L. J. 78, [1918] AIR (A) 282.

⁵ Per Plowden, J., in *Imam Din*, (1890) P. R. No. 2 of 1891, F.B., at p. 7.

⁶ Per Rivaz, J., in *Albel Singh*, (1890) P. R.

No. 32 of 1890, at p. 104.

⁷ *Ibid.*

⁸ *Ashraf Ali*, (1883) 6 All. 129.

⁹ *Ghulam Ali*, (1883) P. R. No. 19 of 1883.

¹⁰ *Rur Singh*, (1935) 40 C. W. N. 61, 37 Cr. L. J. 918.

(4) That the accused was legally bound to keep in confinement such person under such committal.

(5) That he suffered such person to escape from confinement.

(6) That he acted negligently when suffering such escape.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, or first or second class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, being a public servant, to wit——, and as such public servant legally bound to keep in confinement one AB who was charged with the offence of——, under section——, of the Indian Penal Code, (*or convicted of, or lawfully committed to custody*) negligently suffered the said AB to escape from confinement, and that you thereby committed an offence punishable under s. 223 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged¹ or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence,² shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

COMMENT.

This and the section following relate to resistance or illegal obstruction offered to the lawful apprehension of any person. Sections 221-223 punish public servants who fail to apprehend or confine persons liable to be apprehended or confined.

Scope.—This section punishes the persons who offer resistance or obstruction to their lawful apprehension. It requires that the accused person must offer resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he has either been charged or of which he has been convicted.¹¹

Ingredients.—The section deals with two kinds of offences :—

1. Resistance or illegal obstruction by a person to his lawful apprehension for any offence with which he is charged.

2. Escape or attempt to escape by a person from lawful custody for the offence with which he is charged or of which he has been convicted.

1. 'Resistance or illegal obstruction to the lawful apprehension... for any offence with which he is charged'.—The prosecution should show that the apprehension or arrest made or attempted was lawful in every way.¹² Trivial resistance to unlawful force on the part of an arresting officer does not constitute an offence under this section.¹³

The accused committed contempt of Court and was ordered into custody by the presiding Magistrate. He resisted the arrest, but was ultimately arrested in a Court on a warrant issued by the Magistrate, and was tried and convicted of the offence of resisting lawful arrest. It was held that the conviction was legal.¹⁴ Where the accused having been sentenced to imprisonment by a Village Magistrate refused to submit to

¹¹ *Khanu*, (1923) 18 S. L. R. 301, 25 Cr. L. J. 462, [1925] AIR (S) 193.

¹² *Kartik Chandra Maity*, (1930) 33 Cr. L. J.

706, 13 P. L. T. 135, [1932] AIR (P) 171.

¹³ *Tan Sein*, (1901) 1 L. B. R. 178.

¹⁴ *Mahommed Kassim*, (1881) 1 Weir 204.

the sentence and went away, and the evidence did not show that any proper attempt was made to arrest her, it was held that the conviction under this section was bad.¹⁵

'Illegal obstruction'.—The simple evading of arrest does not amount to resistance or illegal obstruction to lawful apprehension.¹⁶ As to the word "illegal", see s. 43, *supra*.

'Offence'.—'Offence' means a thing punishable under the Code or any special or local law (s. 40). Escapes by parties detained for offences not punishable under the Code are punishable under this section.¹⁷

'Charged'.—An arrest of a person by an officer authorized in that behalf is a charging, that is, an imputation of the alleged offence though but a *prima facie* imputation until the case goes before some functionary authorized to deal with it.¹⁸ The word "charged" is used in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial.¹⁹ But the mere fact that a Sub-Inspector of Police put his hand on the shoulder of the accused or caught hold of his wrist without the least intimation to him for what offence he was being arrested cannot amount to the accused being "charged" with an offence under this section.²⁰

2. 'Escapes or attempts to escape from any custody in which he is lawfully detained for any such offence'.—A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law he commits the offence of escape.²¹ Thus, where a person, having been legally arrested, was subsequently left unguarded and he escaped, it was held that he was guilty under this section.²² Manual detention is not essential to constitute arrest.²³

'Custody in which he is lawfully detained'.—In construing these words regard must be had to the nature of the custody itself as well as to the circumstances under which the authority to arrest and keep in custody arises.²⁴ The mere fact that a constable in charge of the accused, who was detained in a jail, became insensible was held not to determine the lawful custody of the accused.²⁵

Where a person apprehended on a charge of a cognizable offence, escapes from lawful custody, his liability to punishment is not affected by the circumstances that a competent Court determines his offence to be other than that with which he has been charged. But, if charged with a non-cognizable offence, the police-officer, who apprehends him without warrant does not have him in lawful custody, and his escape is not punishable under this section.¹

A person is not in lawful custody if the person apprehending him or causing his apprehension has no power to arrest,² or if he is arrested on a warrant, not lawfully signed,³ or by a person who cannot legally arrest, e.g. a *chowkidar*,⁴ or if he is kept in confinement for inflicting illegal punishment.⁵

A person of the same name as the offender was arrested, tried and acquitted. Whilst under arrest the accused escaped from custody. It was held that he was not liable to conviction under this section.⁶ Where a prisoner escaped from lawful custody while on his way to undergo a sentence of transportation, he was held liable

¹⁵ *Nooruboobu*, (1882) 1 Weir 204.

¹⁶ *Nanjan*, (1888) 1 Weir 205.

¹⁷ (1866) 3 M. H. C. Appx. 11.

¹⁸ *Kutia Ali*, (1886) Unrep. Cr. C. 298, Cr. R. No. 46 of 1886.

¹⁹ *Kalia Amra*, (1926) 29 Bom. L. R. 168, 28 Cr. L. J. 380, [1927] AIR (B) 96.

²⁰ *Muneshwar Bux Singh*, (1938) 14 Luck. 409.

²¹ Russell, Vol. I, 9th Edn., p. 254.

²² *Muppan*, (1895) 18 Mad. 401; *Kalia Amra*, *sup.*

²³ *Nanjan*, *supra*.

²⁴ (1878) 1 Weir 199.

²⁵ *Saudeya Goundan*, (1890) 1 Weir 205.

¹ *Ram Saran Tewary*, (1875) 24 W. R. (Cr.) 45. See also *Chakua*, (1896) 16 A. W. N. 151.

² *Rur Singh*, (1885) P. R. No. 21 of 1885; *Bojigan*, (1882) 5 Mad. 22; *Kalian*, (1896) 19

Mad. 310; *Lajje Ram*, (1898) P. R. No. 12 of 1898; *Pandaram Thukanam*, (1883) 1 Weir 205; *Kesar*, (1932) 33 P. L. R. 185, 33 Cr. L. J. 680, [1932] AIR (L) 263; *Gulabi Mahto*, (1940) 21 P. L. T. 144, [1940] P. W. N. 149, 41 Cr. L. J. 742, [1940] AIR (P) 361.

³ *Rur Singh*, *supra*; *Mousi Lal*, (1918) 5 P. L. W. 226, 19 Cr. L. J. 1000, [1918] AIR (P) 252.

⁴ *Purna Chandra Kundu*, (1913) 41 Cal. 17; *Jogaraj*, [1940] P. W. N. 687, (1940) 22 P. L. T. 280, 42 Cr. L. J. 199, [1940] AIR (P) 696.

⁵ *Uppala Kotayya Nagaram*, (1915) 16 Cr. L. J. 672, [1916] AIR (M) 686.

⁶ *Ganga Charan Singh*, (1893) 21 Cal. 337. See *Johri*, (1901) 23 All. 266, where the escape was from the custody of an officer who had no right to arrest the accused as the offence was not committed in his presence.

under this section and not under s. 226.⁷ Escape from custody by a thief, who had been caught by a private person in the very act of stealing, at a time when the thief was being sent to the nearest police-station in custody of a person, who had not witnessed the offence, was held to be an offence under this section.⁸ A prisoner in a jail was employed in brickfields outside the jail. While so employed he endeavoured to escape, but was recaptured. It was held that he had committed an offence under this section.⁹ A process-server went to the village of the accused and told him that he had a warrant for him and took him before the Village Magistrate, who then read out the warrant to the accused. The process-server informed him that he should pay the amount. The accused's offer to pay a less sum than that mentioned in the warrant having been refused, he ran away. It was held that the accused was duly arrested and was in the custody of the process-server at the time he made his escape.¹⁰

'For any such offence.'—These words mean, for any offence with which a person is charged or of which he has been convicted. So that it will be an offence for a man to escape from custody after he has been lawfully arrested on a charge of having committed an offence although he may not be convicted of such latter offence. An accused person is no less guilty than a convicted person, if he escapes from lawful custody.¹¹ Escape from custody when such detention is not for an offence is not punishable under this section.¹² The detention contemplated should necessarily be for any of the offences mentioned in the Code or under any local or special law applicable to British India. If the detention is in respect of an offence committed in an Indian State it is not a detention which could be taken notice of under this section. The accused, a subject of an Indian State, was lawfully arrested by the State police within the State territory for an offence committed by him there. While in such custody, he passed through the British territory and escaped. He was arrested by the British police, and prosecuted and convicted under this section. It was held that the detention contemplated in this section should necessarily be for any of the offences mentioned in the Code or under any local or special law applicable to British India, and that the accused could not be convicted under this section as he was detained at the time of his escape by the State police for an offence committed within the State territory.¹³

An escape from custody, when a person is being taken before a Magistrate for the purpose of being bound over to keep good behaviour, is not punishable under this section¹⁴ for in such a case he is not in custody for an offence. He could, however, be punished under s. 225B.

Escape with consent.—Even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law.¹⁵

Police-officer to show authority under which he is acting.—It may be desirable or even obligatory that if called upon the police-officer making an arrest should show the person arrested the authority under which he is acting; but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the Legislature has thought proper to declare it.¹⁶

An endorsement in a warrant of arrest should be made properly in accordance with law. If it is made only by initials which are proved or identified to be of the proper person the warrant does not become invalid by reason merely of its being initialled.¹⁷

⁷ *Ramasamy*, (1868) 3 M. H. C. 152, 1 Weir 213; *Nga Po Chein*, (1911) 4 B. L. T. 261, 13 Cr. L. J. 54; *Punjab Singh*, (1933) 15 Lah. 84.

⁸ *Potadu*, (1888) 11 Mad. 480; *Fakira*, (1893) 17 Mad. 103.

⁹ *Hasan Ali*, (1894) 14 A. W. N. 176.

¹⁰ *Venkatachela Samban*, (1892) 1 Weir 206.

¹¹ *Deo Sahay Lal*, (1900) 28 Cal. 253, 255; *Mohammed Kazi*, (1916) 43 Cal. 1161; *Kalia Amra*, (1926) 29 Bom. L. R. 168, 28 Cr. L. J. 380, [1927] AIR (B) 96; *Po Hla*, (1906) 3 L. B.

R. 221, 4 Cr. L. J. 389.

¹² *Ganga Charan Singh*, (1893) 21 Cal. 337.

¹³ *Bilhi*, [1940] Lah. 570.

¹⁴ *Shasti Churn Napat*, (1882) 8 Cal. 331; *Kandhaia*, (1884) 7 All. 67; (1874) 7 M. H. C. Appx. 41, 1 Weir 198.

¹⁵ 1 Russell, 9th Ed., p. 255; Roscoe, 14th Edn., p. 581.

¹⁶ *Basant Lal*, (1900) 27 Cal. 320.

¹⁷ *Abdul Sikdar v. Mathu Singh*, (1901) 5 C. W. N. 447.

Explanation.—The Explanation does not require that a sentence of imprisonment under this section must be made to run consecutively to a sentence imposed for the main offence of which the accused has been convicted.¹⁸

PRACTICE.

Evidence.—When the offence charged is that of resistance to apprehension, prove—

- (1) That the accused is charged with an offence.
- (2) That he offered resistance or obstruction to his apprehension.
- (3) That such resistance or obstruction was illegal.
- (4) That the accused offered it intentionally.

When the offence charged is that of escape from custody, prove—

- (1) That the accused had been charged with or convicted of an offence.
- (2) That he was detained in custody.
- (3) That such detention in custody was in respect of such charge or conviction.
- (4) That such detention in custody was lawful.
- (5) That the accused escaped from such custody or attempted to do so.
- (6) That the accused did so intentionally.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Venue.—A charge of having escaped from custody may be inquired into and tried wherever the person happens to be when the charge is made.¹⁹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, [intentionally offered resistance (*or* illegal obstruction) to your lawful apprehension for the offence of—with which you were charged (*or* of which you had been convicted)] (*or*) [escaped *or* attempted to escape from the custody of—— in which you were lawfully detained for the offence of——], and thereby committed an offence punishable under s. 224 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—The punishment awardable under this section being in addition to the original sentence, the Courts, when passing a sentence, must comply with the directions of s. 396 (2), (3), of the Code of Criminal Procedure.²⁰

225. Whoever intentionally offers any resistance¹ or illegal² obstruction to the lawful apprehension of any other person for an offence, or rescues³ or attempts to rescue any other person from any custody in which that person is lawfully detained⁴ for an offence,⁵ shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended or the person rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended, or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either

¹⁸ *Chokhu*, (1934) 36 Bom. L. R. 963, 36 Cr. L. J. 282 (1), [1934] AIR (B) 462.

¹⁹ Criminal Procedure Code, s. 181.

²⁰ *Chinna Madakudumban*, (1882) 1 Weir 203; *Dhonda Bhooiya*, (1867) 8 W. R. (Cr.) 85.

description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

This section punishes a person who—

(1) intentionally offers resistance or obstruction to the lawful apprehension of an offender; or

(2) rescues or attempts to rescue a person from any custody in which he is lawfully detained for an offence.

The last section punishes the offenders themselves. Section 130 deals with the rescue of a prisoner of State or War, and s. 186, with rescue in any other case.

1. 'Intentionally offers... resistance'.—The intention of the accused is an important ingredient in the offence. If the apprehension is not lawful then resistance to such apprehension will not be any offence. Where a police-officer sent villagers to arrest certain persons suspected of theft, contrary to the Code of Criminal Procedure which confers no powers on a police-officer to send persons who are not police-officers to make an arrest which he could lawfully make, it was held that resistance to the villagers did not constitute an offence under this section.²¹ A person who offers resistance or obstruction to the arrest by a private person of another person, who is escaping after the commission of a non-bailable and cognizable offence but who did not commit the offence in view of the person attempting to arrest him, cannot be held to have committed an offence under this section.²² Where a Sub-Inspector of Police went to a village dressed up in his uniform to arrest the accused in a most illegal and reprehensible manner, it was held that the accused could not be held guilty under this section if they offered resistance to the police.²³

Where a Sub-Inspector of Excise was threatened in order to prevent him from arresting an offender, it was held that it amounted to offering resistance and illegal obstruction to arrest.²⁴

2. 'Illegal'.—See s. 43, *supra*.

3. 'Rescues'.—This word is not defined in the Code. 'Rescue' is the act of forcibly freeing a person from custody against the will of those who have him in custody. If the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody.²⁵ 'Rescue' implies intention and the use of violence to effect the object desired.¹ The act of rescue will always be accomplished by the use of a certain amount of criminal force. A person, under such circumstances, cannot be convicted of both rescuing another person and using force.² A person rescuing a prisoner arrested by a police-officer as a member of an unlawful assembly,³ and a person rescuing a thief from the custody of a private

²¹ *Taik Pyu*, (1909) 5 L. B. R. 21, 10 Cr. L. J. 118.

²² *Alawala*, (1921) 23 P. L. R. 47, 23 Cr. L. J. 3, [1922] AIR (L) 73.

²³ *Gaya Din*, (1934) 9 Luck. 517.

²⁴ *Bechu Mian*, (1930) 12 P. L. T. 312, 31 Cr. L. J. 465, [1930] AIR (P) 344.

²⁵ Stephen, Dig. Cr. L., Art. 162.

¹ *Ghulam Ali*, (1883) P. R. No. 19 of 1883; *Kallu*, (1922) 23 Cr. L. J. 693, [1922] AIR (L) 59.

² *Kalishankar Sandyal*, (1869) 3 Beng. L. R. (A. Cr. J.) 14, sub-nom. *Chunder Kani Lahoree*, (1869) 12 W. R. (Cr.) 2.

³ *Assan Shurreff*, (1870) 13 W. R. (Cr.) 75.

person who had arrested him, in the act of stealing,⁴ or from the custody of a *chowkidar* to whom a private person had handed over the thief after arresting him,⁵ were held to have committed an offence under this section.

4. 'Lawfully detained'.—The person from whose custody the rescue is effected must have authority to lawfully detain the person rescued. Otherwise no offence is committed for effecting the rescue.⁶ It is not necessary that the custody from which the offender is rescued should be that of a policeman, it is enough that the custody is one which is authorized by law,⁷ and it must be proved that the person rescued was in lawful custody at the time.⁸ Otherwise no offence is committed. The accused rescuing a person alleged to have committed theft, who was unlawfully arrested by a private person and made over to the custody of a village *chowkidar*, not a police-officer, was held to have committed no offence under this section.⁹ But in virtue of the amendment of s. 59, Criminal Procedure Code, by the introduction of the words "or cause him to be taken in custody" such a defence cannot now be raised and a *chowkidar* has power to receive the custody of a person arrested under s. 59 by a private individual and to take him to the police-station and rescue from such custody amounts to an offence under this section.¹⁰ Where a person was arrested by a private person not while committing theft but only when hiding himself in a house, it was held that his arrest was not lawful and consequently his rescue from the custody of the person arresting him did not constitute an offence under this section.¹¹ On a warrant which provided for bail a constable arrested a person without giving him intimation that bail had been allowed. He was rescued by a number of persons who assaulted the constable. It was held that as the constable arrested him without asking him whether he could give bail he was not in lawful custody and his rescue therefore did not constitute any offence.¹² The seal of the Court is essential to the validity of a warrant, and its absence makes the warrant void and an arrest made in execution of such warrant is not legal.¹³ A civil warrant not addressed to a particular bailiff by name but addressed "to the bailiff of the Court" is not invalid. The rescuer of a person arrested under such warrant was held guilty of an offence under this section.¹⁴ If the person rescuing another who is arrested under an illegal warrant uses more force than is necessary and causes unnecessary hurt to the public servant who has the custody of that person, he will be punished under s. 353.¹⁵

If a person authorized to arrest has made an arrest and handed over the person arrested to the custody of an agent, such custody continues to be, what it originally was, a lawful custody.¹⁶

5. 'Offence'.—'Offence' means a thing punishable under the Code or any special or local law (s. 40). An escape from custody, when being taken before a Magistrate for the purpose of being bound over to be of good behaviour, is not punishable under this section.¹⁷ Similarly, an escape from arrest under s. 55, Criminal Procedure Code, will not fall under this section.¹⁸

PRACTICE.

Evidence.—Prove (1) that the person in question was detained in custody.

(2) That such detention was in respect of an offence.

(3) That such detention was lawful.

(4) That the accused rescued or attempted to rescue such person.

(5) That he did so intentionally.

There must be a clear finding as to the intention with which the accused acted.¹⁹

⁴ *Kutti*, (1888) 11 Mad. 441.

⁵ *Parsiddhan Singh*, (1907) 29 All. 575.

⁶ *Bolai De*, (1907) 35 Cal. 361; *Kesar*, (1932) 33 P. L. R. 185, 33 Cr. L. J. 680, [1932] AIR (L) 263; *Shridhar*, [1941] Ran. 141; *Vijoy Narain Singh*, (1940) 22 P. L. T. 29.

⁷ *Kutti*, (1888) 11 Mad. 441, (1878) 1 Weir. 199.

⁸ *Degumbur Aheer*, (1873) 21 W. R. (Cr.) 22.

⁹ *Kalai v. Kalu Chowkidar*, (1900) 27 Cal. 366.

¹⁰ *Chotu Hajjam*, (1932) 13 P. L. T. 321, 33 Cr. L. J. 572, [1932] AIR (P) 214.

¹¹ *Gokul Talva*, (1924) 7 P. L. T. 65, 26 Cr. L.

J. 1462, [1926] AIR (P) 53.

¹² *Shyama Churn Majumdar*, (1911) 16 C. W. N. 549, 18 Cr. L. J. 590.

¹³ *Mahajan Sheikh*, (1914) 42 Cal. 708.

¹⁴ *Abdul Rahiman Sahib*, (1914) 15 Cr. L. J. 439, 1 L. W. 500, [1914] AIR (M) 55.

¹⁵ *Mousi Lal*, (1918) 19 Cr. L. J. 1000, [1918] AIR (P) 252.

¹⁶ *Johri*, (1901) 23 All. 266, 268.

¹⁷ *Shasti Churn Napit*, (1882) 8 Cal. 331.

¹⁸ *Kandhaia*, (1884) 7 All. 67.

¹⁹ *Alawala*, (1921) 23 P. L. R. 47, 23 Cr. L. J. 3, [1922] AIR (L) 78.

Prove further that the case falls under a particular clause of the section.

Procedure.—Cognizable—Warrant—Bailable, if the case falls under the first clause, otherwise not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class, if the case falls under the first clause; but by Court of Session, or by Magistrate, Presidency or first class, if it falls under the second; by Court of Session, if it falls under any of the remaining clauses.

Jurisdiction.—The words in the second paragraph of this section, describing the punishment for the offence with which the person apprehended is charged, should not be read disjunctively as denoting transportation for life or imprisonment for ten years in the alternative. A Second Class Magistrate has therefore no jurisdiction to try an offender under s. 225(2), if the person to be apprehended or attempted to be rescued is liable to be apprehended for, or is charged with, an offence punishable with transportation for life, or an offence punishable with imprisonment for ten years.²⁰

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, intentionally offered resistance (*or illegal obstruction*) to the lawful apprehension of AB for the offence of ——under section—— of the Indian Penal Code [*or rescued (or attempted to rescue) the said AB from the custody in which the said AB was lawfully detained for the offence of——*], and that you thereby committed an offence under s. 225, clause ——, of the Indian Penal Code, and within my cognizance [*or the cognizance of the Court of Session*].

And I hereby direct that you be tried [*by the said Court (omit these words when the accused is tried by a Magistrate)*] on the said charge.

225A. Whoever, being a public servant¹ legally bound² as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished—

Omission to apprehend, or suffering of escape, on part of public servant, in cases not otherwise provided for.

(a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and

(b) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section was substituted by the Indian Criminal Law Amendment Act (X of 1886), s. 24 (1), for the old s. 225A which was inserted by the Indian Penal Code Amendment Act (XXVII of 1870), s. 9. It punishes intentional or negligent omission to apprehend or keep in confinement on the part of a public servant not coming within the purview of s. 221, 222 or 223. Where a police-officer who was entrusted with the custody of an arrested person omitted to secure one of the doors of the room in which that person was confined and the prisoner escaped through that door, it was held that the officer was clearly guilty of negligence under this section.²¹

A person who intentionally resists or illegally obstructs a police-officer in the apprehension of a deserter from His Majesty's Army or rescues or attempts to rescue him from the custody of such officer commits an offence under this section.²²

Chapter IV (General Exceptions) and Chapter V (Abetment) of the Code apply to offences punishable under this section.

²⁰ Venkatasubbier, (1890) 1 Weir 210.

²¹ Ramnandan Singh, (1929) 31 Cr. L. J. 717, [1930] AIR (P) 103.

²² Rahm Ali, (1911) P. R. No. 20 of 1911, 13 Cr. L. J. 284.

1. 'Public servant'.—See s. 21, *supra*. 2. 'Legally bound'.—See s. 43, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he was legally bound to apprehend, or keep in confinement, the person in question.

(3) That he omitted to apprehend that person, or suffered him to escape from confinement.

(4) That he did as above intentionally [*or negligently for clause (b)*].

(5) That the offence does not fall under s. 221, 222 or 223 or any other law.

Procedure.—(a) In the case of intentional omission or sufferance—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

(b) In the case of negligent omission or sufferance—Not cognizable—Summons—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being a public servant legally bound as such public servant to apprehend (*or to keep in confinement*) one AB intentionally (*or negligently*) omitted to apprehend the said AB (*or suffered the said AB to escape from confinement*) and that you thereby committed an offence punishable under s. 225A of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

225B. Whoever, in any case not provided for in section 224

Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.

or section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction¹ to the lawful apprehension² of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained,³ or rescues or attempts to rescue any other person from any custody⁴ in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

This section was substituted by the Indian Criminal Law Amendment Act (X of 1886), s. 24 (1).

Chapters IV (General Exceptions) and V (Abetment) of the Code apply to offences punishable under this section.

Object.—This section was introduced to provide for cases referred to in *Empress v. Shasti Churn Napi*²³ and *Queen-Empress v. Kandhaia*²⁴ in which it was held that a person escaping from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour not being punishable under s. 224 or 225 could not be punished, and for cases which s. 651 of the old Code of Civil Procedure was intended to meet.

1. 'Intentionally offers any resistance or illegal obstruction'.—See s. 43, *supra*, for the meaning of 'illegal'. Resistance to arrest must be intentional. A person who makes a resistance not knowing that he is being, or is about to be, arrested, cannot be convicted of an offence under this section.²⁵ Where a warrant is issued by a civil

²³ (1882) 8 Cal. 331.

²⁴ (1884) 7 All. 67.

²⁵ *Holmes*, (1927) 29 Cr. L. J. 286, [1928] AIR (L) 324.

Court for the arrest of a judgment-debtor and he resists the officer executing the warrant in making the arrest he will be guilty of an offence under this section. But if the judgment-debtor on seeing the officer runs into the house and thus avoids the arrest, it does not amount to intentional resistance or obstruction to arrest. There must be an overt act of resistance or obstruction which can justify a conviction under this section.¹ There must be some active opposition by show of force. Something more than mere absconding is required.² In order to constitute an offence under this section something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest.³

Though absconding in order to avoid being served with a summons, notice or order, is punishable, no provision exists for punishing absconding in order to avoid arrest under a warrant. The law provides certain alternative coercive procedure against the property of the absconder in such a case.⁴

2. 'Lawful apprehension'.—The warrant under which a person is to be apprehended must be a legal one, that is, it must have been executed with all due formalities of law.⁵ If the warrant is illegal, then resistance to the execution of such a warrant is not an offence. Where, therefore, a warrant was issued for the arrest of a witness in the first instance without previously serving summons upon him, for attendance and without recording reasons for the issue of the warrant and the witness was arrested, it was held that the resistance to the execution of such a warrant was not an offence.⁶ If the arrest is not lawful then no offence under this section is committed.⁷ When the imposition of tax for the non-payment of which a warrant is issued is itself illegal and *ultra vires*, the resistance to its execution is not punishable under this section.⁸

Obstruction to the apprehension of a person who cannot be lawfully arrested, cannot be an offence under this section, e.g. a child under seven years,⁹ or searching and taking a person into custody from a place different from that specified in the search-warrant.¹⁰

The evading of arrest does not amount to resistance or illegal obstruction to lawful apprehension.¹¹ Where the accused, seeing a process-server accompanied by the decree-holder coming with a warrant to arrest him in execution of a decree, ran into his house and would not come out when called upon to do so, it was held that this did not amount to resistance or obstruction within the meaning of this section.¹² Where two peons arrived with a warrant of arrest, complete in itself and exhibiting no defect of form, and arrested the judgment-debtor, but did not do anything more than the duties imposed upon them by the warrant, nor did they act otherwise than in good faith, and the judgment-debtor resisted the arrest while the other two accused persons pushed the two peons aside whereupon the judgment-debtor also pulled himself free of their grasp, it was held that although the executing Court might have wrongly exercised the discretion in issuing the warrant of arrest, nevertheless it was the duty of the peons to execute that warrant and it was no part of their duty to ascertain whether the executing Court had properly exercised its undoubted legal discretion, and, therefore, that the apprehension of the judgment-debtor by the peons was a lawful one and escape from and obstruction to that apprehension were unlawful acts, and the accused persons were guilty under this section and s. 353.¹³

¹ *Gajadhar*, (1910) 7 A. L. J. R. 1174, 11 Cr. L. J. 721.

² *Annawadin*, (1928) 1 Ran. 218.

³ *Aijaz Hussain*, (1916) 38 All. 506; *Dewa Singh*, (1918) P. R. No. 33 of 1918, 20 Cr. L. J. 64, [1919] AIR (L) 475.

⁴ *Annawadin*, *supra*.

⁵ *Maung Po Shein*, [1939] Ran. 445.

⁶ *Sukheswar Phukan*, (1911) 38 Cal. 789. Where on a search-warrant the name and designation of a police-officer who was to execute the warrant was omitted and he apprehended the person to be produced before the Court in accordance with the warrant but was resisted by the accused who caused hurt,

it was held that the accused could not be convicted under this section though they could be under s. 147 : *Gaman*, (1918) P. R. No. 16 of 1918, 18 Cr. L. J. 142.

⁷ *Arjun Suie*, (1917) 3 P. L. J. 106, 19 Cr. L. J. 385.

⁸ *Dasodhi*, (1927) 9 Lah. 424.

⁹ *Sivasanga*, [1915] M. W. N. 543, 16 Cr. L. J. 602.

¹⁰ *Chepa Mahton*, (1928) 30 Cr. L. J. 175, 11 P. L. T. 31.

¹¹ *Nanjan*, (1888) 1 Weir 205.

¹² *Gun Pal*, (1906) U. B. R. (P. C.) (1904-06) 29, 4 Cr. L. J. 287.

¹³ *Puna Mahton*, (1932) 11 Pat. 743.

Resistance to improper warrant justifiable.—It is illegal to convict a person under this section and s. 353 when the warrant attempted to be executed was addressed to the person with a wrong description to which the accused did not answer,¹⁴ or when it was executed by an incompetent person,¹⁵ or when it did not contain the name of the person to be apprehended,¹⁶ or when it was void as it did not bear the seal of the Court issuing it,¹⁷ or when it was defective as the person who directed the peons to make the arrest was not authorised to do so,¹⁸ or when it did not give the name or designation of the person to whom it was issued for execution,¹⁹ or when it was signed by an officer who was not legally empowered to sign it,²⁰ or where it was not addressed to the bailiff of the Court as required by Sch. IV of the old Civil Procedure Code,²¹ or where it was endorsed to the Munsif instead of to the District Court as required by s. 136, Civil Procedure Code.²² Similarly, it is illegal to convict persons under this section for resisting a search carried on under a defective search-warrant.²³

If a warrant is not signed by the Judge of the Court purporting to issue the warrant, it is necessary that it should be shown either on the face of the signature itself or by evidence that the officer by whom the warrant purported to be signed had been appointed in that behalf.²⁴

Resistance to arrest without notifying substance of warrant justifiable.—

An arrest by a police-officer without notifying the substance of the warrant to the person against whom the warrant is issued as required by s. 80, Criminal Procedure Code, is not a lawful arrest, and resistance to such an arrest is no offence under this section.²⁵ Where a person is arrested without a summons or a warrant having been issued, the arrest is unauthorised and such person commits no offence in escaping from custody.¹

Bailiff must show warrant to person arrested.—To make an arrest under a warrant issued in execution of a civil Court decree valid it may not be necessary to show the warrant to the person to be arrested, but it is the duty of the bailiff to acquaint the person with the contents of the warrant at the time he arrests him and that he was authorized to arrest him, and if the accused wants to see the warrant it would be the duty of the bailiff to show it to him. If a warrant is not shown to the person arrested nor are the contents of the warrant notified to him, before or at the time of the arrest, there is no lawful arrest.²

3. 'Escape from any custody in which he is lawfully detained'.—A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law he commits the offence of escape.³ A peon who arrested the accused under a civil warrant made him sleep by his side in a house after nightfall. The accused escaped while the peon was asleep. It was held that the accused was liable under this section as the fact that the peon went to sleep did not in any way put an end to his custody, or affect the accused's duty to submit to the judgment of the law.⁴ The accused, who was arrested by a process-server, was released by a number of his friends. He made no resistance himself but disappeared and surrendered the next morning. It was held that he having taken advantage of his release and gone away when rescued by his friends, was guilty of escaping from lawful custody.⁵

¹⁴ *Debi Singh*, (1901) 28 Cal. 399.

¹⁵ *Durga Charan Jemadar*, (1900) 27 Cal. 457; *Ghasita Mal*, (1920) 22 Cr. L. J. 145.

¹⁶ *Jogendra Nath Laskar v. Hiralal Chandra Poddar*, (1924) 51 Cal. 902.

¹⁷ *Dasondhi*, (1927) 9 Lah. 424; *Maung Po Shein*, [1939] Ran. 445.

¹⁸ *Jagannath*, [1932] A. L. J. R. 179, 33 Cr. L. J. 887, [1932] AIR (A) 227.

¹⁹ *Fattu*, (1932) 55 All. 109.

²⁰ *Subbaramiah*, [1934] M. W. N. 399, 39 L. W. 388, 66 M. L. J. 408, 35 Cr. L. J. 782, [1934] AIR (M) 206.

²¹ *Muhammad Bakhs*, (1904) P. R. No. 16 of 1904, 1 Cr. L. J. 1091.

²² *Bansropan Singh*, [1938] P. W. N. 97.

²³ *Gaman*, (1913) P. R. No. 16 of 1913, 13 Cr. L. J. 142.

²⁴ *The Deputy Legal Remembrancer v. Mir Sarwar Jan*, (1902) 6 C. W. N. 845.

²⁵ *Satish Chandra Rai v. Jodu Nandan Singh*, (1899) 26 Cal. 748; *Abdul Gafur*, (1896) 23 Cal. 896.

¹ *Kala*, (1924) 26 Cr. L. J. 1360, [1925] AIR (L) 623.

² *Rajani Kanto Pal*, (1901) 5 C. W. N. 843; *The Superintendent and Remembrancer of Legal Affairs v. Baroda Kanta Majumdar*, (1921) 25 C. W. N. 815, 23 Cr. L. J. 847, [1921] AIR (C) 79; *Aijaz Husain*, (1916) 38 All. 506.

³ *The Public Prosecutor v. Ramaswami Konan*, (1908) 31 Mad. 271; *Jamna Das*, (1927) 9 Lah. 214.

⁴ *Ibid*.

⁵ *D. M. Attiya*, (1922) 11 L. B. R. 449, 24 Cr. L. J. 307, [1923] AIR (R) 133.

The word 'escape' includes an escape effected with the consent of the custodian. Where the accused, under arrest by a process-server in execution of a decree, was set at liberty on his promise to pay the decretal amount within a given time, or, failing which, to surrender himself into custody again, and subsequently failed to carry out either of the two alternatives, it was held that he had committed an offence under this section.⁶ Where the accused escaped from the jail in which he was confined for having failed to furnish security to be of good behaviour (s. 123, Criminal Procedure Code), it was held that he had committed an offence under this section and not under s. 224.⁷ A bailiff armed with a warrant of arrest apprehended the accused in his village. The accused refused to accompany him and sat down. The trial Court convicted him under this section. It was held that the mere refusal to go with the bailiff and the sitting down did not constitute an attempt to escape.⁸ Where the accused on arrest for a decree paid detention *batta* for two days and refused to follow the process-server when called but entered into his *vakil's* house, and appeared before the Court on the third day, it was held that the accused was guilty of escaping from lawful custody.⁹

'Lawfully detained'.—A person cannot be convicted of escape or attempt to escape, unless the custody in which he was detained was lawful.¹⁰ A person about to be arrested is entitled to know under what power the constable is arresting him and, if he specifies a certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one. The prosecution must first establish that the constable who arrested the man had power to act under the specific authority that he claimed to have.¹¹ A warrant issued by a revenue officer for the arrest of a defaulting witness, which does not contain the name of the person to be arrested, is illegal and a conviction, under this section, of the witness arrested under such warrant for escaping from custody, and of others, under s. 353 for assaulting a public servant in the discharge of his duty, is bad in law.¹² The Allahabad High Court has taken a different view on similar facts. Two constables in the bona fide execution of their duty carried out an arrest under a warrant which, unknown to them, was in fact not legally issued. Whereupon certain persons came up and rescued the prisoner and tore up the warrant but did not cause hurt to any one. It was held that the rescuers were not liable to punishment under this section or s. 323, but should have been convicted under s. 352.¹³ A civil Court is not empowered to leave a judgment-debtor in the custody of a peon after giving him time to pay up a decretal amount nor is such detention 'lawful custody' within the meaning of this section. A judgment-debtor was arrested in execution of a decree and was brought before the Court passing the decree. He applied for two days' time. The Court made him over to the custody of a peon and the judgment-debtor paid his own diet money for two days. Subsequently he escaped from the custody of the peon. It was held that he was not guilty of any offence as he was not in lawful custody.¹⁴ Where the accused was arrested in the verandah of his house after sunset in pursuance of a warrant for a civil Court decree and he escaped from arrest, it was held that the arrest was illegal as the verandah was part of a dwelling under s. 55, Civil Procedure Code, and the accused could not be arrested after sunset in a dwelling-house.¹⁵ Arrest under a civil process is not effected unless either the person to be arrested submits to the arrest or the officer making the arrest actually touches or confines the body of the person to be arrested. Where, therefore, the bailiff of a civil Court met the accused in a street, showed him his staff, and told him that he was under arrest but did not touch him, and the accused, instead of accompanying him, walked away and entered a shop, it was held that the accused could not be convicted of the offence of escaping from lawful custody of the bailiff under this section.¹⁶ A surety who had given security

⁶ *The Public Prosecutor v. Sennimalai Goundan*, [1919] M. W. N. 695, 9 L. W. 216, 20 Cr. L. J. 208, [1919] AIR (M) 864 (2).

⁷ *Muti*, (1920) 43 All. 185.

⁸ *Santa Singh*, (1932) 34 P. L. R. 668, 34 Cr. L. J. 632, [1933] AIR (L) 128.

⁹ *Audinarayana Reddi*, [1932] M. W. N. 1223.

¹⁰ *Ramara*, (1907) 4 L. B. R. 103, 7 Cr. L. J. 74; *Khanu*, (1923) 18 S. L. R. 301, 25 Cr. L. J. 462, [1925] AIR (S) 193. See s. 225, *sup.*, for

other cases on the point.

¹¹ *Appasami Mudaliar*, (1924) 47 Mad. 442.

¹² *Jogendra Nath Laskar v. Hiralal Chandra Poddar*, (1924) 51 Cal. 902.

¹³ *Gokul*, (1922) 45 All. 142.

¹⁴ *Madho Singh*, (1925) 47 All. 409.

¹⁵ Cr. Rev. Case No. 47 of 1925, 49 M. L. J. 39n.

¹⁶ *Aludomal*, (1915) 9 S. L. R. 141, 17 Cr. L. J. 87, [1916] AIR (S) 19.

under O. XXXVIII, r. 1, Civil Procedure Code, applied to the Court for his discharge. The Court discharged the surety and ordered the arrest and detention of the judgment-debtor until he produced another surety. The judgment-debtor left the Court and for this he was prosecuted under this section. It was held that he was not guilty inasmuch as there was no order to find fresh security as required by the Civil Procedure Code, and the detention in the absence of such an order was illegal.¹⁷

1. 'Rescues or attempts to rescue any other person from any custody in which that person is lawfully detained'.—Where a person was rescued from the custody of a police-officer, who had arrested him at a place other than the one which was mentioned in the search-warrant, it was held that this did not amount to an offence under this section.¹⁸

A person cannot rescue himself from lawful custody and he cannot be convicted under this section.¹⁹

Detention under s. 54 of the Criminal Procedure Code.—A police-officer is empowered under s. 54 (1) (6) to arrest without a warrant a person reasonably suspected of being a deserter from the Army. Persons rescuing such a person from such custody are guilty under this section.²⁰

Village Chowkidari Act (Beng. Act VI of 1890).—Resistance to an arrest by a *chowkidar* is an offence.²¹

Land Revenue Act (U. P. Act III of 1901), ss. 142, 143 and 146.—Under s. 142, Land Revenue Act, all the proprietors are jointly and severally responsible to Government for the revenue and the arrears may be realized, under s. 146, by the arrest and detention of the defaulter as defined in s. 143. Hence, where a co-sharer had made default in payment of Government revenue and under a writ of detention was confined in the lock-up wherefrom he escaped, it was held that he was guilty of an offence under this section.²²

PRACTICE.

Evidence.—Prove (1) that the accused offered some resistance or illegal obstruction.

(2) That he did so (a) to prevent the lawful apprehension of himself or of any other person, or (b) to escape or attempt to escape from any custody in which he is lawfully detained, or (c) to rescue or attempt to rescue some person from some custody in which that person was lawfully detained.

(3) That he did as in (1) intentionally.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

The correct procedure to be adopted by a civil Court desirous of prosecuting a person who has escaped from the lawful custody of a servant of the Court is that the servant of the Court should file a complaint in the ordinary way. The High Court will not interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction, or a prosecution for an alleged offence under this section, irregularly instituted on a report sent in by a Munsif which was treated as a complaint.²³

In a prosecution under this section, the proper person to make the complaint is the officer from whom the escape or rescue has been effected. But a complaint by another person aware of the facts is not a nullity. A Magistrate is competent to make a complaint as a common informer.²⁴

¹⁷ *Gopal Singh*, (1928) 30 P. L. R. 147, 30 Cr. L. J. 663, [1929] AIR (L) 163.

¹⁸ *Chepa Mahton*, (1928) 11 P. L. T. 31, 30 Cr. L. J. 175, [1928] AIR (P) 550.

¹⁹ *Moti Dusat*, [1940] P. W. N. 376, (1940) 41 Cr. L. J. 381, [1940] AIR (P) 479.

²⁰ *Rahm Ali*, (1911) P. R. No. 20 of 1911, 13 Cr. L. J. 234.

²¹ *Babubal Sircar*, (1905) 10 C. W. N. 827, 8 Cr. L. J. 201; but see *Kalai v. Kalu Chowkidar*, (1900) 27 Cal. 366.

²² *Gulab Singh*, (1909) 32 All. 116.

²³ *Madho Singh*, (1925) 47 All. 409.

²⁴ *Mehr Singh*, (1938) 84 P. L. R. 1020, 35 Cr. L. J. 86, (1938) AIR (L) 884.

226. Whoever, having been lawfully transported,¹ returns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

Unlawful return
from transporta-
tion.

COMMENT.

This section punishes the criminal who is lawfully transported but who unlawfully returns from the place of transportation.

1. 'Having been lawfully transported.'—A person serving out his sentence of transportation in the jail without being transported is not a person 'lawfully transported.' It is essential that the convict should have been actually sent to a penal settlement, and have returned before his term of transportation had expired or been remitted. If a prisoner escapes from custody whilst on his way to undergo sentence of transportation, he commits an offence punishable under s. 224, and not under this section.²⁵

The word 'lawfully' indicates that the Court passing the sentence must have jurisdiction to do so, and the offence must be one for which transportation is a legal punishment.

A prisoner was indicted for being found at large in England before the expiration of a term for which he had been sentenced to be transported. It was held that the fact of such sentence being in force at the time he was so found at large, was sufficiently proved by the certificate of his conviction and sentence,—the judgment remaining unreversed,—although, on the face of such certificate, it appeared that the sentence was one which could not have been inflicted on him for the offence of which he had been convicted.¹

PRACTICE.

Evidence.—Prove (1) that the accused had been lawfully transported.

(2) That the term of transportation had not expired.

(3) That the punishment of such transportation had not been remitted.

(4) That the accused had returned from such transportation.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the—day of—, at—, having been sentenced to transportation by the Court of Session of—(*specify the term*) and that on the—day of—, at—, you did return from such transportation, the term of such transportation not having expired, and your punishment not having been remitted, and that you thereby committed an offence punishable under s. 226 of the Indian Penal Code and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

Violation of
condition of remis-
sion of punishment.

²⁵ *Ramasamy*, (1868) 4 M. H. C. 152, 1 Weir

¹ *Finney*, (1849) 2 C. & K. 774.

COMMENT.

This section deals with those cases in which remission of punishment is made conditional by Government under s. 401 of the Code of Criminal Procedure.

PRACTICE.

Evidence.—Prove (1) the nature and extent of the original punishment to which the accused had been sentenced.

(2) That such punishment had been remitted.

(3) That such remission had been granted to and accepted by the accused upon a certain condition.

(4) That the accused violated such condition.

The Court has to decide whether a conditionally released prisoner has violated the conditions on which remission was granted to him. Until he has been found guilty under this section, it is not for the jail authorities to say that he has committed an offence.²

(5) That he did so, knowing that he was violating such condition.

(6) Prove also whether the accused has already suffered any part of the original punishment.

The first three points must be proved by documentary evidence, viz. a certified copy of the judgment as regards conviction and sentence; a certified copy of the order of remission; and the bond executed by the accused. Oral evidence is inadmissible on these points. The identity of the accused and the breach of the conditions may be established by oral evidence.³

Procedure.—Not cognizable—Summons—Not bailable—Not compoundable—Triable by the Court by which the original offence was triable.

Jurisdiction.—A person convicted by the Recorder's Court of! Prince of Wales' Island, Singapore and Malacca, of the crime of burglary, and sentenced to transportation for ten years was released from the Ratnagiri Jail on a ticket-of-leave after having been in confinement for more than eight years. At Karwar he committed theft in a dwelling-house before his sentence had expired. It was held that the First Class Magistrate at Karwar had jurisdiction to try the case.⁴

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—were sentenced in case No.—of—by the Court of—to—(*mention the punishment*) and which punishment was remitted on—by the order of—on your accepting the condition, to wit,—and which you accepted, and which you knowingly violated in that on or about the—day of—you—(*state the nature of the violation*) and that you thereby committed an offence punishable under s. 227 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried (by the said Court) on the said charge.

Intentional insult
or interruption to
public servant sit-
ting in judicial pro-
ceeding.

228. Whoever intentionally¹ offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding,³ shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

² *Nga Po Min*, (1931) 34 Cr. L. J. 447, [1933] AIR (R) 28.

³ *Nga Po Ngwe*, (1929) 7 Ran. 355.

⁴ *Ahone Akong*, (1872) 9 B. H. C. 356; *Nga Po Ngwe*, supra.

COMMENT.

This is the only section of the Penal Code which deals with contempts committed against a judicial officer, that is to say, a Court.

In cases coming under this section, the Court is both prosecutor and judge and so the powers should be used only in exceptional cases. Courts taking action under this section ought not to give room for the impression that they are unduly sensitive.⁵

Object.—The object of this section is to punish a person who intentionally insults in any way the Court administering justice. It is to preserve the prestige and dignity of the Court that this section is provided. It lays down the highest sentence that could be inflicted for contempt of Court. Under s. 480 of the Criminal Procedure Code a person guilty of contempt of Court may be dealt with summarily, but in such cases he can only be fined.

Scope.—This section is confined to those cases of contempt of Court where the public servant is sitting in any stage of a judicial proceeding. But the Court has inherent jurisdiction to punish cases of contempt not coming within the purview of this section. A process-server was insulted in most filthy language, caught by his throat and severely pushed out of a room by the plaintiff while effecting service of a notice; service was subsequently effected by him by affixing a copy on the outer door. It was held that when a process-server, in execution of his duty, has been abused and assaulted, it is a contempt of Court, as it is an attempt to obstruct or unduly interfere with the administration of justice. Those who have duties to discharge pursuant to the orders of a Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of Justice and carry out their order.⁶

The Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting, and neither in Chapter XXI (of Defamation) nor elsewhere, does it provide for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties.⁷

“Courts of record have inherent power to punish contempts of their authority whether committed in the face of the Court or whether committed vicariously upon the persons of their officers. It was, however, not thought fit to give power of that character to subordinate courts. The express provisions of section 228 set forth the contempts of inferior courts which are punishable under the Code and it was subsequently held that contempts, which would be certainly contempts of a court of record, if they do not come within the provisions of section 228 or any other section, cannot be punished as offences of the character of contempt of court. And it was further held that the High Courts of record cannot punish contempts of the inferior courts. Subsequently the Contempt of Courts Act was passed which enabled the superior courts to punish contempts of the inferior courts notwithstanding that such contempt as is complained of is not an offence (as contempt) against any of the sections of the Indian Penal Code and the object is that as to contempts considered as contempts of the court which are punishable by the Indian Penal Code they shall not be taken cognizance of by the High Court.”⁸

Ingredients.—Three things are necessary under this section:—

1. Intention.
2. Insult or interruption to a public servant.
3. The public servant insulted or interrupted must have been sitting in any stage of a judicial proceeding.

1. ‘Intentionally.’—The insult or interruption to the Court should be intentional. “Merely uttering of words and not keeping silent can hardly be construed as intentional insult or interruption caused by an undefended prisoner during the course

⁵ *Ramasami Goundan*, (1915) 29 M. L. J. 274, 2 L. W. 686, 16 Cr. L. J. 610.

⁶ *A. H. Skone v. V. M. Bason*, (1925) 29 C. W. N. 766, 41 C. L. J. 515, 26 Cr. L. J. 1205, [1925] AIR (C) 945.

⁷ *Surendro Nath Banerjee v. The Chief*

L. C.—37

Justice and Judges of the High Court, (1888). 10 Cal. 109, 129, 130, 10 I.A. 171.

⁸ Per Courtney Terrell, C.J., in *Jnanendra Prasad Bose v. Gopal Prasad Sen*, (1932) 12 Pat. 172, 177.

of a judicial proceeding against him.”⁹ An audible remark which has the effect of interrupting the Court is not enough to convict the accused.¹⁰

As regards interruptions on the part of pleaders it has been said : “Some latitude should be allowed to a member of the bar, insisting in the conduct of his case upon his question being taken down or his objections noted, where the Court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial unless the pleader’s conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the Court.”¹¹

2. ‘Offers any insult, or causes any interruption to any public servant.’—The insult should be of a public servant sitting in any stage of a judicial proceeding. A coarse expression used by a litigant but not addressed to the Court can hardly be treated as an intentional insult to the Court or interruption of the proceedings under this section, even if it is actually overheard by the presiding officer.¹² But vulgar abuse addressed to the Court amounts to an offence under this section.¹³ If a remark is not addressed to a Court, however rude or vulgar it may be, it cannot be made the subject of an offence under this section, even if the Court happens to overhear it.¹⁴

Where an assessor appeared in Court dressed in a *paheeran* (loose shirt), a cap, and a scarf, it was held that he did not commit an offence, in the absence of any rule as to the dress of assessors, and in the absence of any suggestion that the dress offended against any rule of public decency or was intended to be insulting to the Court.¹⁵ Where K gave away in marriage a minor girl while she was in the custody of a guardian appointed by the Court, the appointment being well understood to involve the forbidding of anybody to deal with the minor by marriage or otherwise while she was under that guardianship, it was held that the conduct of K was merely a disobedience of the order of the Court and did not constitute an offence punishable under this section.¹⁶

Acts such as rude and contumacious behaviour; obstinacy, perverseness, prevarication or refusal to answer any lawful question; breach of the peace or any wilful disturbance whatever, will amount to a contempt of Court.

Refusal to answer question.—Prevarication by a witness and refusal to answer a question might amount to intentional interruption within the meaning of this section.¹⁷ The head-notes to these cases seem inaccurate. All that the decisions show is that the findings of a Magistrate did not clearly specify that there had been an interruption. In other words, it was held, not that prevarication could not constitute an interruption, but that it was not necessarily so.¹⁸

Where in an inquiry ordered by the former Chief Court of the Punjab the examination of a person as a witness was adjourned to another date and on that day he, before entering into the witness-box, presented to the Court an application praying that, for the reasons mentioned therein, the inquiry might be stopped and after his application was rejected he refused to answer the questions put to him by counsel in the case on the ground that his application ought to have been granted, it was held that the persistent refusal to answer any question whatsoever amounted to an intentional interruption within the meaning of this section.¹⁹

3. ‘While such public servant is sitting in any stage of a judicial proceeding.’—Insult or interruption to a public servant, offered under this section, should be while he is sitting in a stage of a judicial proceeding. A judicial proceeding is not necessarily at an end when the sentence is passed. The section does not provide against

⁹ Per Mitra, J., in *Surendra Nath Banerjee*, (1906) 10 C. W. N. 1062, 1065, 4 C. L. J. 414, 418, 4 Cr. L. J. 210, 212.

¹⁰ *Ramasami Goundan*, (1915) 29 M. L. J. 274, 2 L. W. 686, 16 Cr. L. J. 610.

¹¹ Per Chandavarkar and Batty, JJ., in *Dattatraya Venkatesh Belvi*, (1904) 6 Bom. L. R. 541, 548, 1 Cr. L. J. 612, 613.

¹² 1912, 13 Cr. L. J. 567.

¹³ *Jit Singh*, (1912) P. W. R. (Cr.) No. 23 of 1912, 13 Cr. L. J. 567.

¹⁴ *Kunhutti*, [1934] M. W. N. 398.

¹⁵ *Hakumat Rai*, [1943] Lah. 793.

¹⁶ *Chhaganlal Ishwardas*, (1933) 35 Bom. L. R. 1025, 35 Cr. L. J. 107, [1933] AIR (B) 478.

¹⁷ *Kaulashia*, (1932) 12 Pat. 1.

¹⁸ *Jaimal Shrivani*, (1873) 10 B. H. C. 69. See *Auba bin Bhirav*, (1867) 4 B. H. C. (Cr. C.) 6, and *Pandu bin Vithoji*, (1867) 4 B. H. C. (Cr. C.) 7.

¹⁹ *Jaimal Shrivani*, (1873) 10 B. H. C. 69; *Devji Asa*, (1889) Unrep. Cr. C. 473, Cr. R. No. 31 of 1889.

²⁰ *Gopi Chand*, (1917) P. R. No. 14 of 1918, 19 Cr. L. J. 676, [1918] AIR (L) 65.

a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting.²⁰ The whole sitting of a Court for the disposal of judicial work from the opening to the rising of the Court is a judicial proceeding, and the necessary interval between the conclusion of one case and the opening of another is a stage in a judicial proceeding. In proceedings against the accused under s. 107, Criminal Procedure Code, the Magistrate recorded and read out an order calling upon him to give security, whereupon the accused used certain words to the effect that the Court had to act with *zulm* (oppression) and mockingly asked whether this *zulm* was to be applied to Mahomedans as well as to Hindus. The Magistrate convicted him under this section. On appeal, the Sessions Judge set aside the conviction on the ground that proceedings under s. 107 having been concluded by the reading out of the final order, the Court had not been insulted during any stage of a judicial proceeding. The former Chief Court of the Punjab reversed the order of the Sessions Judge holding that the announcement of the order under s. 107 was undoubtedly a stage in a judicial proceeding, and these proceedings must be held to have continued until the accused was allowed to leave the Court after executing the bond required by the Court, or was removed in custody on failing to execute it. A Magistrate cannot be considered to have concluded a case the very moment he has announced his order, while his judgment is still in his hands and before he could possibly have turned to any other occupation.²¹

‘**Judicial proceeding.**’—See Comment on s. 192 as to the meaning of this expression. This expression includes any proceedings under the Registration Act, XVI of 1908. A Sub-Registrar is a public officer, and proceedings before him are judicial proceedings within the meaning of this section.²² So are proceedings before an Income-tax Officer pursuant to a notice under s. 23(3);²³ or the Debt Settlement Boards created under the Bengal Agricultural Debtors Act, 1935.²⁴

While a Tahsildar was engaged in hearing a civil case, he allowed the proceedings to be interrupted by the accused who had brought part of a sum due from him for revenue, and promised the balance on a later date. On the Tahsildar pressing for immediate payment in full, the accused was alleged to have abused him. It was held that the Tahsildar was not sitting in any stage of a judicial proceeding and therefore the accused could not be convicted under this section.²⁵

Contempt.—A person bidding for an estate at a sale in execution with the knowledge that he was not in a position to deposit the earnest-money;¹ a person persisting in putting irrelevant and vexatious questions to a witness after warning;² an accused person making an impertinent threat to a witness in the box;³ a person sentenced to two hours’ imprisonment and ordered to be kept in custody insulting the Magistrate in the grossest manner;⁴ a person chewing betel while being examined as a witness;⁵ an accused calling the trial Judge a ‘prejudiced Judge’;⁶ a person stating in an application for postponement to enable him to make an application for transfer of a suit that the Court had become hostile to him;⁷ a counsel saying to a full bench of the Court that his client does not wish the matter to be argued before the bench as constituted,⁸ were held guilty of contempt of Court.

Matter published in a newspaper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that with which he is charged, is contempt of Court as it must tend to interfere with the fair trial of that charge.⁹

No contempt.—A person retracting statements in giving evidence;¹⁰ a person

²⁰ *Surendro Nath Banerjee v. The Chief Justice and Judges of the High Court*, (1883) 10 Cal. 109, 10 I.A. 171.

²¹ *Salig Ram*, (1898) P. R. No. 16 of 1897; (1868) 1 Weir 214.

²² *Sardhari Lal*, (1874) 13 Beng. L. R. Appx. 40, 22 W. R. (Cr.) 10.

²³ *Lal Mohan Poddar*, (1927) 55 Cal. 423.

²⁴ *Hari Charan Kundu v. Kanshi Charan De*, [1940] 2 Cal. 14.

²⁵ *Sulaiman Khan*, (1881) P. R. No. 40 of 1881.

¹ *Mohesh Chunder Mookerjee*, (1864) W. R. (Gap No.) Mis. 3.

² *Azeemoola*, (1867) P. R. No. 44 of 1867.

³ *Allu*, (1922) 45 All. 272.

⁴ (1868) 1 Weir 214.

⁵ *Bhavani Mudaliyar*, (1883) 1 Weir 217.

⁶ *Venkatrao*, (1922) 24 Bom. L. R. 386, 46 Bom. 973.

⁷ *Narotamdas*, [1943] All. 186.

⁸ *Sukh Dev Raj*, (1932) 33 Cr. L. J. 531, 33 P. L. R. 722, [1932] AIR (L) 390.

⁹ *S. A. Dange v. S. T. Sheppard*, [1930] A. L. J. R. 665, 32 Cr. L. J. 78, [1930] AIR (A) 483.

¹⁰ (1862) 1 Weir 214.

leaving the Court when ordered to remain;¹¹ or making signs from outside to a prisoner on his trial;¹² a person listening to evidence after being told to leave the Court;¹³ a person absenting himself from the Court in disobedience to a summons;¹⁴ a person using vulgar language for the purpose of emphasis;¹⁵ a person walking out of the Court without answering the question whether he had any witness;¹⁶ a person reluctantly speaking the truth, or giving inconsistent answers;¹⁷ a person refusing to give direct answers to questions;¹⁸ a person walking with creaking shoes near a Court room;¹⁹ a person presenting an application for transfer of a case containing allegations that the persons who caused the proceeding to be instituted were on terms of intimacy with the Magistrate;²⁰ a person making an application for transfer of a case containing assertions of a scandalous or defamatory nature concerning the Magistrate who was trying the case;²¹ a person writing a letter to the Judge containing an imputation that he acted unlawfully and with a view to cause him loss,²² were held to have committed no offence under this section. A Magistrate in his order adjourning a case made a remark that unnecessary questions had been put by the pleader for the accused. To this remark the pleader took exception saying that he resented it. The Magistrate asked the pleader to reduce his protest to writing which the pleader considered unnecessary and observed that the Magistrate's remark was improper. The Magistrate after demanding an apology which was refused ordered the detention in custody of the pleader. At that stage a friend of the pleader sought to enter the Court room but was pushed out in a rough manner by a chaprasi. The pleader thereupon protested against the treatment meted out to his friend. The Magistrate took this as an interruption in his work and refused to listen. The pleader remarked that this was strange. At the end of the day's proceedings the Magistrate took action against the pleader under this section. It was held that the pleader had not offended against any of the rules of conduct laid down for the profession of law and that the expressions used by him did not amount to any breach of such principles as to call for any action under this section.²³

The use of objectionable or defamatory expressions in the petition presented to a Magistrate could not be regarded as a contempt committed in his presence justifying him in taking immediate action under this section and s. 480, Criminal Procedure Code.²⁴

PRACTICE.

Evidence.—Prove (1) that the person offended is a public servant.

(2) That, at the time of the offence, such public servant was sitting in some stage of a judicial proceeding.²⁵

(3) That whilst he was so sitting, the accused offered an insult to such public servant, or caused some interruption to him.

(4) That he did so intentionally.

Intention must be strictly made out by the prosecution.¹

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Criminal Procedure Code. See s. 480, Criminal Procedure Code.

The law requires that a criminal Court inflicting a fine for contempt of Court should specially record its reasons, the facts constituting the contempt with any statement the offender may make as well as the finding and sentence.² The record must show the nature and stage of the judicial proceedings in which the Court interrupted

¹¹ (1870) 1 Weir 215.

¹² (1870) 1 Weir 214.

¹³ *Papa Naiken*, (1882) 1 Weir 217.

¹⁴ (1878) 1 Weir 215.

¹⁵ (1880) 1 Weir 216.

¹⁶ *Abdul Rahman*, (1899) 1 Weir 218.

¹⁷ *Chota Hurry Pramannick Tantee*, (1871) 15 W. R. (Cr.) 5.

¹⁸ *Pandu Vithoji*, (1867) 4 B. H. C. R. (Cr. C.) 7.

¹⁹ *Davaluri Virayya*, (1909) 9 Cr. L. J. 309.

²⁰ *Murli Dhar*, (1916) 38 All. 284.

²¹ *Abdullah Khan*, (1898) 18 A. W. N. 145.

²² *Subordinate Judge, Hoshangabad v. Jawa-*

harlal, [1941] Nag. 304.

²³ *Hakumat Rai*, [1943] Lah. 791.

²⁴ *Wahid Bakhsh*, (1903) 4 P. L. R. 582.

²⁵ *Prokash Chunder Dass*, (1869) 12 W. R. (Cr.) 64; *Khushal Singh*, (1886) P. R. No. 36 of 1886.

¹ (1881) 1 Weir 216; *Hurri Kishen Doss*, (1871) 15 W. R. (Cr.) 62; *K. Chappu Menon*, (1868) 4 M. H. C. 146; *Venkatrao*, (1922) 24 Bom. L. R. 386, 46 Bom. 973.

² *Panchanada Tambiran*, (1869) 4 M. H. C. 229; *Kashinath Vithal v. Daji Govind*, (1870) 7 B. H. C. (A. C. J.) 102.

or insulted was sitting and the nature of the interruption or insult.³ Omission to set forth the particulars required by s. 481, cl. (2), of the Criminal Procedure Code, would be fatal to the proceedings.⁴

Proper opportunity should be given to the accused to meet the charge.⁵

The procedure laid down in s. 480, Criminal Procedure Code, should be strictly followed. The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed.⁶ The Bombay High Court has held that it is not permissible to the Court to hear evidence and postpone sentence until a later date.⁷ The Allahabad High Court has held that the Magistrate may postpone passing sentence until some subsequent day if the accused is not thereby prejudiced.⁸

A charge under this section should be dealt with in a summary manner under s. 480 or else in a rather more elaborate manner provided by s. 482.⁹ The Court has the option of proceeding either under ss. 480 to 482, or under s. 476, and the existence of s. 482 does not operate so as to take away this option.¹⁰

Complaint.—A complaint in writing of the Court before which the offence is committed, or of some other Court to which it is subordinate, is required.¹¹

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned,¹

Personation of a juror or assessor.

empanelled or sworn as a jurymen or assessor in any case in which he knows that he is not entitled by law² to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily³ serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to punish false personation of a juror or an assessor. It deals with two classes of cases : (1) where the accused had guilty knowledge before he was returned, i.e., got himself enlisted as a juror or assessor, and (2) where he had such knowledge after he was returned.

Six sections of the Code deal with false personation, viz. ss. 140, 170, 171, 171F, 205 and 229.

1. 'By personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned.'—'To be returned' means getting oneself enlisted as a juror or as an assessor.

It is a misdemeanour at common law for a person to pretend to be a qualified jurymen, and to go into the jury-box and act in the name of a qualified jurymen, and this without any corrupt motive on the part of such person.¹²

2. 'Not entitled by law.'—See s. 278, Criminal Procedure Code, which says what persons are not qualified to serve as jurors or assessors. As to choosing of a jury, see s. 276, Criminal Procedure Code; as to choosing of assessors, see s. 321, Criminal Procedure Code.

3. 'Voluntarily.'—See s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was returned, etc.

³ *Khushal Singh*, (1886) P. R. No. 36 of 1886; *Jattu Mal*, (1928) 29 P. L. R. 653, 29 Cr. L. J. 880, [1928] AIR (L) 357.

⁴ *Ramlal*, (1931) 32 Cr. L. J. 1221, [1931] AIR (N) 193.

⁵ *Boyle*, (1891) 1 O. D. 287.

⁶ *Jogendra Narayan Majumdar Chowdhury v. Syama Charan Ukil*, (1907) 6 C. L. J. 713, 6 Cr. L. J. 405.

⁷ *Shankar Krishnaji Gavankar*, (1942) 44 Bom. L. R. 439, [1942] AIR (B) 206 (1).

⁸ *Paiambar Bakhsh*, (1889) 11 All. 361.

⁹ *Prabhachandra Adhikari*, (1929) 57 Cal. 1007.

¹⁰ *Ram Lal Anand*, [1941] Lah. 145.

¹¹ Criminal Procedure Code, s. 195.

¹² *Clark*, (1918) 26 Cox 138.

(2) That he was not entitled by law to be so returned or empanelled, etc.

(3) That he caused or suffered himself intentionally or knowingly to be so returned, empanelled, etc., by personation, or otherwise.

(4) That he at the time he was so returned or empanelled, etc., knew that he was not entitled to be so returned or empanelled, etc.

Or prove points (1) and (2) as above and further—

(3) That the accused knew that he had been returned or empanelled, etc., contrary to law.

(4) That he nevertheless voluntarily served in that capacity.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the _____ day of _____, at _____, intentionally caused (*or knowingly suffered*) yourself to be returned (*or empanelled or sworn*) as a jurymen (*or assessor*) in case No. _____ of _____ tried by _____ by personating AB when you knew that you were not entitled to be so returned (*or empanelled or sworn*) [*or you knowing yourself to have been so returned (or empanelled or sworn) contrary to law voluntarily served on such jury (or as such assessor)*], and that you thereby committed an offence punishable under s. 229 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

ON second conviction of an offence under this Chapter punishable with imprisonment for three years, the offender may be punished with transportation for life or ten years' imprisonment (*vide s. 75*).

230. Coin¹ is metal used for the time being² as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

Queen's coin³ is metal stamped and issued by the authority of the Queen, or by the authority of the Central Government or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money; and metal which has been so stamped and issued shall continue to be the Queen's coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

ILLUSTRATIONS.

- (a) Cowries are not coin.
- (b) Lumps of unstamped copper, though used as money, are not coin.
- (c) Medals are not coin, inasmuch as they are not intended to be used as money.
- (d) The coin denominated as the Company's rupee is the Queen's coin.
- (e) The "Farukhabad" rupee, which was formerly used as money under the authority of the Government of India, is Queen's coin although it is no longer so used.

COMMENT.

Why heavier punishment for counterfeiting the King's coin.—The authors of the Code say : "We have proposed that the Government of India should follow the general practice of Government in punishing more severely the counterfeiting of its own coin than the counterfeiting of foreign coin. It appears to us peculiarly advisable, under the present circumstances of India, to make this distinction. It is much to be wished that the Company's currency may supersede the numerous coinages which are issued from a crowd of mints in the dominions of the petty Princes of India. It has appeared to us that this object may be in some degree promoted by the law as we have framed it. That coinage, the purity of which is guarded by the most rigorous penalties, is likely to be the most pure; and that coinage which is likely to be the most pure will be the most readily taken in the course of business.

"It is not very probable that any person in this country will employ himself in making counterfeit sovereigns or shillings; but should so improbable an event occur, we think that the King's coin should have the same protection which is given to the coin of the local Government...It appears to us, however, that the offence of coining, though, in an arbitrary classification, it may be called by the technical name of treason, is in substance an offence against property and trade, that it is an offence of very nearly the same kind with the forging of a banknote, and that it would be an offence of exactly the same kind if the banknote, like the notes of the Bank of England formerly, were in all cases legal tender, or if the coin, like the Company's gold mohur at present, were not legal tender. We do not therefore conceive that in proposing a law for punishing the counterfeiting of the King's coin, we are proposing a law which can reasonably be said to affect any of the royal prerogatives."¹

¹ Note I, pp. 134, 135.

1. **'Coin.'**—The present definition of 'coin' was introduced by the Indian Penal Code Amendment Act (XIX of 1872) in order to check the practice of counterfeiting the copper coin of Indian States. The former definition defined coin as "metal stamped and issued by the authority of some Government." But 'Government', by s. 17, denotes the person or persons authorized by law to administer executive Government in any part of British India. It had thus happened that the coin of Indian States was not coin within the meaning of the Code.

The Indian Coinage Act (III of 1906) deals with coins of different denominations and their weight, dimensions and designs.

2. **'For the time being.'**—These words were introduced by the Indian Penal Code Amendment Act (XIX of 1872) as it was suggested that the definition might possibly be held to include old coin, such as a Græco-Bactrian States formerly used as money, but now regarded only as a curiosity. A coin of the time of Emperor Akbar² or a gold mohur of the reign of Shahjahan³ cannot be deemed to be a coin inasmuch as it is not used for the time being as money.

Legal tender not necessary.—Coin need not be a legal tender receivable at a value in rupees fixed by law. Gold mohurs which although they do not pass at an absolutely fixed value, yet have a current value, not ascertainable merely by weighing them as lumps of gold, but attaching to them as coin, are coins "for the time being used as money."⁴

The test of whether a particular piece of metal is money or not (supposing it genuine) is the possibility of taking it into the market, and obtaining goods of any kind in exchange for it. For this, its value must be ascertained and notorious; that it is known to persons of special skill or information is not sufficient.⁵

3. **'Queen's coin.'**—The present definition of Queen's coin was introduced by the Indian Penal Code Amendment Act (VI of 1896), s. 1. The reasons for amending the definition are stated as follows: "At present 'coin' is defined as metal used for the time being as money, and the consequence is that, if any offence under these sections has to be proved, it has to be shown that the coin was in use at the time of the offence as money. There is a process in coinage which is provided for by law, namely, in the Indian Coinage Act, which is termed 'the calling in of coin'. This gives Government an authority which it exercises under certain circumstances to call in coin and to cause it after a certain time to cease to be used as money. It is extremely doubtful whether if the coin so called in has been counterfeited, a Court would hold that it was in use as money after the date of the proclamation which had called it in. After a certain time it would certainly cease to be in use as money. This power to call in money has been exercised in one case,—and I think in only one,—namely, that of the Farukhabad rupee, which immediately preceded the existing Government rupee, or, as it was at first called, 'the Company's rupee.' It was called in in 1877. We have ascertained that this coin has been recently largely manufactured in Bombay. The manufacture has been carried on perfectly openly, and it has been brought to our notice by some of our Political Officers who showed that it was being imported into Central India and Rajputana in considerable quantities. This manufacture we are unable, under the present law, to stop, because that particular coin is not in use at present as money. The immediate practical object of the change which I propose to the Council to make in the Indian Penal Code is to put a stop to this particular coinage. But it is obvious that the same necessity may arise in any future case. We may at any time find reason to call in any particular issues of the rupee, and it would be an extremely peculiar state of the law if an act which is to-day reckoned so harmful as to be punishable with ten years' imprisonment should tomorrow become a perfectly innocent one. It is to protect our action against a consequence of this kind that the measure is proposed.

"But there is a special necessity peculiar to India which arises in this connection. In a great part of the Native State of India coin is not current in the same legal sense in which it is current in British India; that is to say, there is no law of legal tender; and the consequence is that many kinds of coins pass in those Native States from

² *Bapu Yadav*, (1874) 11 B. H. C. 172.

³ *Khushali*, (1906) 29 All. 141.

⁴ *Kunj Beharee*, (1873) 5 N. W. P. 187.

⁵ *Bapu Yadav*, (1874) 11 B. H. C. 172.

hand to hand, not by reason of being legal tender, but by reason of each person who receives them knowing that they are customarily current in his own or other Native States, and that any other person will receive them in the same way as he receives them. From the fact that these Farukhabad rupees were imported in such large quantities into Rajputana and Central India, there can be little doubt that they are current in this sense in certain part of Rajputana and Central India. . . It seems to me, therefore, . . . that we are under some obligation to the Native States in this matter not to permit a coin which passes, or which certainly might pass, there from hand to hand as an ordinary circulating coin, to be fabricated by private individuals in British India."⁶

Illustration (e).—This illustration was added by the Indian Penal Code Amendment Act (VI of 1896), s. 1 (2). It has been held that Murshidabad rupees stand on the same footing as Farukhabad rupees.⁷

Amendment.—The word 'Central' was added before 'Government' and the words 'of India' were omitted after the word 'Government' by the Government of India (Adaptation of Indian Laws) Order 1937. In Burma the word "Burma" was substituted for the words "any Presidency", by the Government of Burma (Adaptation of Laws) Order, 1937.

231. Whoever counterfeits¹ or knowingly performs any part of the process² of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting
coin.

Explanation.—A person commits this offence who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

COMMENT.

It is not necessary under this section that the counterfeit coin should be made with the primary intention of its being passed as genuine; it is sufficient if the resemblance to genuine coin is so close that it is capable of being passed as such.⁸

1. 'Counterfeits.'—A "counterfeit coin" means a coin not genuine, but resembling, or apparently intended to resemble, or pass for genuine coin; and includes genuine coin prepared or altered so as to resemble or pass for coin of a higher denomination.⁹ As to the definition of the word 'counterfeit', see s. 28, *supra*.

The thing charged to be counterfeit coin must have some such resemblance to a genuine piece of coin as to show that it was intended to resemble and pass for it, though the imitation may be imperfect or the process incomplete.¹⁰ A counterfeiting, with some small variation in the inscription, effigies, or arms, done with the intention of evading the law, is yet within it.¹¹ It is not necessary to have impression of any sort on a counterfeit coin if it was meant to pass off as a worn out or defaced coin of a particular denomination.¹² Preparing blanks with such material as when rubbed will make them resemble the real coin amounts to a complete offence.¹³ It is not also necessary that the counterfeit coin should be counterfeit of the current coin.¹⁴

2. 'Performs any part of the process.'—The offence is complete although the coin may not be in a fit state to be uttered, or the work may not be finished or perfected. The section applies equally whether the act of counterfeiting is complete or unfinished.

⁶ *Gazette of India*, 1895, Part VI, p. 320.

⁷ *Deni*, (1905) 28 All. 62; *Gopal*, (1903) 21 A. W. N. 115; *Baman*, (1902) P.R. No. 3 of 1903.

⁸ *Qadir Bakhsh*, (1907) 30 All. 93; *Amrit Sonar*, (1919) 4 P. L. J. 525, 20 Cr. L. J. 439, [1919] AIR (P) 330.

⁹ Stephen's Dig. of Cr. L., Art. 408.

¹⁰ (1863) 1 Weir 219.

¹¹ 1 East P. C., c. 4, s. 13, p. 164.

¹² *John and Patrick Welsh's Case*, (1785) 1 Leach 364, 1 East P. C. 164; *Wilson's Case*, (1783) 1 Leach 285.

¹³ *William Case*, (1795) 1 Leach 154 (n), 1 East P. C. 176.

¹⁴ *Kandamuru Annappa*, (1883) 1 Weir 221.

Coin should be of a kind for the time being used as money.—Where a person counterfeited a coin of the Emperor Akbar's time, it was held that he had committed no offence under this section.¹⁵ A person counterfeiting Kuldar and Jeypur gold-mohurs was held to be guilty under this section because although they did not pass at a fixed value yet they had a current value attached to them as coin.¹⁶ Certain Nepalese came to the shop of the accused who at their request agreed to make for them in German silver a number of imitations of a current Nepalese coin. The coins were not intended originally to be passed as genuine coins, for it was stipulated that they should be made with hooks attached to them; but in fact this was not done and the coins were handed over plain. It was held that he was guilty under this section.¹⁷ Certain merchants had been in the habit of sending copper to the Nawab of Lohareo, who turned the metal, in a mint established for the purpose, into small round pieces upon which a certain stamp was impressed, the stamp not purporting to resemble the mark on any legal coin. These pieces of copper were then sold in the bazaars in British India by weight, and used as money. It was generally believed that the Nawab had authority to establish the mints and issue this copper as coin. It was held that the pieces of copper were not counterfeit coin.¹⁸

Where the impression of money was forged on an irregular piece of metal, not rounded, without finishing it, so as not to be in a state to pass current, the offence was held to be incomplete, although the accused had actually attempted to pass it in that condition.¹⁹ Where a genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one-twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin, it was held that the coin was false and counterfeit.²⁰

Passing medal.—Where a person fraudulently represented to an ignorant person a medal as being money, it was held that he had committed no offence.²¹

PRACTICE.

Evidence.—Prove (1) that the metal is a coin.

(2) That the accused counterfeited it, or performed on it any part of the process of counterfeiting.

(3) That he did so knowingly.

To prove the offence of counterfeiting, it is not necessary to show that the accused person was detected in the act. But presumptive evidence will be sufficient where a false coin is found in his possession, and coining tools are discovered in his house, etc.

Where the accused is charged with 'performing any part of the process of counterfeiting' it will not be sufficient merely to show that steps have been taken towards counterfeiting as by providing materials, tools, etc., but some stage of the process itself must be proved to have been commenced.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Bombay Circular.—*Evidence of Mint Officer.*—When the evidence of an officer connected with the Mint or the Currency Department is required as to the genuineness or spuriousness of a coin or currency note, the Courts and Magistrates are recommended to send the coin or note to the Mint Master, or to the Commissioner of Paper Currency, Bombay, as the case may be, under cover of their Court seal or by messenger whose evidence can afterwards be taken and, at the same time, to issue a commission for the examination of such officer as a witness under the provisions of s. 503 of the Code of Criminal Procedure. This will prevent the great inconvenience of officers being called away from their duties on mere ordinary occasions. In special cases

¹⁵ *Bapu Yadav*, (1874) 11 B. H. C. 172.

¹⁶ *Kunj Beharee*, (1873) 5 N. W. P. 187.

¹⁷ *Qadir Bakhsh*, (1907) 30 All. 93.

¹⁸ *Premsookh Dass*, (1870) P. R. No. 38 of 1870.

¹⁹ *Farley's case*, (1771) 1 East P. C. 164.

²⁰ *Hermann*, (1879) 4 Q. B. D. 284.

²¹ (1863) 1 Weir 219. But in an English case a person who uttered a medal resembling a half-sovereign in size, figure and colour, but of less value than a half-sovereign was convicted under 24 & 25 Vic., c. 99, s. 13, because that Act made passing of medals as coin punishable: *Robinson's Case*, (1865) L. & C. 604.

a careful discretion is to be exercised, regard being had to the considerations above stated.²²

Burma circular.—The Government of India have drawn attention to the inadequacy of the sentences which in some instances are passed by the Courts for offences relating to the coinage. Magistrates are therefore reminded of the necessity for the imposition of suitable sentences in such cases. Sessions Judges and District Magistrates are also requested to scrutinize carefully all sentences passed in such cases. In any instance in which the sentence of the Court is obviously insufficient, application should be made to the High Court to revise and enhance the sentence.²³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—at—, counterfeited (*or knowingly performed any part of the process of counterfeiting, to wit—*), a coin (*or King's coin*), to wit—and that you thereby committed an offence punishable under s. 231 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried [by the said Court] on the said charge.

232. Whoever counterfeits¹ or knowingly performs any part of the process² of countefeiting the Queen's coin,³ shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Counterfeiting
Queen's coin.

COMMENT.

This section enables the Court to inflict enhanced sentence where the offence committed is the same as in the last section but the coin is King's coin.

To constitute the offence described in this section, there must be an intention that the coins made will be used as King's coin or a knowledge that they are likely to be used as such. Such knowledge or intention will be inferred from the mere fact of counterfeiting, except under circumstances which conclusively negative it; but a distinction must be drawn between a deception practised for show merely, and one practised for wrongful loss or gain, and the former is not an offence under the Penal Code.²⁴ If the intention of the person who makes coins resembling genuine coins is to foist a false case upon his enemy by introducing the coins into his house and not to put the coins in circulation, no offence is committed under this section.²⁵

1. 'Counterfeits.'—See s. 28, *supra*.

2. 'Performs any part of the process.'—See s. 231, *supra*.

3. 'Queen's coin.'—See s. 230, *supra*.

Circulation of spurious coin not necessary.—In order to constitute offences under this section and s. 235, it is not necessary to prove that the accused intended that the spurious coins should go into circulation and be used as money. It is sufficient that there should be the intention to practise deception by means of the imitation.¹ But where false coins are made only for the purpose of passing them secretly into the house of the coiner's enemy in order to get him into trouble, the persons making those coins and in possession of the instruments and materials used therefor are neither guilty under this section nor under s. 235, but are liable to be convicted only under s. 195.²

CASES.

Quick-silvering of coin.—Where the accused had in his possession a double pice, which he quick-silvered so that it resembled a rupee, and he delivered it to a third

²² B. H. C. Cr. C. O., Ch. V, s. 80, p. 54.

²³ B. C. M., s. 720, p. 295.

²⁴ *Shumsodeen*, (1868) P. R. No. 26 of 1868.

²⁵ *Velayudham Pillai*, (1937) 2 M. L. J. 232, 46 L. W. 141, [1937] M. W. N. 551, [1937] AIR

(M) 711; 39 Cr. L. J. 51; *Sahebrao*, [1938] Nag. 534.

¹ *Pirbhu*, (1899) P. R. No. 4 of 1899.

² *Lal Chand*, (1911) 18 P. L. R. 129, 13 Cr. L. J. 252.

person to get it changed for other coins as a rupee, it was held that he would not be guilty of an offence under this section, unless at the time of quick-silvering the coin he intended thereby to practise deception, or knew it to be likely that deception would thereby be practised.³ Explanation 2 to s. 28 added by the Metal Tokens Act I of 1889 shakes the principle of this case. See *Emperor v. Qadir Bakhsh*,⁴ where such defence was held not good.

Sections 232 and 235.—Where a person removed the ring from a coin which had been used to form part of a necklace or other ornament, and worked up the face of the coin where the ring had been, it not being shown that any material part of the coin had at any time been removed, it was held that he was not guilty under this section.⁵

PRACTICE.

Evidence.—Prove the same points as those for s. 231, showing in (1) that the coin counterfeited is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Sections 232 and 235.—The accused was convicted of, and sentenced for, an offence under s. 232, i.e., for performing a part in the process of counterfeiting King's coin, and on a second count under s. 235, for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coin. It was held that the possession of such instruments and materials being part and parcel of the transaction of counterfeiting coin the sentence for the second offence was illegal.⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did counterfeit a piece of the King-Emperor's coin, to wit——, and that you thereby committed an offence punishable under s. 232 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

233. Whoever makes or mends, or performs any part of the process¹ of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe² that it is intended to be used, for the purpose of counterfeiting³ coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Making or selling
instrument for
counterfeiting coin.

COMMENT.

In this as well as in the following section mere acts of preparation towards the commission of the offence of coining are made substantive offences, such as the making of dies or other instruments used in the manufacture of coin.

1. 'Performs any part of the process.'—It is not necessary that the instrument should be capable of making an entire impression of a coin.⁷

2. 'Reason to believe.'—See s. 26, *supra*. 3. 'Counterfeiting.'—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made, or mended, or performed some part of the process of making or mending the die or instrument; or that he bought, sold, or disposed of it.

³ *Miharban*, (1888) P. R. No. 9 of 1884.

⁴ (1907) 30 All. 93.

⁵ *Muhammad Husain*, (1901) 23 All. 420.

⁶ *Hayat*, (1904) P. R. No. 14 of 1904, 1 Cr.

L. J. 946; *Bishan Das*, (1922) 24 Cr. L. J. 236, [1924] AIR (L) 78.

⁷ *Foster*, (1886) 7 C. & P. 494.

(2) That he did so, for the purpose that such die or instrument might be used for the purpose of counterfeiting coin; or that he knew, or had reason to believe, that the same was intended to be used for such purpose.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

In the case of a previous conviction the accused should be committed for trial to the Court of Session, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.⁸

Charge.—Same as that for s. 234.

234. Whoever makes or mends, or performs any part of the process¹ of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe² that it is intended to be used, for the purpose of counterfeiting³ the Queen's coin,⁴ shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or selling
instrument for
counterfeiting
Queen's coin.

COMMENT.

This section describes the same offence as in the last, but provides enhanced punishment as the coin affected is the King's coin.

1. 'Performs any part of the process.'—See s. 231, *supra*.

2. 'Reason to believe.'—See s. 26, *supra*.

3. 'Counterfeiting.'—See s. 28, *supra*. 4. 'Queen's coin.'—See s. 230, *supra*.

CASES.

Intention necessary.—The accused employed a die-sinker to make for a pretended innocent purpose a die calculated to make shillings; the die-sinker, suspecting fraud, informed the Commissioners of the mint, and under their directions made the die for the purpose of detecting the accused. It was held that the die-sinker was an innocent agent, and the accused was the real offender.⁹ The accused ordered dies, impressed with the resemblance of the sides of a sovereign, of the maker. The maker gave information to the police, who communicated with the authorities of the mint. The latter authorities, through the police, gave the maker permission to give them to the accused. He did so, and they were found in the accused's possession. It was held that the accused being knowingly in possession of the dies, had a sufficient guilty knowledge to constitute felony, whatever his intention as to their use might be.¹⁰

PRACTICE.

Evidence.—Prove the same points as those for s. 233, showing in (1) that the coin counterfeited is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did make [*or mend or perform any part of the process of making or mending, to wit——, or buy, or sell, (or dispose of) a certain die (or instrument) for the purpose of being used*] (*or knowing, or having reason to believe that it was intended to be used*) for counterfeiting a piece of the King-Emperor's coin, to wit—; and that you thereby committed an offence punishable under s. 234 of the Indian Penal Code, and within the cognizance of the Court of Session or the High Court.

And I hereby direct that you be tried by the said Court on the said charge.

⁸ Criminal Procedure Code, s. 348.

⁹ *Bannen's Case*, (1844) 2 Moody 309, 1 C.

& K. 295.

¹⁰ *Harvey*, (1871) L. R. 1 C. C. R. 284.

235. Whoever is in possession of any instrument or material,¹ for the purpose of using the same for counterfeit-
 Possession of in-
 strument or mate-
 rial for the purpose
 of using the same
 for counterfeiting
 coin ;
 ing coin,² or knowing or having reason to believe³
 that the same is intended to be used for that purpose,
 shall be punished with imprisonment of either des-
 cription for a term which may extend to three years,
 and shall also be liable to fine;

and if the coin to be counterfeited is the Queen's coin,⁴ shall be
 punished with imprisonment of either description for
 if Queen's coin. a term which may extend to ten years, and shall also
 be liable to fine.

COMMENT.

This section punishes the person who is in possession of any instrument or material for the purpose of using the same for counterfeiting coins.

1. 'Possession of any instrument or material.'—The word 'possession' connotes the intention to exercise power or control over the object possessed (*animus sibi habendi*) and therefore necessarily implies that the possessor has been conscious of the possibility of exercising that power or control. The mere physical relation arising from the position of the object is insufficient. The possession contemplated is not possession which has never been voluntary: and for the purpose of bringing home to any person the voluntary possession of any object, the mere proof of a fact of which he knows nothing, would be valueless. The section no doubt also requires in the accused person intention or knowledge as to the use to be made of the objects in possession, and these might be implied from the nature of the objects themselves. But before that stage is reached, there must be some circumstance indicating such intention or knowledge as is inseparable from the notion of conscious retention implied in the word 'possession'. "Such indication may arise from the position of the object in a place which is constantly used by the person accused, and which could not be overlooked by him, or from the bulk of the object itself, or from any circumstance, such as the locking up of the object which would point to voluntary and conscious possession."¹¹

Under the English statute dealing with offences relating to coin the word 'possession' embraces a wider area. Having any matter in the custody or possession of any person includes "not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person."¹²

If coining implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately and without her husband's sanction, they cannot both be convicted. The fact of a wife attempting to break up coining implements at the time of her husband's apprehension if done with the object of screening him, is no evidence of possession.¹³ Where it is sought to make a wife liable along with her husband with whom she is living, it is necessary to prove that possession and control over the instruments and materials for counterfeiting were with her alone or with her also. The mere fact that the wife knew that certain implements and materials were in the possession of her husband and also the place where those implements and materials were to be found, does not necessarily indicate that

¹¹ Per Batty, J., in *Hari Maniram Sonar*, (1904) 6 Bom. L. R. 387, 891, 1 Cr. L. J. 960. In the same case, Aston, J., did not concur in the above remarks, and went on to say (p. 894): "I think that if we introduce 'conscious' or 'voluntary' before the word possession where that word is not so qualified in a section of the Indian Penal Code we shall

be legislating instead of administering the law, with inconvenient consequences such as shifting the burden of proof indicated by sections 114 and 106 of the Evidence Act.... and even altering the substantive criminal law".

¹² 24 & 25 Vic., c. 99, s. 1.

¹³ *James Boober*, (1850) 4 Cox 272.

she herself was in subordinate possession or in any kind of possession of them.¹⁴ Where several persons are found in a room where false coining is going on and most of them are shown to have taken active part therein, they are all to be presumed to have been in possession of all the instruments and materials lying there which can be used for the purpose of making false coins.¹⁵

Where father and son were accused of being in possession of moulds for the purpose of using the same for making counterfeit coins and of being in possession of such coins, and there was evidence to show that the father looked after the family cultivation while the son exclusively attended to the shop, in the verandah of which the moulds and coins were discovered, and it was also shown that the father was never seen in possession of the moulds or of the counterfeit coins, it was held that the ordinary presumption that the things in the house of a joint Hindu family were in the possession, and under the control, of the managing member, had been rebutted.¹⁶

It is not only necessary that the accused should be in possession of the instruments or materials for counterfeiting coin, but it should also be proved that the possession was within the accused's knowledge.¹⁷

The accused was in possession of a box containing instruments used for counterfeiting coin. It appeared that two other brothers of his had access to the box and it was not proved that there was any property of the accused in it. It was held that the accused could not be convicted, for it was not shown that he was in exclusive possession of the box.¹⁸ The accused went into a village and purchased sweetmeats from one K, for which he paid a counterfeit two-anna piece; he also delivered another counterfeit two-anna piece to R in payment for some milk. K, on discovering the fraud, pursued the accused and aided by two others arrested him. On being pursued the accused threw away a yellow bag which was found to contain a mould, an instrument called a "gugi" used for keeping up a draught in a fire, a file and some white metal, all evidently instruments or materials used for counterfeiting coin. It was held that he was guilty of an offence under this section.¹⁹

Where coining instruments were found in a house occupied by a man, his wife, and a child ten years of age, the jury were directed to acquit the child of a felonious possession.²⁰ The accused was indicted for knowingly and without lawful excuse having in his custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown. The mould was found in the house of the accused, who had previously passed a bad half-crown; but there was no evidence to show that the half-crown had been made in that mould. It was held that there was sufficient evidence to go to the jury.²¹

Instruments of coining.—The following are held to be instruments of coining : a press for coinage;²² a mould on which was impressed the resemblance of a shilling inverted;²³ a puncheon of iron upon which was impressed the figure and similitude of the head-side of a shilling;²⁴ a collar of iron for graining the edges of counterfeit money;²⁵ and a galvanic battery.¹

2. 'For the purpose of using the same for counterfeiting coin.'—The mere possession of instruments and materials capable of counterfeiting coins is no offence. Possession of such instruments should be with the intention of counterfeiting coins, and the intention must be proved in order to establish the charge. The accused had in his possession three 'dies' and some instruments for the purpose of counterfeiting coin. He was a goldsmith by occupation, and the instruments found with him were required for his work as a goldsmith. The dies were deficient and no complete counterfeit coin could be struck from them either singly or combined. There was no evidence that he ever used those instruments or dies for the purpose of counterfeiting.

¹⁴ *Lachminiya Thakurain*, (1933) 14 P. L. T. 256, 35 Cr. L. J. 9, [1933] AIR (P) 272.

¹⁵ *Lal Chand*, (1911) 13 P. L. R. 129, 13 Cr. L. J. 252.

¹⁶ *Amrit Sonar*, (1919) 4 P. L. J. 525, 20 Cr. L. J. 439, [1919] AIR (P) 336. See *Sangam Lal*, (1893) 15 All. 129, as to what evidence is necessary where a criminating article is found in a common room of a joint family house.

¹⁷ *Nga San Nyein*, (1915) 8 B. L. T. 131, 16 Cr. L. J. 264, [1915] AIR (LB) 64.

¹⁸ *Abdul Majid*, (1903) 5 P. L. R. 14, 1 Cr. L. J. 40; *Mohammad Bakhs*, [1935] Cr. C. 39.

¹⁹ *Ahmad Shah*, (1892) P. R. No. 10 of 1892.

²⁰ *James Boober*, (1850) 4 Cox 272.

²¹ *Week's Case*, (1861) L. & C. 18.

²² *Bellay's Case*, (1753) 1 East P. C. 169.

²³ *Lennard's Case*, (1772) 1 East P. C. 170.

²⁴ *Ridgel's Case*, (1778) 1 Leach 189.

²⁵ *Moore*, (1875) 2 C. & P. 235.

¹ *Gover*, (1863) 9 Cox 282.

It was held that he was not guilty of an offence under this section.² Instruments and materials which can be used for the purpose of making false coins as well as other purposes are to be considered instruments and materials used for the purpose of making false coins when these are found in connection therewith.³

3. 'Reason to believe.'—See s. 26, *supra*. 4. 'Queen's coin.'—See s. 230, *supra*.

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one for the purpose of counterfeiting coin (*or* King's coin).

It must be shown by the prosecution that the instrument is capable of counterfeiting coin.⁴

(2) That the accused was in possession of such instrument or material in question.

(3) That he was in possession thereof for the purpose of using it; or that he knew or had reason to believe that it was intended to be used for that purpose.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, if the offence relates to King's coin; otherwise by Court of Session or Magistrate, Presidency or first class.

In the case of a previous conviction the accused should be committed for trial to the Court of Session.⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, were in possession of a certain instrument (*or* material), to wit——, for the purpose of using the said instrument for counterfeiting a piece of King-Emperor's coin known as——[*or* knowing *or* having reason to believe that the said instrument was intended to be used for the purpose of counterfeiting, etc.], and thereby committed an offence punishable under s. 235 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried [by the said Court] on the said charge.

Sentence.—Having regard to s. 71 of the Code separate sentences cannot be passed under . 232 and this section.

The offence of counterfeiting coin is very serious and an exemplary sentence should be given. But when a man is being convicted for being in possession of instruments or materials for counterfeiting coin it is hardly right to convict him separately for being in possession of various parts of such instruments, or materials.⁶

236. Whoever, being within British India, abets¹ the counterfeiting² of coin out of British India shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Abetting in India the counterfeiting out of India of coin.

COMMENT.

Any person in India, whether a British subject or a foreigner, who supplies instruments or materials for the purpose of counterfeiting any coin, or assists in any other way, is punishable under this section. Abetment in British India must be complete.

1. 'Abets.'—See s. 107, *supra*. 2. 'Counterfeiting.'—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused abetted the counterfeiting of coin.

(2) That the counterfeiting of coin was to be out of British India.

(3) That the accused was in British India at the time of such abetment.

² *Khadim Hussain*, (1924) 5 Lah. 392; *Morsan*, [1938] 1 M. L. J. 482, 47 L. W. 173, [1938] M. W. N. 89, 39 Cr. L. J. 344, [1938] AIR (M) 393.

³ *Lal Chand*, (1911) 13 P. L. R. 129, 13 Cr. L. J. 232.

⁴ *The Public Prosecutor v. Kona Tirumala Reddi*, (1899) 1 Weir 219.

⁵ Criminal Procedure Code, s. 348.

⁶ *Allah Wadhaya*, (1929) 31 Cr. L. J. 527, [1930] AIR (L) 51.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being in British India abetted one AB residing out of British India at——, in the counterfeiting of coin by doing—(*mention the act done*), and thereby committed an offence punishable under s. 236 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried [by the said Court] on the said charge.

237. Whoever imports into British India, or exports therefrom, any counterfeit¹ coin, knowingly or having reason to believe² that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Import of export
of counterfeit coin.

COMMENT.

The offence under this and the following section consists in an import or export, whether by sea or by land, of any coin known by the importer, or which he has reason to believe, to be counterfeit.

2. 'Counterfeit.'—See s. 28, *supra*. 3. 'Reason to believe.'—See s. 26, *supra*.

PRACTICE.

Evidence.—Prove (1) that the coins in question are counterfeit coins.

(2) That the accused imported into, or exported from, British India, such coins.

(3) That he, at the time he so imported or exported them, knew, or had reason to believe, that they were counterfeit.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, did import into (*or export from*) British India, viz., at——, certain pieces of counterfeit coin, to wit——(*specify the amount and name of the coins*) knowing (*or having reason to believe*) that the said coins were counterfeit; and that you thereby committed an offence punishable under s. 237 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Import or export
of counterfeits of
the Queen's coin.

COMMENT.

This section describes the same offence as the one under the preceding section, but provides enhanced punishment as the coin is King's coin.

PRACTICE.

Evidence.—Prove the same points as those for s. 237, showing in (1) that the counterfeit coins are King's coins.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, did import into (*or export from*) British India, viz., at——, certain pieces of counterfeit King-Emperor's coin, to wit——, (*specify the amount and name of the coins*) knowing (*or having reason to believe*) that the said coins were counterfeit; and that you thereby committed an offence punishable under s. 238 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

239. Whoever, having any counterfeit¹ coin, which at the time when he became possessed² of it he knew to be counterfeit,³ fraudulently⁴ or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Delivery of coin, possessed with knowledge that it is counterfeit.

COMMENT.

Object.—This section is directed against a person other than the coiner, who procures or obtains or receives counterfeit coin, and not to the offence committed by the coiner.⁷ The receipt of the false coin, knowing at the time it is received that it is counterfeit, is made the test of a person being such a dealer. The offence contemplated in this section appears to be a delivery or an attempt to deliver by such a dealer to some person whether an accomplice or not; the intention being that that person or some other should be defrauded.

The authors of the Code say: "An utterer by profession, an utterer who is the agent employed by the coiner to bring counterfeit coin into circulation, is guilty of a very high offence. Such an utterer stands to the coiner in a relation not very different from that in which a habitual receiver of stolen goods stands to a thief. He makes coining a far less perilous and a far more lucrative pursuit than it would otherwise be. He passes his life in the systematic violation of the law, and in the systematic practice of fraud in one of its most pernicious forms. He is one of the most mischievous, and is likely to be one of the most depraved of criminals. But a casual utterer, an utterer who is not an agent for bringing counterfeit coin into circulation, but who, having heedlessly received a bad rupee in the course of his business, takes advantage of the heedlessness of the next person with whom he deals to pay that bad rupee away, is an offender of a very different class. He is undoubtedly guilty of a dishonest act, but of one of the most venial of dishonest acts. It is an act which proceeds not from greediness for unlawful gain, but from a wish to avoid, by unlawful means it is true, what to a poor man may be a severe loss. It is an act which has no tendency to facilitate or encourage the operations of the coiner. It is an occasional act, an act which does not imply that the person who commits it is a person of lawless habits. We think, therefore, that the offence of a casual utterer is perhaps the least heinous of all the offences into which fraud enters.

"We considered whether it would be advisable to make it an offence in a person to have in his possession at one time a certain number of counterfeit coins, without being able to explain satisfactorily how he came by them. It did not, after much discussion, appear to us advisable to recommend this or any similar provision. We entertained strong objections to the practice of making circumstances which are in truth only evidence of an offence part of the definition of an offence; nor do we see any reason for departing in this case from our general rule.

"Whether a person who is possessed of bad money knows the money to be bad, and whether, knowing it to be bad, he intends to put in circulation, are questions to

be decided by the tribunals according to the circumstances of the case, circumstances of which the mere number of the pieces is only one and may be one of the least important. A few bad rupees which should evidently be fresh from the stamp would be stronger evidence than a greater number of bad rupees which appeared to have been in circulation for years. A few bad rupees, all obviously coined with the same die, would be stronger evidence than a greater number obviously coined with different dies. A few bad rupees placed by themselves, and unmixed with good ones, would be far stronger evidence than a much larger number which might be detected in a large mass of treasure."⁸

Three classes of offences are created by ss. 239 to 243.

(1) Delivery to another of coin, possessed with knowledge that it is counterfeit (ss. 239, 240).

(2) Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know it to be counterfeit (s. 241).

(3) Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof (ss. 242, 243).

1. 'Counterfeit.'—See s. 28, *supra*. It is not necessary that the counterfeit coin should be a counterfeit of a current coin.⁹ But it must be a counterfeit of a coin used for the time being as money. Otherwise the offence will be that of cheating and not of uttering false coin.¹⁰

2. 'Possessed.'—See s. 235, *supra*.

3. 'Which, at the time when he became possessed of it, he knew to be counterfeit.'—These words point to a person other than the coiner, that is, the person who procures, or obtains, or receives counterfeit coins.¹¹ Against such a person this and the following sections are directed.

All that is required is a guilty knowledge of the spuriousness of the coin at the time of receiving possession of it.¹² A knowledge of the coin being counterfeit at the time of becoming possessed of it was inferred from the fact of the accused being goldsmiths.¹³

4. 'Fraudulently.'—See s. 25, *supra*.

Uttering under this section must be with intent to defraud the party receiving the money. The giving of a piece of counterfeit money in charity is held to be not an uttering, although the person may know it to be counterfeit.¹⁴ But this decision has not only been questioned in a later case where a person who gave a counterfeit coin to a woman with whom he had intercourse was held to be guilty of uttering,¹⁵ but it is considered to have been overruled.¹⁶

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused became possessed of it.

(3) That when he became so possessed he knew that it was a counterfeit coin.¹⁷

(4) That he delivered it to some one, or attempted to induce some one to receive it.

(5) That he, when he so delivered it, etc., intended to defraud, or intended that a fraud might be committed.

Evidence of possession and the attempted disposal of coins of unusual kind is relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering is denied.¹⁸ Possession of bad money five days after uttering a bad coin is admissible to show guilty knowledge.¹⁹ Upon an indictment for uttering a forged bill, the previous uttering by the accused of other bills forged in other names may be given in evi-

⁸ Note 1, pp. 135, 136.

⁹ *Kandamuru Annappa*, (1883) 1 Weir 221.

¹⁰ *Khushali*, (1906) 29 All. 141.

¹¹ *Sheobux*, (1871) 8 N. W. P. 150.

¹² *Parushulla Mundul v. Kheroo Mundul*, (1874) 23 W. R. (Cr.) 4; *Karuppa Muppen*, (1887) 1 Weir 222; *Public Prosecutor v. Sinnakkal*, [1937] M. W. N. 876.

¹³ *Kandamuru Annappa*, (1883) 1 Weir 221.

¹⁴ *Page*, (1837) 8 C. & P. 122.

¹⁵ *Anon.*, (1845) 1 Cox 250.

¹⁶ *Ion's Case*, (1852) 2 Den. Cr. C. 475, 484.

¹⁷ *Bhan Singh*, (1930) 31 P. L. R. 235, 31 Cr. L. J. 736; *Dost Mohammad*, [1937] Nag. 133.

¹⁸ *Nur Mahomed*, (1883) 8 Bom. 223.

¹⁹ *Harrison's Case*, (1934) 2 Lewin 118.

dence in proof of guilty knowledge. It is impossible to lay down any general rule as to the time within which such previous uttering must have taken place in order to be admissible in evidence.²⁰

Upon a charge of uttering counterfeit coin, in order to prove a guilty knowledge, evidence is admissible of the subsequent uttering by the accused of counterfeit coin of a different denomination.²¹

Section 14, ill. (b), of the Indian Evidence Act, recognizes this principle of English cases.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—Same as that for s. 240.

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

240. Whoever, having any counterfeit coin, which is a counterfeit of the Queen's coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of the Queen's coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin, possessed with knowledge that it is counterfeit.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last. This section does not apply to the actual coiner.²² The offence under it is committed even though the coin is refused by the person to whom it is offered.²³

See Comment on s. 23, *supra*

CASES.

Sections 240 and 243.—A person having four counterfeit rupees in his possession, but uttering only one of them, cannot be separately convicted under s. 240 respecting the one rupee, and under s. 243 regarding the other three; because an offence under this section implies prior guilty possession.²⁴

Delivering.—The accused went into the shop of D, and asked to purchase some coffee and sugar, and in payment of the same he put down on D's shop a counterfeit shilling, which D took up and said to the accused that it was a bad one. The accused left D's shop, leaving the shilling; but without the coffee and sugar. It was held that he was guilty of uttering a false coin.²⁵

Ring the changes.—R bargained with the accused, a fruiterer, to have five apricots for six pence, and gave him a good shilling to change. The accused put the shilling into his mouth as if to bite it in order to try its goodness, and returning a shilling to R told him it was a bad one. R gave him another good shilling, which also he affected to bite, and then returned another shilling saying it was not a good one. Again R gave him a third good shilling with which he practised this trick a third time. The shillings returned by the accused were all bad shillings. It was held that he was guilty of uttering bad coin.¹

PRACTICE.

Evidence.—Prove the same points as those for s. 239, showing in (1) that the counterfeit coin is a counterfeit of the King's coin.

Joint uttering.—If two accused are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is not necessary to prove with

²⁰ *Salt*, (1862) 3 F. & F. 834; *Whiley and Haine's Case*, (1804) 2 Leach 983.

²¹ *Forster*, (1855) 6 Cox 521, 24 L. J. (M. C.) 134, Dears. Cr. C. 456.

²² *Ahmad Shah*, (1892) P. R. No. 10 of 1892.

²³ *Patrick Welch*, (1851) 20 L. J. (M.C.) 101,

16 L. T. 530.

²⁴ *Lakshia*, (1884) Unrep. Cr. C. 202.

²⁵ *Patrick Welch*, (1851) 20 L. J. (M.C.) 101, 16 L. T. 530. See *Parushullah Mundul v. Kheroo Mundul*, (1874) 23 W. R. (Cr.) 4.

¹ *Frank's Case*, (1794) 2 Leach 644.

certainly which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of money are proved to be counterfeit; and if it appear that the two accused went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, both may be convicted: the uttering and the possession being both joint.²

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, having in your possession—pieces of counterfeit King-Emperor's coin, known as——, knowing at the time when you became possessed of the said coins that they were counterfeit, fraudulently (*or with intent that fraud might be committed*) delivered the same to one AB (*or attempted to induce AB to receive the same*), and thereby committed an offence punishable under s. 240 of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried (by the said Court [*in cases tried by Magistrate omit these words*]) on the said charge.

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

241. Whoever delivers to any other person as genuine,¹ or at-

Delivery of coin as genuine, which when first possessed, the deliverer did not know to be counterfeit.

tempts to induce any other person to receive as genuine, any counterfeit² coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession,³ shall

be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

ILLUSTRATION.

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240, as the case may be.

COMMENT.

This section applies to a casual utterer of base coins. Section 239 deals with professional utterers. A casual utterer may not be aware that the coin was counterfeit at the time when he took it into his possession but he is responsible if he utters it knowingly. Use of counterfeit coins knowing them to be counterfeit is sufficient for conviction under this section.³

1. 'As genuine.'—The gist of an offence under this section is that a person should deliver or attempt to induce any other person to receive as genuine a coin known to be counterfeit.⁴ Where A handed a counterfeit coin to his friend, in order to avoid its being discovered by the police in A's possession, it was held that A committed no offence under this section, because the coin was not delivered as genuine.⁵ If the Court be of opinion that the coin was not intended by the utterer to pass as a good coin, it should not convict the accused.⁶ Where a person tendered a false coin to another and asked for change which was refused on the ground that the coin was false, and he thereafter tendered it to another person, it was held that it might be

² *Skerrit*, (1826) 2 C. & P. 427.

³ *Dost Mohammad*, [1937] Nag. 133.

⁴ *Soorut*, (1872) 4 N. W. P. 62.

⁵ *Michael Byrne*, (1852) 6 Cox 475.

⁶ *Soorut*, (1872) 4 N. W. P. 62.

presumed that after the first refusal the accused knew the coin to be bad and that his attempt thereafter to induce another person to receive it constituted an offence under this section.⁷

2. 'Counterfeit.'—See s. 28, *supra*. 3. 'Possession.'—See s. 235, *supra*.

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused delivered it, or attempted to induce some one to receive it.

(3) That he so delivered it, or so attempted to induce some one to receive the same, as genuine.

(4) That he, at the same time he delivered it, etc., knew the same to be a counterfeit coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, having in your possession—pieces of counterfeit King-Emperor's coin, known as——delivered as genuine to one AB the said coins (*or attempted to induce one AB to receive the said coins as genuine*) knowing at the time of the said delivery (*or attempt*), though not at the time when you became possessed of the said coins, that the said coins were counterfeit, and thereby committed an offence punishable under s. 241 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

242. Whoever, fraudulently¹ or with intent that fraud may be committed, is in possession² of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit,³ shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.

COMMENT.

Mere possession of a counterfeit coin is an offence under this and the following section, even though no attempt is made to pass it off, provided it was kept for a fraudulent purpose, and was originally obtained with guilty knowledge. Possession must be with intent to defraud.

1. 'Fraudulently.'—See s. 25, *supra*. 2. 'Possession.'—See s. 235, *supra*.
3. 'Counterfeit.'—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused was in possession of it.

(3) That he was in possession thereof, with intent to defraud, or with intent that fraud might be committed.

The accused may tender evidence to show that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not.⁸

(4) That at the time he became so possessed thereof, he knew it to be counterfeit.

When pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty.⁹

⁷ *Ebrahim*, (1910) 4 B. L. T. 9, 12 Cr. L J. 79.

⁸ Evidence Act (I of 1872), s. 21, ill. (e).
⁹ *Rodger's Case*, (1839) 2 Moody 85.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—See s. 243.

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

243. Whoever, fraudulently¹ or with intent that fraud may be committed, is in possession² of counterfeit coin, which is a counterfeit of the Queen's coin,³ having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

1. 'Fraudulently.'—See s. 25, *supra*. In the course of a search of the house of the accused in connection with an offence under ss. 457 and 380 of the Code, counterfeit coins were recovered from a cloth bundle kept inside a black wooden box under lock and key. The coins were examined and were found that they were counterfeit, and in fact there was no denial as to this. The defence was that the coins at one time belonged to the S estate and were sold as a part of the estate's property. The purchase was ostensibly made by one M but the accused had a half share in it, with the result that the counterfeit coins fell to his share. After the purchase it was not shown that any attempt had been made by the petitioner to pass on the coins to other persons as genuine. It was held that the important element of the offence that the accused was in possession of counterfeit coins "fraudulently, or with intent that fraud may be committed", had not been proved and, therefore, the charge under this section had not been proved against him.¹⁰

2. 'Possession.'—See s. 235, *supra*. Where eleven silver pieces of the size of a rupee along with thirty counterfeit rupees, all bearing the same year, were found concealed under *bhusa* in a locked room, the key of which was in the possession of the accused, it was held that under s. 114, Indian Evidence Act, the circumstances created a presumption of guilt in the case of the accused that the accused was in possession of the coins fraudulently or with intent to commit fraud.¹¹

3. 'Queen's coin.'—See s. 230, *supra*.

PRACTICE.

Evidence.—Prove the same points as those for s. 242, showing in (1) that the counterfeit coin is a counterfeit of the King's coin. It is essential to prove that at the time the accused became possessed of the coin he knew it to be counterfeit, whether he was in possession of the coin himself, or his wife, clerk or servant was in possession of the coin on his account.¹² The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins for determining whether he had knowledge at the time that the coins were spurious.¹³

It is difficult to establish by positive evidence that a man in whose possession counterfeit coin is found knew when it came into his possession that it was counterfeit. This difficulty is enhanced when the accused who is in a position to give an explanation refuses to give one. In such a case guilty knowledge of the accused has to be inferred from the circumstances of the case and the conduct of the accused. The fact that at the time when he came into possession of the counterfeit coin for the first time the accused knew that it was counterfeit need not necessarily be proved by positive evidence, especially when the accused refuses to give any explanation of its possession,

¹⁰ *Gudar Sao*, (1936) 37 Cr. L. J. 1154, 17 P. L. T. 648, [1936] AIR (P) 533.

¹¹ *Sangaram*, (1932) 34 Cr. L. J. 545, 9 O. W. N. 1198, [1933] AIR (O) 85.

¹² *Fateh Chand Agarwalla*, (1916) 44 Cal.

477, F.B.

¹³ *Fateh Chand Agarwalla*, (1916) 44 Cal. 477, 513, F.B.; *Alla Dad*, (1901) 3 P. L. R. 288; *Kesho Bania*, (1940) 21 P. L. T. 940, 42 Cr. L. J. 301, [1941] AIR (P) 26.

and can be inferred from the conduct of the accused and the circumstances of the case.¹⁴ The onus to prove that the accused knew "at the time when he became possessed of the coin that it was counterfeit" is on the prosecution. Section 106 of the Evidence Act does not entitle the prosecution to throw the onus as regards the time of knowledge on the accused without any qualification, but if the prosecution has succeeded in establishing circumstances suggesting that the accused knew at the time he became possessed of the coins that they were counterfeit, then and in that case alone it would be necessary for the accused to lead evidence to show that it was not at that time that he became aware of their counterfeit character.¹⁵

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, fraudulently (*or with intent that fraud might be committed*) were in possession of——pieces of counterfeit King-Emperor's coin, known as——, knowing at the time when you became possessed of the said coins that they were counterfeit; and thereby committed an offence punishable under s. 243 of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate, omit these words)*] on the said charge.

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

244. Whoever, being employed in any mint lawfully established in British India, does any act, or omits what he is legally bound to do,¹ with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Person employed in mint causing coin to be of different weight or composition from that fixed by law.

COMMENT.

The law has fixed the weight and composition of various coins and has declared in what cases they shall be a legal tender. The object of this section is to secure the purity of the coinage and its exact conformity to the legal standard against the act or omission of persons employed in mints. The proof must be that the person is employed in a Government mint, and that the act or omission which is the subject of the charge was intended to cause the coin there made or issued to vary from the fixed standard. It is no part of the definition and therefore it will be no necessary part of the proof that any wrongful gain should accrue to the person charged, or that loss should be caused to the Government or the public.¹⁶ See the Indian Coinage Act.¹⁷

1. 'Legally bound to do.'—See s. 43, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused is employed in a lawfully established mint in British India.

(2) That he, during such employment, did or omitted to do, something which he was legally bound to do, which would cause any coin issued from that mint to be of a different weight or composition from that fixed by law.

(3) That he did, or omitted to do such thing with that intention.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

¹⁴ *Dhanna Singh*, [1943] O. W. N. 113, (1943) 44 Cr. L. J. 542, [1943] AIR (O) 335.

¹⁵ *Kesho Bania*, (1940) 21 P. L. T. 940, 42 Cr.

L. J. 301, [1941] AIR (P) 26.

¹⁶ M. & M. 192.

¹⁷ Act III of 1906.

That you, on or about the——day of——, at——, being — employed as — in the——mint lawfully established in British India, did an act, to wit——, (or omitted what you were legally bound to do, to wit——,) with the intention of causing the coin——issued from the said mint to be of a different weight (or composition) from the weight (or composition) fixed by law, and thereby committed an offence punishable under s. 244 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in British India, any coining tool or instrument,¹ shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Unlawfully taking coining instrument from mint.

COMMENT.

The substance of this offence consists in taking a coining tool without lawful authority out of any mint for the purpose of using it for making counterfeit coins.

1. 'Instrument.'—That is coining instrument.

PRACTICE.

Evidence.—Prove (1) that the instrument in question is a coining tool or instrument.

(2) That it belonged to a mint lawfully established in British India.

(3) That the accused took it out of the mint without lawful authority.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, without lawful authority, did take out of a mint lawfully established in British India, to wit, the mint——, a certain coining tool (or instrument), to wit——; and thereby committed an offence punishable under s. 245 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

246. Whoever fraudulently¹ or dishonestly² performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Fraudulently or dishonestly diminishing weight or altering composition of coin.

Explanation.—A person who scoops out part of the coin and puts anything else into the cavity alters the composition of that coin.

COMMENT.

Fraudulent or dishonest diminution in the weight or composition of a coin is punishable.

1. 'Fraudulently.'—See s. 25, *supra*. 2. 'Dishonestly.'—See s. 24, *supra*.

PRACTICE.

Evidence.—Prove (1) that the metal in question is a coin.

(2) That the accused performed upon such coin the operation in question.

(3) That such operation diminished its weight, or altered its composition.

(4) That the accused did as above fraudulently or dishonestly.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently (*or dishonestly*) performed on the coin, to wit——, an operation which diminished its weight (*or altered its composition*), and you thereby committed an offence punishable under s. 246 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

247. Whoever fraudulently or dishonestly performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Fraudulently or dishonestly diminishing weight or altering composition of Queen's coin.

PRACTICE.

Evidence.—Prove the same points as those for s. 246, showing in (1) that the coin in question is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—See s. 246.

248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Altering appearance of coin with intent that it shall pass as coin of different description.

COMMENT.

This section refers to any operation which alters the appearance of a coin with the intention that the said coin shall pass as a coin of a different description. The operation, whether of gilding, or silvering, or washing, etc., must be of such a kind, and so far completed, that the coin which is subjected to it is actually altered in appearance. Thus quick-silvering of a half-pice so as to give it the appearance of a four-anna silver piece will be punishable under this section. The offence is complete as soon as the coin is altered though no fraudulent purpose can be proved. And it does not seem necessary to show that there is in fact a description of coin at all resembling or corresponding to the altered coin. The alteration, under this section, must not diminish the weight of the coin. If the weight is diminished either s. 246 or s. 247 will apply.

PRACTICE.

Evidence.—Prove (1) that the metal in question is a coin.

(2) That the accused performed on such coin the operation in question.

(3) That such operation altered the appearance thereof.

(4) That the accused did as above with the intention that such coin should pass as a coin of a different description.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

In the case of a previous conviction the accused should be committed for trial to the Court of Session unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence.¹⁸

¹⁸ Criminal Procedure Code, s. 348.

Charge.—See s. 249.

249. Whoever performs on any of the Queen's coin¹ any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Altering appearance of Queen's coin with intent that it shall pass as coin of different description.

COMMENT.

See Comment under the preceding section. The offence under this section is merely an aggravated form of the offence described in the last section.

1. 'Queen's coin.'—See s. 230, *supra*.

PRACTICE.

Evidence.—Prove the same points as those for s. 248, showing in (1) that the coin in question is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, did perform a certain operation, to wit——, on a piece of the King-Emperor's coin known as——, with the intention that the said coin should pass as a coin of a different description, to wit——; and that you thereby committed an offence punishable under s. 249 of the Indian Penal Code, and within my cognizance (*or cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently¹ or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Delivery of coin, possessed with knowledge that it is altered.

COMMENT.

This and the following sections are intended to punish persons who are traders in spurious or altered coins. They correspond to ss. 239 and 240. There must be both possession with knowledge and fraudulent delivery.

1. 'Fraudulently.'—See s. 25, *supra*.

PRACTICE.

Evidence.—Prove (1) that the coin in question was one with respect to which the offence defined in s. 246 or 248 was committed.

(2) That the accused was in possession of it.

(3) That at the time when he became possessed of it he knew that any of the said offences had been committed.

(4) That he delivered it to some one, or attempted to induce some one, to receive it.

(5) That he did as above with intent to defraud or with intent that fraud might be committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—See s. 251.

251. Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.¹

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

1. 'And shall also be liable to fine.'—This section does not require a sentence of fine as well as imprisonment to be inflicted; the sentence of fine is optional.¹⁹

CASE.

Two persons, who carried on a business as dealers in coins, came to Moradabad and obtained an introduction to the cashier of the local branch of the Imperial Bank. They had with them a large number of coins, and they offered to the cashier a commission of three per cent., if he could change them. On further examination of these coins at the Bank the next day, the Bank officials sent for the police and the two dealers were arrested. The coins which they had brought were sent for examination to the Calcutta Mint. The report of the Mint expert, which was duly proved at the trial, showed that a considerable number of the coins tendered were old and worn coins which had been used at one time as ornaments and from which the solder had only been partially removed in order to keep up their weight, whilst many more were coins of recent date which were not much worn but had been carefully subjected to a process of clipping or filing so as to reduce their weight to the lowest limit of wastage allowable under the law. It was held that the persons who had tried to get these coins changed were guilty of an offence under this section.²⁰

PRACTICE.

Evidence.—Prove (1) that the coin in question was one with respect to which the offence defined in s. 247 or 249 was committed.

Other points as in s. 250.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the ——— day of ———, at ———, had in your possession a coin, to wit ———, and in respect of which the offence defined in s. 246 (*or s. 248*) of the Indian Penal Code, had been committed, and knowing at the time when you became possessed of the said coin that such offence had been committed, you fraudulently (*or with intent that fraud may be committed*) delivered such coin to AB (*or attempted to induce the said AB to receive the same*), and thereby committed an offence punishable under s. 251 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

¹⁹ *Joseph alias Thavasi*, (1888) 1 Weir 223.

²⁰ *Mahtab Rai*, (1925) 48 All. 603.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

252. Whoever, fraudulently¹ or with intent that fraud may be committed, is in possession² of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

Possession of debased or altered coin by the professional dealer, with fraudulent intention, is made punishable by this section. This and the following section resemble ss. 242 and 243. Under ss. 240 and 251 the accused is punished for uttering, under this and the next section he is punished for possessing a coin in respect of which the offence defined in either s. 246 or 247 has been committed.

1. 'Fraudulently'.—See s. 25, *supra*. 2. 'Possession'.—See s. 235, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was in possession of a coin.

(2) That it was a coin in respect of which the offence defined in s. 246 or 248 had been committed.

(3) That the accused knew of it when he became possessed of the coin.

(4) That he was so possessed of the coin with intent to defraud, or with intent that fraud might be committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

253. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section. See Comment on the preceding section.

PRACTICE.

Evidence.—Prove the same points as those for s. 252, showing in (1) that the coin in question was a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248, or 249 has been committed, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

COMMENT.

Section 241 is similar to this section. Where possession is acquired innocently but on subsequent knowledge that the coin is counterfeit, if a person passes it off or attempts to pass it off as a genuine coin he will be punished under this section.

See the Metal Tokens Act, s. 3.²¹

PRACTICE.

Evidence.—Prove (1) that the coin in question is one with respect to which any such operation as that mentioned in s. 246, 247, 248 or 249 has been performed.

(2) That the accused delivered it to some one; or that he attempted to induce some one to receive it.

(3) That he so delivered it, or attempted to induce some one to receive it, as a genuine coin, or as a coin of a different description.

(4) That at the time he did so, he knew that it had been operated upon.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, delivered to AB (*or attempted to induce AB to receive*) as genuine a coin, to wit——, in respect of which an operation as is mentioned in ss. 246, 247, 248 or 249 of the Indian Penal Code, to wit——, had been performed, and you thereby committed an offence punishable under s. 254 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

255. Whoever counterfeits,¹ or knowingly performs any part of the process of counterfeiting, any stamp² issued by Government³ for the purpose of revenue, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

COMMENT.

The remaining sections of this Chapter deal with offences relating to Government stamps. These stamps are impressions upon paper, or parchment, or any material used for writing made by Government, mostly for the purpose of revenue.

This section is similar to s. 241 which deals with counterfeiting of coins.

1. 'Counterfeits'.—See s. 28, *supra*. Engraving a stamp, like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, amounts to counterfeiting a stamp.²²

2. 'Stamp'.—This word is used in this and the following sections to denote the impression or mark set upon the paper, parchment, etc. It includes postage stamps.²³

²¹ Act I of 1889.

²² *Collicot's Case*, (1812) 2 Leach 1048.

²³ Indian Post Office Act, VI of 1898, ss. 16 and 17.

The word 'stamp' must be construed according to its ordinary meaning in the English language. An obliterated stamp can be a stamp in the ordinary use of the English language. A stamp does not cease to be a stamp because it is cancelled. A person selling a forged stamp, although it bears a cancellation mark, commits an offence of selling forged stamps.²⁴

3. 'Government'.—See s. 17, *supra*, and s. 263A (4), *infra*.

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused made such counterfeit; or that he knowingly performed any part of the process of counterfeiting.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, counterfeited (*or knowingly performed a certain part of the process of counterfeiting, to wit——*), a certain stamp issued by Government for the purpose of revenue, to wit——, and thereby committed an offence punishable under s. 255 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

256. Whoever has in his possession¹ any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Having possession of instrument or material for counterfeiting Government stamp.

COMMENT.

See Comment on the preceding section. This section resembles s. 235 with which it may be compared.

1. 'Possession.'—See ss. 27 and 235, *supra*. The proprietor of a newspaper circulating among stamp collectors and others caused a die to be made for him abroad, from which imitations or representations of a current colonial postage stamp could be produced. The only purpose for which the die was ordered by him, and was subsequently kept in his possession, was for making upon the pages of an illustrated stamp catalogue or newspaper, called "The Philatelist's Supplement", illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper. It was held that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse within the meaning of the Post Office (Protection) Act,²⁵ 1884, s. 7(c), which says that "A person shall not...make, or, unless he shows a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp."¹

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one usable for counterfeiting stamps.

(2) That the stamps so producible thereby are counterfeits of those issued by Government for the purposes of revenue.

(3) That the accused had such instrument or material in his possession.

²⁴ *Lowden*, [1914] 1 K. B. 144.

²⁵ 47 & 48 Vic., c. 76.

¹ *Dickins v. Gill*, [1896] 2 Q.B. 310.

(4) That the same was in possession of the accused for the purpose of its being used to counterfeit such Government stamps; or that the accused knew or had reason to believe that such instrument or material was intended to be so used.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

257. Whoever makes or performs any part of the process¹ of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe² that it is intended to be used, for the purpose of counterfeiting any stamp³ issued by Government⁴ for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or selling instrument for counterfeiting Government stamp.

COMMENT.

This section corresponds to s. 234.

1. 'Performs any part of the process.'—It is not necessary that the instruments should be capable of making an entire impression of a stamp.²

2. 'Reason to believe.'—See s. 26, *supra*.

3. 'Stamp.'—See s. 255, *supra*.

4. 'Government.'—See s. 17, *supra*, and s. 263A (4), *infra*.

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one usable for counterfeiting stamps.

(2) That the stamps so producible thereby are counterfeits of those issued by Government for the purpose of revenue.

(3) That the accused made, or performed, some part of the process of making such instrument; or that he bought, sold, or disposed of such instrument.

(4) That he did as above in order that such instrument might be used for the purpose of counterfeiting such stamp; or that the accused knew or had reason to believe that the same was intended to be used for such purpose.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, made (*or performed any part of the process of making or bought or sold or disposed of*) an instrument, to wit—, for the purpose of being used (*or knowing or having reason to believe that it was intended to be used*) for counterfeiting a stamp, to wit—, issued by Government for the purpose of revenue, and thereby committed an offence punishable under s. 257 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Sale of counterfeit Government stamp.

² *Foster*, (1836) 7 C. & P. 494.

COMMENT.

See Comment on s. 255, *supra*. A person selling a forged stamp although it bears a cancellation mark commits an offence of selling forged stamps.³

This section resembles s. 239.

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused sold or offered to sell such counterfeit stamp.

(3) That when selling or offering the same for sale he knew, or had reason to believe, that the same was counterfeit.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, sold (*or offered for sale*) a stamp, to wit—, which you knew (*or had reason to believe*) to be counterfeit of the stamp—issued by the Government for the purpose of revenue, and thereby committed an offence punishable under s. 258 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried [by the said Court] on the said charge.

259. Whoever has in his possession¹ any stamp² which he knows to be a counterfeit³ of any stamp issued by Government⁴ for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Having possession of counterfeit Government stamp.

COMMENT.

This section resembles s. 243.

1. 'Possession.'—See ss. 27 and 235, *supra*. 2. 'Stamp.'—See s. 255, *supra*.

3. 'Counterfeit.'—See s. 28, *supra*.

4. 'Government.'—See s. 17, *supra*, and s. 263A(4), *infra*.

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused had such counterfeit stamp in his possession.

(3) That he then knew the same to be counterfeit.

(4) That he was so possessed intending to use or dispose of the same as a genuine stamp; or that he was so possessed thereof in order that the same may be used as a genuine stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, were in possession of a stamp, Exhibit—, which you knew to be a counterfeit of a stamp, to wit—, issued by Government for the purpose of revenue, intending to use (*or dispose of*) the same as a genuine stamp and thereby committed an offence punishable under s. 259 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session, or the High Court*).

³ *Lowden*, [1914] 1 K. B. 144.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Using as genuine
a Government
stamp known to be
counterfeit.

COMMENT.

See Comment on s. 255. This section corresponds to s. 254.

Here the stamp used as genuine must be a counterfeit stamp. Hence, where a person sold a one-anna stamp as a one-rupee stamp, it was held that he had committed no offence under this section, but was guilty of cheating under s. 415.⁴

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused knew the same to be counterfeit.

(3) That he used such counterfeit stamp with such knowledge.

(4) That he used the same as a genuine stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, used as genuine a stamp, to wit—, knowing it to be a counterfeit of a stamp issued by Government for the purpose of revenue, to wit—, and thereby committed an offence punishable under s. 260 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session, or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

261. Whoever, fraudulently¹ or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document² for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Effacing writing
from substance
bearing Govern-
ment stamp, or
removing from
document a stamp
used for it, with
intent to cause loss
to Government.

COMMENT.

This section provides penalty for (1) the effacing of a writing from a stamp, and (2) the removing of a stamp from a document. The intention may be to defraud some one or to cause loss of revenue to Government. The section resembles ss. 246 and 248 which provide punishment for the alteration and defacement of a coin.

1. 'Fraudulently.'—See s. 25, *supra*. 2. 'Document.'—See s. 29, *supra*.

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for revenue purposes.

⁴ *Shuroop Chunder Doss*, (1865) 2 W. R. (Cr.) 65.

- (2) That such stamp had been used as such on the substance in question.
 (3) That the accused removed or effaced from such stamp some of the writing for which it had been used.
 (4) That he did so with intent to defraud or to cause loss to Government.
 Or prove points (1) and (2) as above, and further—
 (3) That such stamp had been used as such for a writing or document.
 (4) That the accused removed the stamp from such writing or document.
 (5) That he did so in order that such stamp might be used for a different writing or document.
 (6) That he did so with intent to defraud or to cause loss to Government.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, fraudulently (*or with intent to cause loss to the Government*) [removed (*or effaced*) from any substance bearing any stamp issued by Government for the purpose of revenue any writing (*or document*) for which such stamp has been used] *or* [removed from any writing (*or document*) a stamp which had been used for such writing (*or document*) in order that such stamp may be used for a different writing (*or document*)] and thereby committed an offence punishable under s. 261 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session.*)

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

262. Whoever, fraudulently¹ or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Using Government stamp known to have been before used.

COMMENT.

Under this section fraudulent use of a stamp already used is made punishable.

1. 'Fraudulently.'—See s. 25, *supra*. The mere affixing to a letter of a postal stamp which has been previously used does not of itself prove fraud or an intent to cause loss to Government;⁵ but if a person uses a postage stamp twice he will be punished under this section.⁶

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for the purpose of revenue.

- (2) That it had been already used for such purpose.
 (3) That the accused afterwards again used such stamp.
 (4) That when he used it again he knew that it had been before used.
 (5) That he again so used the stamp with intent to defraud or to cause loss to Government.⁷

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

263. Whoever, fraudulently¹ or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark, put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his pos-

Erasure of mark denoting that stamp has been used.

⁵ *Niaz Ahmad*, (1881) 1 A. W. N. 56.

⁶ *Sitaram*, (1882) 5 C. P. L. R. (Cr.) 43.

⁷ *Murlidhar*, (1880) Unrep. Cr. C. 145.

session² or sells or disposes of any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used,³ shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Under this section three things are punishable : (1) erasure or removal of a mark denoting that a stamp has been used, (2) knowingly possessing any such stamp, and (3) selling or disposing of any such stamp.

1. 'Fraudulently.'—See s. 25, *supra*.

2. 'Knowingly has in his possession.'—Under the second part of the section it is enough to prove possession of a revenue stamp from which any mark put upon it for denoting its use has been erased or removed, with knowledge of such erasure or removal. It is not necessary to prove that the possession was fraudulent or with intent to cause loss to Government. Neither is it necessary to prove, under that part of the section, that the erasure or removal had been by the accused person or that he had any connection with it. But it must be proved that the marks or notations that had been erased or removed were marks or notations denoting that the stamp had already been used for revenue purposes.⁸

3. 'Used.'—'Used' means used upon documents which required to be stamped in accordance with law.

When there is nothing to show that the stamp had been used upon a document for revenue purposes as required by law and the traces of marks or notations left are consistent with their being private marks or notations, the offence is not established, e.g. when the marks of a rubber stamp on a Court-fee stamp, such as they are, do not indicate that it was the stamp of a Court of law.⁹

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for the purpose of revenue.

(2) That it had been used for that purpose.

(3) That it bore a mark or impression denoting that it had been so used.

(4) That the accused removed or erased such mark or impression.

(5) That when he so removed or erased such mark or impression, he did so with an intention to defraud or to cause loss to Government.¹⁰

Or prove points (1), (2), (3) and (4) as above, and further—

(5) That the accused had possession of such stamp in such cancelled condition; or that such stamp, in such cancelled condition, was sold or disposed of by the accused.

(6) That the accused at the time knew that such mark or impression had been so removed or erased.

(7) That he had a fraudulent intention, or had the intention to cause loss to Government, when he had such possession, or made such sale or disposal.

Or prove points (1), (2) and (3) as above, and further—

(4) That the accused sold or disposed of such stamp.

(5) That he, when selling or disposing of the same, knew that it had been so used.

(6) That he had a fraudulent intention, or had the intention to cause loss to Government, when so selling or disposing of it.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

⁸ *Supdt. and Remembrancer of Legal Affairs, Bengal v. Bazlar Rahaman*, (1935) 39 C. W. N. 542, 37 Cr. L. J. 923.

⁹ *Ibid.*

¹⁰ *Supdt. and Remembrancer of Legal Affairs, Bengal v. Bazlar Rahaman*, (1935) 39 C.W. N. 542, 37 Cr. L. J. 923.

Prohibition of
fictitious stamps.

263A. (1) Whoever—

(a) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(b) has in his possession, without lawful excuse, any fictitious stamp, or

(c) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp, shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section “fictitious stamp” means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word “Government” when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive government in any part of India, and also in any part of Her Majesty’s dominions or in any foreign country.

COMMENT.

This section is exactly the same as s. 7 of the English Post Office Act, 1884.¹¹

Object.—This section was added by the Indian Criminal Law Amendment Act (III of 1895), s. 2, and is intended to give full effect to what is known as the Vienna Convention in respect of postage, and it provides for making it an offence to make fictitious stamps, which are defined to be stamps purporting to be used for purposes of postage whether by the British or any foreign Government. It was introduced at the instance of the Post Office for the purpose of stopping the use of fictitious stamps on letters coming from abroad.

Possession of a fictitious stamp without lawful excuse is an offence. The proprietor of a newspaper circulating among stamp-collectors and others caused a die to be made for him abroad from which imitations or representations of a current colonial postage stamp could be produced. The only purpose for which the die was ordered by him, and was subsequently kept in his possession, was for making upon the pages of an illustrated stamp catalogue or newspaper called “The Philatelist’s Supplement,” illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper. It was held that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse.¹²

PRACTICE.

Evidence.—Prove (1) that the accused made, knowingly uttered, dealt in, or sold the fictitious stamp in question, or knowingly used it for any postal purposes; or

(2) That he had in his possession, without lawful excuse, such stamps; or

(3) That he made, or, without lawful excuse, had in his possession any die, plate, instrument, or materials for making such stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

¹¹ 47 & 48 Vic., c. 76.

¹² *Dickins v. Gill*, [1896] 2 Q. B. 310.

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

THE offences punishable by this Chapter are not defined with reference to any precise standard of weight or measure established by law. A false weight or measure here signifies that—taking the law or the ordinary usage of the place, or the common understanding of the parties, to have fixed on certain known instrument of weight or measure, with reference to which two persons deal together—the false dealer by deceit substitutes another weight or measure in order to defraud.¹

The Legislature has, however, not left the matter quite at large. The Standards of Weight Act,² 1939, has fixed the standard weights of a tola, seer, maund, pound, ounce, hundredweight, and ton. The Measures of Length Act³ makes the imperial yard for the United Kingdom the legal standard measure of length in British India.

The Bombay Legislature has passed the Bombay Weights and Measures Act (Bom. XV of 1932), by which the weights are standardized at a Bombay seer of 80 tolas, and measures at the British yard of 36 inches. In the Punjab weights and measures have been standardized by the Punjab Weights and Measures Act (Punjab Act XII of 1941).

Under Acts passed by local Legislatures certain officers in every presidency and district towns in India are required to keep standards of such retail weights and measures in use throughout a particular town or district.⁴

264. Whoever fraudulently uses any instrument for weighing¹ which he knows to be false,² shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use
of false instrument
for weighing.

COMMENT.

The sections relating to weights make no mention of standard weights. In every place there are well-known customary weights, and, if any resident of the place or other person, knowing that a weight is less than the customary weight which it purports to be, uses the weight dishonestly, he commits fraud and may be punished under Chapter XIII.⁵

As to inspection of weights and measures by police, s. 153, Criminal Procedure Code, provides : “(1) Any Officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false. (2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.”

Ingredients.—This section requires two essentials :—

1. Fraudulent use of an instrument for weighing.
2. Knowledge that such instrument is false.

1. ‘Fraudulently uses any instrument for weighing.’—See s. 25, *supra*. Intention is an essential part of the offence under this section.⁶ “The intention how-

¹ M. & M. 201.

² Act IX of 1939.

³ Act II of 1889, ss. 2, 7.

⁴ The Calcutta Police Act (Beng. Act IV of 1866), s. 55; the Calcutta Municipal Consolidation Act (Beng. Act II of 1888), s. 370; the Madras City Police Act (Mad. Act III of 1888), s. 32; the City of Bombay Municipal Act (Bom. Act III of 1888), s. 418; the Bombay Municipal Boroughs Act (Bom. Act XVIII of 1925), s. 177;

the City of Bombay Police Act (Bom. Act IV of 1902), s. 54; Police Duties and Powers of Magistrate (Bombay) Regulation XII of 1827, s. 20; the Burma Municipal Act (Burma Act III of 1898), s. 142 (o); the Burma Excise Act (Burma Act V of 1917), s. 21; the Bengal Municipal Act (Beng. Act XV of 1932), s. 415.

⁵ *Ma Ein Me*, (1897) P. J. L. B. 354.

⁶ *Kangalee Muduk*, (1872) 18 W. R. (Cr.) 7.

ever must be alleged in laying the charge, though it may be a matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may of course be rebutted...But where the incorrectness of the scale is so visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from that defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance. On the other hand a false balance artfully contrived to elude detection in the use of it, carries with it a presumption of fraudulent intention, which properly brings it within the scope of the chapter."⁷ A one *tolah* below weight in a five seers only represents a fair wear and tear, and is no evidence of a fraudulent intention.⁸

2. 'Knows to be false.'—The word 'false' in this and the following sections means different from the instrument, weight or measure which the offender and the person defrauded have fixed upon, expressly or by implication, with reference to their mutual dealings.⁹ A railway company kept a weighing machine, which for a fortnight had been so out of repair that, when anything was weighed by it, the weight appeared to be four pounds more than was really the weight. It was held that the company was liable to be convicted for having in its possession a weighing machine which on examination was found to be incorrect or otherwise unjust.¹⁰

PRACTICE.

Evidence.—Prove (1) that the instrument in question is one for weighing.

(2) That it is a false one.

(3) That the accused knew it to be false.

(4) That he used it knowing it to be so.

(5) That he did as above with intent to defraud.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently used a certain instrument for weighing, to wit——, knowing it to be false at the time of using it, and thereby committed an offence punishable under s. 264 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

265. Whoever fraudulently¹ uses any false² weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false weight or measure.

COMMENT.

Section 264 punishes one who uses a false balance; this section punishes one who uses a false weight or measure.

To ascertain whether a measure is false or not, the only proper test to apply is that of the measure, and the same articles must be measured in each case, and proof should be adduced that this had been done. The weight of the grain that a measure is found to hold is no evidence of its capacity, as compared with that of another measure unless the very same grain is used.¹¹

1. 'Fraudulently.'—See s. 25, *supra*.

2. 'False.'—See s. 264, *supra*. The false weight or measure must be a prescribed weight or measure. Where the accused sold liquor, measuring it with a glass

⁷ 2nd Rep., ss. 220, 221, p. 404.

⁸ *Bikka Mal*, (1883) 3 A. W. N. 224.

⁹ Stokes' Anglo-Indian Codes, Vol. I, p. 193. Approved of in *Kanayalal*, (1839) 41 Bom. L.

R. 978, 41 Cr. L. J. 172, [1939] AIR (B) 455.

¹⁰ *Great Western Railway Company v. Bailie*,

(1864) 34 L. J. M. C. 31.

¹¹ *Lakshman*, (1898) Unrep. Cr. C. 989.

which was not the prescribed measure and of which they falsely misrepresented the capacity, it was held that they had not committed an offence under this section but one under s. 415.¹² Selling by means of an unstamped measure does not, in the absence of evidence of fraud or falsity of the measure, constitute this offence.¹³

PRACTICE.

Evidence.—Prove (1) that the weight or measure is a false one or that it is different from what it was used as.

(2) That the accused used such false or different weight or measure.

(3) That he did as above with intent to defraud.

The prosecution must lead some evidence to prove that the accused knew the measures to be incorrect and in the absence of any such evidence there could be no presumption of fraudulent intention on the part of the accused.¹⁴

A conviction under this section cannot be maintained where there is no complaint by a purchaser.¹⁵

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, or on about the—day of—, at—, [fraudulently used a false weight (*or* false measure of length or capacity)], *or* [fraudulently used a weight (*or* measure of length or capacity) as a different weight (*or* measure) from what it was], and thereby committed an offence punishable under s. 265 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

266. Whoever is in possession¹ of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used,² shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Being in possession of false weight or measure.

COMMENT.

This section punishes a person who is in possession of a false weight or measure just as ss. 235, 239 and 240 punish a person who is in possession of counterfeit coins and s. 259 punishes a person who is in possession of a counterfeit stamp.

1. 'Possession.'—The mere possession of false weights or measures will not of itself raise any strong presumption of fraud, as the weights or measures may have been put away so as not to be used. The fraudulent intent will be shown greatly by the place where they are found. Suppose a false balance was found fixed to a tradesman's counter where he was accustomed to sell his goods, and there was no other in the place. There would be, in this case, the strongest possible presumption that the possession was not innocent. On the other hand, suppose he had true balances in his shop, but an untrue one stowed away in an attic with a lot of lumber, there the presumption would be against fraud.

But the mere possession of the false instrument, if such possession cannot be satisfactorily explained and accounted for, is sufficient ground for presuming an intention to use it fraudulently.

As to the definition of the word "possession", see s. 27, *supra*.

2. 'Knows to be false... fraudulently used.'—It is necessary to prove that the accused knew the scales to be false and intended to use them fraudulently. The mere possession of the scales, or evidence of their use, with a string not accurately

¹² *Nurodin*, (1888) Cr. R. No. 36 of 1888, Unrep. Cr. C. 386.

¹³ *Achi*, (1882) 1 Weir 223.

¹⁴ *Bakhtalal*, (1929) 30 Cr. L. J. 692, [1929]

AIR (N) 239.

¹⁵ *Sobha*, (1902) P. W. R. (Cr., No. 38 of 1908, 9 Cr. L. J. 4.

tied at the centre of the beam, so that one scale outweighed the other, but which could be shifted at any time, and might sometimes have been accurately tied, was held not of itself sufficient evidence of fraud.¹⁶ The mere possession of weights in excess of the authorized standard will not support a conviction.¹⁷

A measure is 'false' within the meaning of this section if it is something other than what it purports to be. The fact that an offence may have been committed under the Weights and Measures Act (Bom. IV of 1932) does not make the measure false within the meaning of s. 266. Where both the purchaser and seller are aware of the actual measure being used, there is no fraudulent intent as required by this section. It is only when the seller purports to sell according to a certain standard, and sells below that standard, that he can be said to be guilty of fraud. Where it was agreed between the seller and the purchaser that a particular measure was to be used in measuring the commodity sold, it was held that, even though the measure was not of the standard requirement, it was not "false" and there was no fraudulent intent within the meaning of s. 264 of the Code.¹⁸

A person who professes to sell by a certain standard of weight is bound to take reasonable care that the weights he uses are not defective.¹⁹ He is bound to see that the measure is correct according to that standard and if the measure varies from the standard so as to give the seller a considerable advantage, the Courts are justified in inferring fraud.²⁰ The accused professed to sell by weights of a certain English standard. It was admitted that the weights were habitually used and were in the possession of the accused for the purpose of being used. The weights were all deficient, but the Sessions Judge was of opinion that there was an absence of fraud, because the weights had been openly and therefore presumably ignorantly used. It was held that the accused was guilty of an offence under this section.²¹

'Fraudulently'—See s. 25, *supra*. Where standard weights are not prescribed no presumption of fraud can arise in respect of short weights, and a conviction under this section cannot be obtained unless the element of fraud is strictly proved.²²

Where a search took place after dark without proper precautions, and there was absence of proper description of the weights seized and there was silence of the record as to what standard weights were used for purposes of comparison, and there was no proof of knowledge or fraudulent intent on the accused's part, it was held that these were fatal defects in a prosecution under this section.²³

PRACTICE.

Evidence.—Prove (1) that the instrument, or the measure, or the weight in question is false.

To prove that the weight or measure is false, comparison should be made with standard weights or measures. Some reasonable allowance should be made for wear and tear and for the rough-and-ready methods of bazaar shop-keepers.²⁴

(2) That the accused was in possession of the same.

(3) That he knew the same to be false.

(4) That he intended that such false weight, etc., should be used to defraud some one.

The prosecution has to prove that the person in possession of a false measure knew it to be false and was in possession intending that the same may be fraudulently used. It is not sufficient that the capacity of the measures seized did not conform to the standard fixed by Government. If a dealer has a measure in his shop which has been tested by the Government and certified to be a proper measure, there is no reason to presume that he could have known that it was not a correct measure or that at the time when the stamp was put on this measure it was not up to the prescribed standard.

¹⁶ *Hamirmal*, (1890) Cr. R. No. 36 of 1890, Unrep. Cr. C. 514; *Harak Chand Marwari*, (1917) 40 All. 84; *Seshapant*, [1937] Mad. 358.

¹⁷ *Damodhar Dalji*, (1864) 1 B. H. C. 181.

¹⁸ *Kanayalal*, (1939) 41 Bom. L. R. 977, 41 Cr. L. J. 172, [1939] AIR (B) 455.

¹⁹ *Appasami alias Munisami*, (1864) 1 Weir 225.

²⁰ *Venkata Chetti*, (1883) 1 Weir 225.

²¹ *Meetalagaih Poker*, (1883) 1 Weir 223.

²² *Mi Ya Pyan*, (1908) U. B. R. (P.C.) 17, 9 Cr. L. J. 415.

²³ *Sobha*, (1902) P. W. R. (Cr.) No. 38 of 1908, 9 Cr. L. J. 4.

²⁴ *Nanak Chand*, (1913) P. R. No. 20 of 1913, 15 Cr. L. J. 11, 15 P. L. R. 110, [1914] AIR (L) 42 (2).

There is in law no duty cast on a shop-keeper to have the measures tested periodically and it cannot be presumed that the shop-keeper was using the measure fraudulently merely by the fact that he did not have his measures tested regularly and the measure is found to be short. There must be evidence that he was aware of the fact that the measures were smaller than the standard ones.²⁵ But where a shop-keeper keeps and regularly uses for the purposes of his trade in his shop weights which are deficient, the only reasonable inference is that he knows them to be deficient and is using them fraudulently.¹

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, were in possession of a certain instrument for weighing (*or of a certain weight, or of a certain measure of length or capacity*), to wit——, knowing it, at the time of your possession, to be false, and intending that the same might be fraudulently used, and thereby committed an offence punishable under s. 266 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

267. Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false,¹ in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Making or selling
false weight or
measure.

COMMENT.

This section punishes a person who makes, sells or disposes of a false balance, weight or measure. The object is to prevent the circulation of false scales, weights or measures.

1. 'False.'—See s. 264, *supra*.

PRACTICE.

Evidence.—Prove (1) that the instrument, or the measure, or the weight in question is false.

(2) That the accused either made, sold, or disposed of the same.

(3) That he then knew it to be false.

(4) That he so made, sold, or disposed of it, in order that it might be used as true; or that he knew that it was likely to be used as true.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, made (*or sold, or disposed of*) a certain instrument for weighing (*or a certain weight, or a certain measure of length or capacity*), to wit——, knowing at the time of making (*or selling or disposing of*) it, to be false, in order that the said instrument might be used as true, (*or knowing that the said instrument was likely to be used as true*), and thereby committed an offence punishable under s. 267 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

²⁵ *M. Abdul Latiff*, [1943] 1 M. L. J. 486, [1941] M. W. N. 341, (1943) 44 Cr. L. J. 781, [1943] AIR (M) 589.

¹ *Challur Seshayya*, [1944] 2 M. L. J. 249, 57 L. W. 489 (1), [1945] AIR (M) 8, 46 Cr. L. J. 246.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

268. A person is guilty of a public nuisance, who does any act or is guilty of an illegal omission¹ which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity,² or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.³

A common nuisance is not excused on the ground that it causes some convenience or advantage.

COMMENT.

Nuisances are of two kinds : (1) Public, and (2) Private.

(1) 'Public nuisance' or common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of the whole community in general, or by neglecting to do anything which the common good requires. It is an act affecting the public at large, or some considerable portion of them; and it must interfere with rights which members of the community might otherwise enjoy. It depends in a great measure upon the number of the houses and the concourse of people in the vicinity; and the annoyance or neglect must be of a real and substantial nature. Acts which seriously interfere with the health, safety, comfort, or convenience of the public generally, or which tend to degrade public morals, have always been considered to be public nuisances.

Persons who carry on offensive trades and thereby, or by any other offensive means, corrupt the air, or by any means cause loud and continued noises and thereby occasion injury or annoyance to those dwelling in the neighbourhood in respect of their health, or comfort and convenience of living or the value of their property, are liable to a prosecution for causing a public nuisance.¹ "It does not appear to me a *sine qua non* that such an annoyance as this should injuriously affect every member of the public within its range of operation. It is sufficient that it should affect people in general who dwell in the vicinity."² A brew-house, glass-house or swine-yard may be a public nuisance if it is shown that the trade is such as to render the enjoyment of life and property uncomfortable. Erecting gunpowder mills or keeping gunpowder magazines near a town, keeping large quantities of naphtha near dwelling-houses, blasting stone near a highway, keeping large quantities of materials for making fire-works near a street,³ working a rice-husking machine at night in a residential quarter of a city,⁴ and keeping disorderly houses, e.g., disorderly inns, bawdy houses, gaming houses, and committing acts of indecency in public places, have been held to be public nuisances.

A public nuisance can only be the subject of one indictment, otherwise a party might be ruined by a million suits. An indictment will fail if the nuisance complained of only affects one or few individuals.

As to when an individual can bring a civil action in respect of a public nuisance, see the authors' Law of Torts, 14th edition.

(2) 'Private nuisance' is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to trespass. It is an act affecting some particular individual or individuals as distinguished from

¹ 7th Parl. R. p. 57.

² Per Anderson, J., in *Phiraya Mal*, (1904) P. R. No. 9 of 1904, 5 P. L. R. 256, 257, 1 Cr. L. J. 513.

³ Russell, 9th Edn., Vol. II, p. 1345.

⁴ *Phiraya Mal*, (1904) P. R. No. 9 of 1904, 5 P. L. R. 256, 1 Cr. L. J. 513.

the public at large. It is in the *quantum* of annoyance that public nuisance differs from private. It cannot be the subject of an indictment, but may be the ground of a civil action for damages or an injunction, or both.

The various sections of this Chapter deal with everything that is regarded as nuisance in English law. Section 290 is a general provision intended to cover a case not specially provided for.

The definition of 'public nuisance' applies to all Central Acts and Regulations made after 14th January, 1887.⁵

Ingredients.—The section requires two essentials :—

1. A person must do an act or must be guilty of an illegal omission.

2. Such act or omission must cause—

(a) common injury, danger, or annoyance (i) to the public, or (ii) to the people in general who dwell or occupy property in the vicinity, or

(b) injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

1. 'Person...does any act or is guilty of an illegal omission.'—Section 11 defines the word 'person.'

The word 'act' is defined in s. 33, *supra*. It is used in this section in the sense of positive conduct only, not negative conduct or omission to do something as the expression "illegal omission" is specifically used in conjunction with it.

The word 'illegal', as defined in s. 43, is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action. Every omission causing a nuisance is not punishable. The omission must be 'illegal'. Thus, a person omitting to fence a wall on a private ground within eight yards of a highway,⁶ and a person omitting to keep his ponies⁷ or his pigs⁸ from straying, were held to have committed no nuisance. Similarly, where the lombardars of a village, who were making arrangements when an annual fair was held at that village for the public sanitation of the place, did not make the usual arrangements when a fair was held and for which they were convicted of a public nuisance, it was held that their omission to make proper sanitary arrangements was not an illegal omission within the meaning of this section.⁹

Liability of absent proprietor for nuisance committed by his servant.—Where the use of premises gives rise to a public nuisance it is, generally, the occupier for the time being who is liable for it, and not the absent proprietor.¹⁰

2. 'Causes any common injury, danger or annoyance to the public...who dwell or occupy property in the vicinity.'—The injury contemplated in this section must be common, i.e., it must affect the public and not any solitary individual. Thus, a person trotting rams trained to fight in a market-place,¹¹ a person fouling the water of a streamlet by putting into it bundles of stalks of *tur* plants,¹² a person throwing dust and sweeping on the road in front of his house and thus making the atmosphere noxious to health,¹³ a woman keeping on her premises vegetable matter which caused a smell offensive to persons using the public street,¹⁴ a person obstructing or encroaching upon any part of a public highway,¹⁵ a person allowing prickly-pear to spread on to a road used by the public,¹⁶ a person fixing platforms to his shops for shop-keepers to sit, but which encroached on a public road,¹⁷ were held guilty of a public nuisance. Throwing rubbish into one's own garden does not amount to a public nuisance.¹⁸ It should be noted, however, that every act which causes an offensive odour does not necessarily constitute this offence.¹⁹ Villagers accumulating filth and manure in their village are not guilty of public nuisance.²⁰

⁵ General Clauses Act (X of 1897), ss. 3 (44), 4 (2).

⁶ *Anthony*, (1883) 6 Mad. 280.

⁷ *Jaynath Mundul v. Jamul Sheikh*, (1866) 6 W. R. (Cr.) 71.

⁸ *Vallapoo Kotadu*, (1894) 1 Weir 244.

⁹ *Guj Singh*, (1875) P. R. No. 11 of 1875.

¹⁰ *Bibhuti Bhusan Biswas v. Bhuban Ram*, (1918) 46 Cal. 515.

¹¹ *Rajak Sahib*, (1883) 1 Weir 243.

¹² *Vithoba*, (1884) Unrep. Cr. C. 203.

¹³ *Vasudeva Chetti*, (1882) 1 Weir 242.

¹⁴ (1883) 1 Weir 243.

¹⁵ *Vankipuram Chacravarthi Iyengar*, (1893) 1 Weir 232.

¹⁶ *Molaiappa Goundan*, (1928) 52 Mad. 79.

¹⁷ *Puranmashi*, (1935) 58 All. 694. The liability is of the owner who builds the platforms and not of the shop-keepers who rent them.

¹⁸ *Kuppa Pillai*, (1888) 1 Weir 242.

¹⁹ *Shewoo*, Weir, (3rd Edn.), 11.

²⁰ *Buta Singh*, (1872) P. R. No. 25 of 1872; *Guj Singh*, (1875) P. R. No. 11 of 1875.

The 'annoyance' must also be caused to the general public. An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place. Where, therefore, from the noise made by a tinman in carrying on his trade three members of an inn were disturbed in the occupation of their chambers, it was held that the nuisance was not of a sufficiently general extent to support an indictment.²¹ The annoyance of a few residents of a single house is not sufficient to constitute a public nuisance. Where the complainant and his tenants were disturbed by the sounds made by the accused's theatre-band from 12 noon to 4 p.m. and 8 p.m. to midnight every day, it was held that the annoyance caused to the residents of a single house was not sufficient to show that the annoyance made by the theatre-band constituted a public nuisance.²² The defendant had converted his land near a public highway into a shooting ground where persons came to shoot with rifles at a target, and also at pigeons. As the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held that the act of the accused amounted to a public nuisance.²³ Again, the injury or annoyance must not be fleeting or evanescent.²⁴ It must be such as reasonable persons would complain of.²⁵

The word "public" includes any class of the public or any community (s. 12). The expression "people in general" means a body or considerable number of persons.¹ This section does not apply to acts or omissions calculated to offend the sentiments of a class, or a person of particularly refined susceptibilities.² *Lex non facit votis delicatorem*—the law makes no allowance for the susceptibilities of the hypersensitive. "In this country [India] it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of adherents of other creeds residing in the neighbourhood, but the *Penal Code* does not regard such an act as a public nuisance."³ That sort of annoyance which the section aims at is not the kind of nuisance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public; it is not intended to apply to acts calculated to offend the sentiments of a class or section of the public.⁴ Similarly, the slaughtering of kine by the Mahomedans may injure the susceptibilities of the Hindus but it will not be deemed to be a public nuisance unless the act is done in such places or such a manner as to be a nuisance.⁵ It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others.⁶ The scope of this section is to protect the public or people in general, as distinguished from the members of a sect.

The Allahabad High Court has held in a case that annoyance to one individual is sufficient. Where a public servant, whose duty it was to keep the streets clean, saw somebody easing himself and, therefore, he reported it in his official capacity, and gave evidence of the act, it was held that it was a reasonable inference to draw that he was annoyed.⁷ This was really a case under a Municipal Act affecting people passing along a public thoroughfare.

No nuisance where there is no annoyance to public.—A prostitute visiting a dak bungalow at the request of a person staying there;⁸ a person committing bare sollicitation of chastity;⁹ a person soliciting passers-by on a public road for purposes of prostitution;¹⁰ a person urinating in a public place in a village having no public urinals;¹¹

²¹ *Lloyd*, (1802) 4 Esp. 200.

²² *K. T. Hing v. I. N. Silas*, (1929) 57 Cal. 849.

²³ *Moore*, (1882) 3 B. & Ad. 184.

²⁴ *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400, 407.

²⁵ *Attorney General v. Nottingham Corporation*, [1904] 1 Ch. 673.

¹ *Nga Tun U*, (1902) 1 L. B. R. 213.

² *Perumal Naidu*, [1936] M. W. N. 1151, 44 L. W. 806, 38 Cr. L. J. 120, [1937] AIR (M) 130.

³ Per Turner, C. J. in *Muttumira*, (1884) 7 Mad. 590, 591; *Ramditta v. Kirpa Singh*, (1882) P. R. No. 3 of 1883.

⁴ *Janki Prasad v. Karamat Husain*, (1931) 53 All. 836.

⁵ *Zakiuddin*, (1887) 10 All. 44; *Shaikh Amjad*, (1942) 21 Pat. 315.

⁶ *Shahbax Khan v. Umrao Puri*, (1908) 30 All. 181.

⁷ *Lallu Ram*, (1923) 21 A. L. J. R. 772, 25 Cr. L. J. 332, [1924] AIR (A) 194.

⁸ *Musumat Begum*, (1870) 2 N. W. P. 349.

⁹ *Raji*, (1895) Cr. R. No. 28 of 1895, Unrep. Cr. C. 765.

¹⁰ *Nanni*, (1899) 22 All. 113.

¹¹ *Perumal Naidu*, [1936] M. W. N. 1151, 44 L. W. 806, 38 Cr. L. J. 120, [1937] AIR (M) 130.

a person merely placing cowdung cakes by the side of a road to dry;¹² a person placing a cot temporarily on a public road;¹³ a person selling fish near or on a public road;¹⁴ a person enclosing land which was a village site and property of Government;¹⁵ a person refusing to have any social intercourse with persons belonging to *shumsees* or to associate with them as *Hindus*;¹⁶ a person skinning an animal which has died a natural death;¹⁷ and a watchman shouting at night, *jugte raho, jugte raho* (wake up, wake up) in order to scare thieves from the house of his master and thus disturbing the sleep of a neighbour,¹⁸ were held to have committed no offence under this section.

Whether letting of clean water on to a public road is a public nuisance will depend on various matters, viz. the quantity, the frequency of the act, the locality, the feeling of the ordinary public who frequent the locality, etc.¹⁹

Gambling.—A common gaming-house to which every one who chooses to pay is able to go is necessarily a nuisance and no evidence of any actual annoyance to the public is in such a case required. But a person who admits gamblers into his house and every person who games therein are not guilty of this offence in the absence of such evidence.²⁰ Where a lessee of a house permitted disorderly people to use it for gambling and thereby caused annoyance to the public, he was convicted of this offence.²¹ Persons who sat on a public road outside a village, and induced villagers to gamble,²² and persons who gambled in a market-place,²³ were held to have committed a public nuisance. Similarly, where the accused allowed a large crowd of people to collect near their shops with a view to carry on *satta* (gambling) transactions and the crowd was so great as to stop the traffic in the street for half an hour, the Allahabad High Court held that they were guilty of public nuisance. It observed: "If a crowd collects and obstructs the traffic so as to cause a nuisance, the person who is directly responsible for the crowd collecting is obviously not less but more guilty than the other persons who form the crowd and this would be equally the case whether he were inside or outside his shop at the precise moment when the police appeared. No one is allowed to make use of his premises in such a way as to interfere with the rights of the public."²⁴ The Lahore High Court has held that the mere fact that traffic has been obstructed by the assembling of customers outside a shop, for the purpose of buying *satta* tickets which the shop-keeper had offered for sale, was insufficient to support the conviction of the shop-keeper under s. 290, as the mere offer of *satta* tickets for sale could not, by itself, be the source of any nuisance to the public. The customers could purchase tickets without crowding in front of the shop or blocking the traffic.²⁵

The Calcutta High Court has ruled that gambling is not an offence as is defined in this section. Where, therefore, certain persons were found to have gambled at a place where the Gambling Act was not in force and convicted under s. 290, it was held that the conviction was bad.¹ In a Burma case, the Court observed: "It is quite clear that, however pernicious may be the results of gambling, whether in a private house or in a common gaming-house, the mere act of gambling cannot be regarded as a public nuisance within the Penal Code. It would be as reasonable to punish people who had *pwes* or keep grogshops as being guilty of a public nuisance on the ground that *pwes* and drinking frequently 'endanger the public peace and safety'".²

Shop-window.—The accused, who had a toy shop, exhibited in the windows of their shop, overlooking a public road, certain clock-work toys during the *Diwali* festi-

¹² *Bapu*, (1886) Cr. R. No. 42 of 1886, Unrep. Cr. C. 297.

¹³ *Kamla Prasad*, (1912) 10 A. L. J. R. 362, 13 Cr. L. J. 830; but this case was dissented from in *Ram Krishna*, [1935] A. L. J. R. 1057, 36 Cr. L. J. 893, [1935] AIR (A) 746. Both decisions are by a single Judge. The conflict will have to be settled by the Allahabad High Court.

¹⁴ *Paung Tha Ri*, (1880) S. J. L. B. 94.

¹⁵ *Neoor Parivatappa*, (1900) 1 Weir 245.

¹⁶ *Ramditta v. Kirpa Singh*, (1882) P. R. No. 3 of 1883.

¹⁷ *Beni*, (1914) 12 A. L. J. R. 349, 15 Cr. L. J. 600, [1914] AIR (A) 363.

¹⁸ *Ram Charan Ahir*, (1926) 3 O. W. N. 526, 27 Cr. L. J. 1020, [1926] AIR (O) 414.

¹⁹ *Manikkam Pillai*, [1932] M. W. N. 111.

²⁰ *Hau Nagi*, (1870) 7 B. H. C. (Cr. C.) 74; (1879) 1 Weir 240; *Dustoor Khan*, (1867) P. R. No. 16 of 1867.

²¹ *Thandavarayudu*, (1891) 14 Mad. 364; *Rogier*, (1823) 1 B. & C. 272.

²² (1878) 1 Weir 239.

²³ *Bethan Chetti*, (1882) 1 Weir 242.

²⁴ *Happoo Mal*, (1924) 22 A. L. J. R. 662, 663, 26 Cr. L. J. 135, 136, [1934] AIR (A) 568; *Noor Mahomed*, (1911) 13 Bom. L. R. 209, 35 Bom. 368.

²⁵ *Nanak Chand*, (1929) 11 Lah. 236.

¹ *Sasi Kumar Bose*, (1903) 7 C. W. N. 710. See, to the same effect, *Managil Karuwan*, (1891) 1 Weir 240.

² *Nga Shwe Nyo*, (1884) S. J. L. B. 279, 280.

val. A large crowd of people collected on the road to witness the toys; in consequence of which there were dangerous rushes, several persons were knocked down and great obstruction and danger were caused to those using the road. The accused were asked by the police to stop the exhibition but they did not obey. On these facts, the Magistrate convicted the accused of offences under ss. 283 and 114. It was held that there was obstruction, danger and injury to the persons using the public way, which amounted to public nuisance.³

Lawful cremation no nuisance.—Where persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to.⁴ But the owner of a private cremation ground may be liable for nuisance if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood.⁵

Offending sentiments of class no nuisance.—Where Mahomedans residing in a Hindu village, erected in the neighbourhood of a Hindu temple, a shed containing a religious symbol;⁶ where a person cut up meat on his *verandah* and exposed it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by;⁷ where a person kept a shop open for the sale of meat though the sight of meat was offensive to the sentiments of a section of the public;⁸ and where Mahomedans for a religious purpose killed and cut up two cows before sunrise in a private compound partly visible from a public road;⁹ where, on the occasion of *bakri-eeed*, the accused killed a cow at dawn, in a semi-private place, and the killing was seen by some Hindus walking along a path fifty-feet away,¹⁰ this offence was held not to have been committed. But it would be a public nuisance if a person wilfully slaughtered cattle in a public street so that the groans and blood of the poor beasts were heard and seen by passers-by.

3. 'Which must necessarily cause injury, etc., to persons who may have occasion to use any public right.'—The persons referred to in this clause can seek a criminal remedy for apprehended injury. Under this clause common injury to the public or neighbours need not be shown; any individual might complain, provided he is interfered with in respect of a public right, e.g., obstruction caused by building over a part of a public street. Whoever appropriates any part of a street by building over it infringes the right of the public *quoad* the part built over, and thereby commits public nuisance under this section.¹¹ If any portion, however small, of a public street is encroached upon, the inevitable result must be to cause obstruction to persons who may have occasion to use the highway, for the public is entitled to use every inch of a road that has been dedicated to the public.¹²

The Calcutta High Court held in a case where persons placed a bamboo stockade across a tidal navigable river for the purpose of fishing, although they left in such stockade a narrow opening for the passage of boats, which passage was kept closed except on the actual passage of boats, that they were guilty of public nuisance.¹³ But subsequently it was held that an encroachment, however slight, on a tidal navigable river would not constitute this offence. There must be some evidence that such encroachment caused one of the results specified in this section.¹⁴ The Lahore High Court¹⁵ has agreed with the view expressed in the former case and has dissented from the view expressed in the latter case.

³ *Noor Mahomed*, (1911) 13 Bom. L. R. 209, 35 Bom. 368; *Happoo Mal*, (1924) 22 A. L. J. R. 662, 26 Cr. L. J. 135, [1924] AIR (A) 568.

⁴ *Saminadha Pillai*, (1896) 19 Mad. 464.

⁵ *Indra Nath Banerjee*, (1897) 25 Cal. 425.

⁶ *Muttumira*, (1884) 7 Mad. 590.

⁷ *Byramji Edalji*, (1887) 12 Bom. 437.

⁸ *Hasan*, (1897) Cr. R. No. 13 of 1897, Unrep. Cr. C. 903; *Eesa v. Keemoo*, (1867) P. R. No. 18 of 1867; *Assa Nund v. Hoosein Buksh*, (1868) P.

R. No. 15 of 1868.

⁹ *Zakiuddin*, (1887) 10 All. 44.

¹⁰ *Shaikh Amjad*, (1942) 21 Pat. 315.

¹¹ *Virappa Chetti*, (1896) 20 Mad. 433.

¹² *Nisar Muhammad Khan*, (1925) 6 Lah. 203. See *Puranmashi*, (1935) 58 All. 694.

¹³ *Umesh Chandra Kar*, (1887) 14 Cal. 656.

¹⁴ *Jugal Das Dalal*, (1892) 20 Cal. 665.

¹⁵ *Nisar Muhammad Khan*, (1925) 6 Lah. 203.

A person who fills up a portion of a ditch or drain which forms part of a public way and which belongs to the public¹⁶ is guilty of this offence. Similarly, letting loose cattle at night on a road amounts to this offence.¹⁷

Where the riparian owner of land on one bank of a river threw up an embankment on his own land to protect his fields from flood; and this resulted in accumulation of water on the fields of owners of land on the other side of the river causing injury to them, it was held that such an embankment even if it tended to cause injury to some owners of property could not be described as a public nuisance and is not punishable.¹⁸

4. 'Nuisance not excused on the ground that it causes some convenience or advantage.'—It is immaterial whether the act complained of is convenient to a large number of the public than its inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show that it is not a nuisance to any of the public.¹⁹ If a public nuisance is proved, it is generally useless to set up counterbalancing benefits; nor in deciding whether a thing is or is not a public nuisance can the good it does be weighed against the public annoyance which it causes.²⁰

No prescriptive right can be acquired to commit nuisance.—No prescriptive right can be acquired to maintain, and no length of time can legalize, a public nuisance. Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of a longer standing.²¹ But a long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a bona fide dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under ss. 133 and 137 of the Criminal Procedure Code and making the question a proper one for a civil Court.²²

Liability of master for acts of his servants.—Under English law the criminal liability of a master for the acts of his servants in cases of public nuisance is an exception to the general rule that he who does a criminal act is alone guilty. The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.²³ The Calcutta High Court has differed from this view. Where the proprietors and the manager of a mill were prosecuted on a complaint that the working of the mill was a nuisance, and it appeared that the proprietors were not residents in the locality and there was no allegation of abetment by them, it was held that the person liable, where the user of premises gives rise to a nuisance, was the occupier for the time being whoever he might be, and the proprietors were therefore not guilty of public nuisance.²⁴

Liability of joint owners.—A joint owner is responsible in law for nuisance caused by his property, even though he is not in actual enjoyment of the property.²⁵

Prosecution under Criminal Procedure Code not condition precedent.—A prosecution under this section is not illegal on the ground that proceedings have not previously been taken under the Criminal Procedure Code.¹

Civil and criminal liability.—Nuisances punishable under the Code may be made the subject of a civil action before or without prosecution. A person aggrieved by the erection of a building in a public thoroughfare, or on the waste land of a town

¹⁶ *Roopnarain Dutt*, (1872) 18 W. R. (Cr.) 38.

¹⁷ *Kasayi Ahmed*, (1892) 1 Weir 238.

¹⁸ *Joy Krishna Mahanty*, (1940) 21 P. L. T. 514, [1940] P. W. N. 524, (1940) 42 Cr. L. J. 72, [1940] AIR (P) 577.

¹⁹ Stephen's Digest of Criminal Law, Art. 197; *Train*, (1862) 9 Cox 180; *Ward*, (1836) 4 Ad. & El. 384.

²⁰ Russell, Vol. II, 9th Edn., p. 1331.

²¹ *Weld v. Hornby*, (1806) 7 East 195, 199; *The Municipal Commissioners of the Suburbs of Calcutta v. Mahomed Ali*, (1871) 7 Beng. L. L. 499, 16 W. R. (Cr.) 6; *Shotts Iron Company*

v. Inglis, (1882) 7 App. Cas. 518, 528; *Attorney-General v. Richmond*, (1886) L.R. 2 Eq. 306, 311; *Tipping v. St. Helen's Smelting Co.*, (1865) L. R. 1 Ch. 66, 69; *Cross*, (1812) 3 Camp. 224.

²² *Freonath Dey v. Gobardhone Malo*, (1897) 25 Cal. 278.

²³ *Stephens*, (1866) L. R. 1 Q. B. 702; *Medley*, (1834) 6 C. & P. 292.

²⁴ *Bidhuti Bhusan Biswas v. Bhuban Ram*, (1918) 46 Cal. 515.

²⁵ *Molaiappa Goundan*, (1928) 52 Mad. 79, 80.

¹ *Suklal*, (1869) Unrep. Cr. C. 28.

or village, is entitled to institute a suit in a civil Court for its removal, instead of preferring a complaint to the Magistrate.²

Abatement of nuisance.—A person cannot take the law into his own hands and abate nuisance contrary to the provisions of s. 26 of the Indian Easements Act, 1882.³ Complainants were re-building their houses. A portion of the superstructure was alleged to be an encroachment on a portion of a public street and the accused gathered for the purpose of abating what they considered to be a public nuisance and demolished a portion of the terrace and the walls which stood on the encroached portion. It was found that there was encroachment and the accused demolished the portion encroaching. The lower Court held that the act of the complainants in so building would amount to public nuisance and held that the accused could not be found guilty of the offence of mischief and consequently could not constitute an unlawful assembly within the meaning of s. 141. It was held that the accused were guilty of mischief and as their common object in gathering on the scene was for the purpose of causing wrongful loss to the complainants, they might properly be deemed to have been guilty of rioting also.⁴

Statutory authority to commit nuisance.—A statute may authorize and legalize acts which would otherwise amount to a nuisance.⁵

Situation.—If a party set up a noxious trade, remote from habitations and public roads, and after that new houses are built, and new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads.⁶ But this case has been doubted in a later decision.⁷

English cases.—The following acts are held to be public nuisance :—Allowing a house near a highway to be ruinous and dangerous to the public;⁸ keeping swine in a city;⁹ making a great noise at night with a speaking trumpet;¹⁰ collecting a number of persons for pigeon shooting;¹¹ indecent exposure in an omnibus,¹² or on the roof of a house,¹³ or in a public urinal,¹⁴ or in a place where the public go;¹⁵ negligently blasting stone in a quarry so as to endanger the safety of persons living in the vicinity;¹⁶ exhibiting by an herbalist of a picture of a man naked to his waist and covered with sores;¹⁷ keeping a brothel or a bawdy-house;¹⁸ naked bathing near a public footpath;¹⁹ keeping a booth in a public place for the purpose of showing an indecent exhibition;²⁰ exposing the naked dead body of a child on a public highway so as to shock and disgust passers-by;²¹ burning of a dead body in such a place and in such a manner as to annoy persons passing along public roads or other places where they have a right to go.²²

PRACTICE.

As to conditional orders by a Magistrate for the removal of nuisances, see ss. 133 to 143 of the Code of Criminal Procedure; and as to a Magistrate's powers of issuing orders in urgent cases where speedy remedy is desirable, see s. 144 of the same Code. The fact that no proceedings were taken under the Criminal Procedure Code cannot be pleaded as a bar to a prosecution under this section.²³

Punishment.—The definition of 'public nuisance' given in this section is

² *Jina Ranchhod v. Jodha Ghela*, (1863) 1 B. H. C. 1.

³ *Zipru*, (1927) 29 Bom. L. R. 484, 51 Bom. 487.

⁴ *Narasimhulu v. Nagur Sahib*, (1933) 57 Mad. 351; *Dharmalinga Mudaly*, (1914) 39 Mad. 57.

⁵ *Hammersmith, & etc. Railway Co. v. Brand*, (1868-69) L. R. 4. H. L. 171; *London and Brighton Railway Co. v. Truman*, (1885) 11 App. Cas. 45; *Withington Local Board of Health v. Corporation of Manchester*, [1898] 2 Ch. 19; *Attorney-General v. Nottingham Corporation*, [1904] 1 Ch. 673.

⁶ *Cross*, (1826) 2 C. & P. 483.

⁷ Vide the judgment of Byles, J., in *Hole v. Barlow*, (1858) 27 L. J. C. P. 207, 208.

⁸ *Watts*, (1704) 1 Salk. 356.

⁹ *Wigg*, (1706) 2 Raym. 1163, 2 Salk. 460.

¹⁰ *Smith*, (1726) 2 Stran. 704.

¹¹ *Moore*, (1832) 3 B. & Ad. 184.

¹² *Holme's Case*, (1863) Dears. Cr. C. 207.

¹³ *Thallman*, (1863) 9 Cox 388.

¹⁴ *Harris*, (1871) L. R. 1 C. C. R. 282.

¹⁵ *Wellard*, (1884) 14 Q. B. D. 63.

¹⁶ *Mutters*, (1864) 34 L. J. (M. C.) 22.

¹⁷ *Grey*, (1864) 4 F. & F. 73.

¹⁸ *Rice*, (1866) L. R. 1 C. C. R. 21; *Singleton v. Ellison*, [1895] 1 Q.B. 607.

¹⁹ *Reed*, (1871) 12 Cox 1; *Crunden*, (1809) 2 Camp. 89, 11 R. R. 671.

²⁰ *Saunders*, (1875) 1 Q. B. D. 15.

²¹ *Clark*, (1883) 15 Cox 171.

²² *Price*, (1884) 12 Q. B. D. 247.

²³ *Suklal*, (1869) Unrep. Cr. C. 23.

material with reference to s. 290, which provides a punishment for the offence of committing a public nuisance in any case not otherwise punishable by the Code.

269. Whoever unlawfully or negligently does any act¹ which is, and which he knows or has reason to believe to be, likely to spread 'the infection of any disease dangerous to life,'² shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of disease dangerous to life.

COMMENT.

If a man is attacked by a contagious and deadly disease and needlessly goes abroad with it in a public way, or if a person carries about a child so infected, he does what he may be supposed to know to be likely to spread the infection. And unless some lawful occasion or reason for this conduct can be shown, as that the sick person had been directed to be removed to a hospital, and that the removal was performed with due caution, the act will be an offence punishable under this section.²⁴

1. 'Does any act.'—See ss. 32 and 33, *supra*, as to the meaning of 'act.'

2. 'Reason to believe.'—See s. 26, *supra*. It must be shown that the accused had knowledge that the disease was infectious. Where the disease is generally known to be infectious there will be no difficulty.

3. 'Likely to spread the infection of any disease dangerous to life.'—The infection which is likely to be spread must be of a disease dangerous to life.

Syphilis.—A prostitute, who was suffering from syphilis, encouraged and permitted a man, whom she had assured that she was healthy, to have sexual intercourse with her, and thus communicated the disease to him, was held not liable to punishment under this section but under s. 417 or 420. West, J., said: 'Assuming that there was dangerous disease and culpable negligence, still accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself a responsible person and himself generally an accomplice.'²⁵ This decision does not seem to be sound as the complainant cannot be deemed to be an accomplice, he being unaware of the disease. Communication of syphilis to him amounts to spreading the infection under this section.

Small-pox.—Where a mother refused to allow her daughter suffering from small-pox to be removed to a hospital in accordance with an order made by the District Magistrate unless she accompanied her, it was held that she had committed no unlawful or negligent act within the meaning of this section. To keep one's child suffering from small-pox confined to the house or to oppose the removal to hospital, where there is no evidence to show that lodgers or boarders are kept in that house, is not an act or omission as defined in s. 268.¹ It was held similarly where a person disobeyed the order of the Health Officer of the Madras Corporation, under s. 366 of the Madras Municipality Act, to remove his son, who was suffering from small-pox, to an isolation hospital, but he removed him to an isolated house.² But in England it is an offence to carry a child suffering from small-pox through a public street in which persons are passing.³

Cholera.—Where K, knowing he was suffering from cholera, travelled by a train, without informing the railway officers of his condition, and M, knowing K's condition, purchased his ticket and travelled with him, it was held that K was properly convicted under this section, because he must have known that he was doing an act likely to spread infection, and he did so negligently, in not informing the railway authorities, and that M was guilty of abetment of K's offence.⁴

Plague.—The accused resided in a plague-stricken house in the Ambala Cantonment and had been in contact with a plague patient. He was taken to the plague shed

²⁴ M. & M. 205.

²⁵ *Rakma*, (1886) 11 Bom. 59, 61. Mayne has doubted the reasoning of this ruling.

¹ *Cahoon v. Mathews*, (1897) 24 Cal. 494.

² *Kandaswamy Mudaliar*, (1919) 42 Mad. 344.

³ *Vantandillo*, (1815) 4 M. & S. 73; *Burnett*, (1815) 4 M. & S. 272.

⁴ *Krishnappa*, (1883) 7 Mad. 276.

in company with the patient, who died there. The next day the accused left the shed against orders and travelled by rail to the neighbouring town of Shahabad, and from thence to Karnal. It was held that he was guilty of this offence as he had sufficient reason to believe that his act was dangerous and likely to spread infection of a disease dangerous to life.⁵

Inoculation.—Inoculation is not in itself an illegal or negligent act. On proof of a negligent dealing with a patient or patients after inoculation, with the knowledge or belief required by the section, the operator or a third person may be liable under the section.⁶ Though inoculation for small-pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease.⁷

Glanders.—Bringing a horse infected with glanders into a public place to the danger of infecting other people is an offence.⁸

PRACTICE.

Evidence.—Prove (1) that the disease in question is (a) infectious; and (b) dangerous to life.

(2) That the accused did an act which was likely to spread infection thereof.

(3) That such act was unlawful or negligent.⁹

(4) That the accused knew, or had reason to believe, that such act of his was likely to spread the infection of such disease.¹⁰

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

270. Whoever maliciously¹ does any act² which is, and which he knows or has reason to believe³ to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Malignant act likely to spread infection of disease dangerous to life.

COMMENT.

The offence under this section is an aggravation of that which is punished by the preceding section. In the last section the act is done either 'unlawfully' or 'negligently', under this, it is done 'maliciously'. Malice aggravates the offence.

The Law Commissioners observe : "If any person died of the plague and his death could be traced to infection so caused maliciously, the person who caused it, we apprehend, would be chargeable with homicide.... It is contrary to the principle of the Code to punish acts which the doer when he committed them knew to be likely to cause certain evil results, if in fact such results were not produced, in the same manner as if such evil consequences had actually flowed from them."¹¹ This section is intended to meet those cases in which he malicious act is not the cause of death, but death could be traced to it.

1. 'Maliciously.'—See s. 153, *supra*. The word 'maliciously' denotes a deliberate intention on the part of the accused. It is nowhere defined in the Code but it is used in the sense of 'maliciously.' And the word "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse."¹²

2. 'Does any act.'—See ss. 32 and 33, *supra*. **3. 'Reason to believe.'**—See s. 26, *supra*.

⁵ *Niadar Mal*, (1902) P. R. No. 22 of 1902.
See *Chabumian Sahib*, (1912) 14 Cr. L. J. 45.

⁶ (1867) 1 Weir 226; *San Hla*, (1900) 1 U. B. R. (1897-1901) 280.

⁷ *Burnett*, (1815) 4 M. & S. 272.

⁸ *Henson's Case*, (1852) Dears. Cr. C. 24.

⁹ See *Kandaswamy Mudaliar*, (1919) 43 Mad.

344.

¹⁰ *Potina Padmanabhaswami*, (1891) 1 Weir 226.

¹¹ 2nd Rep., s. 226, p. 405

¹² Per Bayley, J., in *Bromage v. Prosser*, (1825) 4 B. & C. 247, 255.

PRACTICE.

Evidence.—Prove points (1), (2) and (4) as in s. 269; and
(3) That the accused acted malignantly.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

271. Whoever knowingly disobeys any rule made and promulgated¹ by the Central or any Provincial Government or the Crown Representative for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

Any breach of a quarantine rule is punishable under this section.¹³

The motive for disobeying any rule is quite immaterial under this section. The disobedience is punishable whether any injurious consequence flows from it or not.

1. 'Any rule made and promulgated.'—The Indian Ports Act¹⁴ authorizes the making of rules in ordinary cases. For outbreaks of plague, the Epidemic Diseases Act¹⁵ has been passed.

Amendment.—The words “by the Central or any Provincial Government or the Crown Representative” were substituted for “by the Government of India or by any Government” by the Government of India (Adaptation of Indian Laws) Order, 1937. In Burma substitute “Government” for the words “Central or by any Provincial Government or the Crown Representative.”

PRACTICE.

Evidence.—Prove (1) the existence of the rule of quarantine.

(2) That such rule was made and promulgated by Government.

(3) That the accused knew of such rule.

(4) That he disobeyed it knowingly.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

272. Whoever adulterates¹ any article of food or drink,² so as to make such article noxious as food or drink,³ intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The mixing of noxious ingredients in food or drink, or otherwise rendering it unwholesome by adulteration is punishable under this section. Mere adulteration with harmless ingredients for the purpose of getting more profit is not punishable under it, e.g., mixing water with milk.¹⁶

¹³ Bom. Act VI of 1867, s. 11.

¹⁴ Act III of 1901 repealing the Indian Quarantine Act (I of 1870).

¹⁵ Act III of 1897.

¹⁶ *Abdul Rahman*, (1902) 1 L. B. R. 153.

It is essential to show that an article of food or drink has been adulterated and that it was intended to sell such article, or that it was known that it would be likely to be sold, as food or drink.¹⁷

1. 'Adulterates.'—The word 'adulterates' means mixes with any other substance, whether wholly different, or of the same kind but of inferior quality.

2. 'Any article of food or drink.'—According to the plain meaning of the section the articles of food or drink may be for human consumption, or for the use of animals.

3. 'Noxious as food or drink.'—The word 'noxious' means injurious to health, e.g. paddy soaked in dirty water;¹⁸ or toddy in which germs have germinated;¹⁹ or bread mixed with alum.²⁰ It is not an offence to sell inferior food cheap, if it is not shown to be noxious.²¹ A person who mixes pig's fat with *ghi*, intending to sell the mixture as food or knowing it to be likely that it will be sold as such does not commit an offence under this section. "It is true that the mixing of pig's fat with *ghi* and selling the mixture would be noxious to the religious and social feelings if both Hindus and Muhammadans; but I am of opinion that such an act would not come within the meaning of the expression 'noxious as food' which occurs in section 272 of the Indian Penal code. That expression obviously means unwholesome as food or injurious to health and not repugnant to one's feelings. The word 'noxious', had it stood by itself, might have had a wider meaning, but what I have to consider is the expression 'noxious as food' and not merely 'noxious'."²²

Similarly, if a person exposes for sale milk adulterated with water he does not commit an offence under this section because the mixture is not noxious or injurious as food or drink.²³ He may be guilty under a special Act.²⁴

Adulteration statutes.—Several statutes have been passed for preventing the adulteration of food. See the Bengal Food Adulteration Act (Beng. Act VI of 1919); the Central Provinces Prevention of Adulteration Act (C. P. Act II of 1919); the Behar and Orissa Food Adulteration Act (Behar Act II of 1919); the Bombay Prevention of Adulteration Act (Bom. Act V of 1925); the Assam Pure Food Act (Assam Act IV of 1932); the Punjab Pure Food Act (Punj. Act VIII of 1929); the Food and Drugs (Adulteration) Act (18 and 19 Geo. V, c. 31).

PRACTICE.

Evidence.—Prove (1) that the article in question is food or drink.

(2) That the accused adulterated it.

(3) That such adulteration rendered it noxious as food or drink.

(4) That the accused, at the time of such adulteration, intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction under this section the Court may order the food or drink to be destroyed.²⁵

273. Whoever sells, or offers or exposes for sale, as food or drink, any article¹ which has been rendered or has become noxious, or is in a state unfit for food or drink,² knowing or having reason to believe that the same is noxious as food or drink,³ shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Sale of noxious food or drink.

¹⁷ *Suleman Shamji*, (1948) 45 Bom. L. R. 895, 45 Cr. L. J. 92, [1948] AIR (B) 445.

¹⁸ *Cunnyappa*, (1888) 1 Weir 227.

¹⁹ *Ediga, Narasappa*, (1894) 1 Weir 228.

²⁰ *Dixon*, (1814) 3 M. & S. 11.

²¹ *Gunesha*, (1873) P. R. No. 15 of 1873.

²² Per Sulaiman, J., in *Ram Dayal*, (1923) 46

All. 94.

²³ *Dhawa*, (1924) 1 Lah. C. 273, 26 Cr. L. J. 1441, [1926] AIR (L) 49.

²⁴ See *Narayana Iyer*, [1932] M. W. N. 1350, 34 Cr. L. J. 16, [1933] AIR (M) 99.

²⁵ Criminal Procedure Code, s. 521.

COMMENT.

Section 272 deals with adulteration of food or drink, this section, with the sale or attempted sale of such adulterated noxious articles, and not only such food or drink. This section is more comprehensive in its provisions, and includes any article of food which has gone bad by being kept too long, or which never was at any time fit for food ; or drink which has gone bad by exposure or by length of time has been bottled, etc. For instance, the selling of toddy in which germs are germinated is an offence under it.¹

Scope.—This section is not expressly limited to food intended for human consumption. But as it comes in the Chapter dealing with offences relating to public health, etc., it seems it is not intended to include food or drink for animals. The words “the public” mean human beings in general and do not include animals. According to Webster, ‘public’ means “the general body of mankind or of a nation, state, or community.” Thus, this section does not make the sale of horse’s food of grain, or fodder, unfit for a horse to eat, an offence punishable under it.²

Ingredients.—This section has the following essentials :—

1. Selling or offering or exposing for sale as food or drink some article.
2. Such article must have become noxious or must be in a state unfit for food or drink.
3. The sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

1. ‘Sells, or offers or exposes for sale, as food or drink, any article.’—The article of food should have been exposed for sale. Where a butcher had killed and hung up a sheep, and on inspection the flesh was found unfit for food, but it was not removed to the shop nor exposed or offered for sale, it was held that the offence was incomplete and a conviction could not be sustained.³

‘As food or drink.’—The mere sale of an article not itself an article of food, even though it be sold with the knowledge of the vendor that it is the buyer’s intention to mix it with the ingredients of which an article of food—e.g. bread—is to be composed does not amount to an offence under this section. The appellant sold to the respondent a packet of baking powder composed of 20 per cent. of bicarbonate of soda, 40 per cent. of ground rice, and 40 per cent. of alum, the latter of which ingredients is injurious to health. It was held that such baking powder was not an article of food, and that the sale of it was not an offence.⁴

What is punishable under this section is the sale or offer or exposure for sale of noxious articles as food or drink and not the mere sale or offer or exposure for sale of noxious articles. Where, as a matter of trade, the owner of a grain pit sold the contents of the pit before it was opened at a certain sum per maund whether the grain was good or bad, and on the pit being opened it was found that a large proportion of the grain was unfit for human consumption, it was held that the vendor could not be convicted under this section.⁵

2. ‘Which has been rendered or has become noxious or is in a state unfit for food or drink.’—The word ‘noxious’ means harmful or injurious to health or unwholesome.⁶ It must be shown that the accused sold or exposed for sale an article which was to his knowledge noxious as food or drink. The accused exposed for sale some *ghi* which was bad. The *ghi* was not adulterated but somewhat rancid. It was not proved that the *ghi* was noxious as food or drink to the knowledge or belief of the accused. It was held that the accused was not guilty of an offence under this section.⁷ Milk is not rendered noxious by being mixed with water.⁸ Nor is *ghi*, when adulterated with vegetable oil.⁹ It is not an offence to sell inferior food cheap, if it is not shown to be noxious. Where a person sold an inferior quality of flour after

¹ *Ediga Narasappa*, (1894) 1 Weir 228.

² *Sita Ram*, (1907) 9 P. L. R. 423, P. R. No. 3 of 1908, 7 Cr. L. J. 278.

³ *Madar Sahib*, (1884) 1 Weir 227. See *Barlow v. Terrett*, [1891] 2 Q. B. 107.

⁴ *James v. Jones*, [1894] 1 Q. B. 304.

⁵ *Sahig Ram*, (1906) 28 All. 312.

⁶ *Chokraj Marwari*, (1908) 12 C. W. N. 608, 7 Cr. L. J. 405.

⁷ *Sheo Lal*, (1904) 26 All. 387.

⁸ *Chinniah*, (1897) 1 Weir 228.

⁹ *Chokraj Marwari*, (1908) 12 C. W. N. 608, 7 Cr. L. J. 405.

reducing its price and the purchaser was aware of the fact, it was held that he was not guilty under this section.¹⁰ Similarly, selling wheat containing a large admixture of extraneous matter, e.g., dirt, wood, matches, charcoal, black-seeds, etc., is held to be no offence.¹¹

A grocer on being asked for two pots of cream sold two pots of cream labelled "Rich cream. This cream contains a small percentage of boron preservative to retard sourness." No indication beyond the label was given to the purchaser as to the composition of the cream, which, on analysis, was found to contain boracic acid. In the trade there were two kinds of cream known and sold, preserved cream and cream, and the boracic acid was generally used by the trade as a preservative to keep the cream good. It was found as a fact that cream if mixed with boracic acid equivalent to that found in the cream sold was not injurious to adults, but was injurious to the health of children and invalids, and that this class of cream was given to children. It was held that the preserved cream so sold was not in itself an "article of food", but was an article of food—namely, cream—mixed with an ingredient; that the article so mixed was "injurious to health" within the meaning of s. 3 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vic., c. 63), although it was not injurious to normal adult persons, and that the seller was guilty of selling an article of food mixed with an ingredient so as to render the article injurious to health.¹²

'Unfit for food or drink.'—According to the plain wording of the section the articles of food or drink may be for human consumption, or for the use of animals. But if the food in question is unfit for men, but fit for animals, and is sold as food for animals, no conviction will lie.¹³

3. 'Knowing or having reason to believe that the same is noxious.'—See s. 26 as to the meaning of the expression 'reason to believe.' A meat salesman can be convicted for knowingly sending or exposing meat for sale in a public market as fit for human food, when it is not.¹⁴

Selling adulterated article as unadulterated.—The sale of adulterated articles of food as pure and unadulterated is not an offence under this section though it may amount to cheating or to an offence under some Municipal Act.¹⁵

PRACTICE.

Evidence.—Prove (1) that the article is food or drink.

(2) That the accused sold, or offered, or exposed for sale such article.

(3) That at the time it was sold, etc., it had been rendered, or had become noxious, or was in a state unfit for food or drink.

(4) That he at the time knew, or had reason to believe, that the article sold, etc., was noxious, or unfit for food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the food or drink to be destroyed.¹⁶

274. Whoever adulterates¹ any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term

¹⁰ *Gunesha*, (1873) P. R. No. 15 of 1873.

¹¹ *Narumal*, (1904) 6 Bom. L. R. 520, 1 Cr. L. J. 618.

¹² *Cullen v. McNair*, (1908) 21 Cox 682;
Haigh v. Aerated Bread Company, (1916) 25 Cox 378.

¹³ *Crawley*, (1862) 3 F. & F. 109.

¹⁴ *Stevenson*, (1862) 3 F. & F. 106.

¹⁵ Vide *Baishab Charan Das v. Upendra Nath Mitra*, (1898) 3 C. W. N. 66.

¹⁶ Criminal Procedure Code, s. 521.

which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

To preserve the purity of drugs sold for medicinal purposes this section is enacted.

To support a conviction under this and the following section it is sufficient to show that the efficacy of a drug is lessened, it need not necessarily become noxious to life. Under both these sections mixing water with a drug would be penal, but where a drug loses its efficacy by its being kept, the sections do not apply. A person who sells an inferior quality of a drug cannot be convicted because the word 'adulteration' imports an admixture of some foreign substance.

1. '**Adulterates.**'—'Adulterates', that is, apparently mixes with any other substance, whether wholly different, or of the same kind but inferior quality. Mayne, however, thinks that to mix an inferior quality of cod liver oil with a superior quality of that drug would not come under this section, though the efficacy of the drug would be lessened by the mixing.

PRACTICE.

Evidence.—Prove (1) that the article is a drug or medical preparation.

(2) That it was adulterated by the accused.

(3) That such adulteration tended to lessen its efficacy, or to change its operation or to make it noxious.

(4) That the accused intended that such adulterated drug should be sold or used for a medicinal purpose as an unadulterated drug; or knew that it was likely that it would be sold or used for the same.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the drug or medical preparation to be destroyed.¹⁷

275. Whoever, knowing any drug or medical preparation to have been adulterated¹ in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells² the same, or offers or exposes³ it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Sale of adulterated drugs.

COMMENT.

The offence under this section consists in selling, or offering, or exposing for sale, or issuing from any dispensary, an adulterated drug as unadulterated. This section bears the same relation to s. 274 as s. 273 bears to s. 272. Section 273 deals with the sale of an article of food or drink that has become noxious. This section not only prohibits its sale but also its issue from any dispensary.

1. '**Knowing any drug or medical preparation to have been adulterated, etc.**'—There must be knowledge that the drug or medical preparation has been adulterated in such a manner as to lessen its efficacy or to change its operation or to render it noxious. Upon a complaint, under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vic., c. 63), for selling tincture of opium which was not "of the nature, substance, or quality" of the article demanded by the purchaser, it appeared that the drug which was sold as "tincture of opium" by the defendant was deficient

¹⁷ Criminal Procedure Code, s. 521.

in opium to the extent of one-third and in alcohol to the extent of nearly one-half as compared with the standard prescribed by the British Pharmacopœia. It was held that the defendant was liable to be convicted.¹⁸ Similarly it was held where a purchaser asked to be supplied with "mercury ointment", but was given an ointment containing a less proportion of mercury than that prescribed by the Pharmacopœia.¹⁹

2. 'Sells.'—He who sells, whether he be a master or servant, whether he be principal or a person to whom the conduct and management of sales is delegated is struck at by this section.²⁰ But a mere canvasser who gets only commission for receiving orders is not a seller.²¹

3. 'Exposes.'—The drug sold may be in a packet: it is not necessary that it must be actually exposed to view. It is sufficient exposure of the article if the packet containing it is in the shop for sale.²² There is no exposure for sale if the drug is simply stored up in a room or cellar.²³

PRACTICE.

Evidence.—Prove (1) that the drug has been adulterated.

(2) That the adulteration was such as to lessen its efficacy, or change its operation, or render it noxious.

(3) That the accused sold, or offered or exposed, such drug for sale; or that he issued it from a medical dispensary; or that he caused it to be used for a medicinal purpose.

(4) That he sold, or issued such drug as an unadulterated drug; or caused it to be used by a person who did not know of such adulteration.

(5) That he knew that such drug was so adulterated when so sold, etc.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the destruction of the drug.²⁴

276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Sale of drug as a different drug or preparation.

COMMENT.

The offence constituted by this section does not involve the idea of any adulteration, or inferiority, in the substituted medicine. It is sufficient that it is not in fact what it purports to be; for instance, supplying saffron instead of saffron.²⁵ If a chemist were to discover a drug which he considered to be just as effective as genuine and which could be procured for half the price, he would not be justified in selling it as genuine even though it answered precisely the same purpose. The fraud consists not in the injury done, but in the false pretence by which persons who suppose that they are using one medicine, are forced to use another against their will.

The difference between this and the two preceding sections is that no adulteration is contemplated or essential for a conviction under this section, while under the former it is.

This section deals with drugs only and not with articles of food or drink.

¹⁸ *White v. Bywater*, (1887) 19 Q. B. D. 582.

¹⁹ *Dickins v. Randerson*, [1901] 1 K. B. 437.

²⁰ *Pharmaceutical Society v. London and Provincial Supply Association*, (1880) 5 App. Cas. 857; *Hotchin v. Hindmarsh*, [1891] 2 Q. B. 181.

²¹ *Pharmaceutical Society v. White*, [1901] 1

K. B. 601.

²² *Wheat v. Brown*, [1892] 1 Q. B. 418.

²³ *Crane v. Lawrence*, (1890) 25 Q. B. D. 152.

²⁴ Criminal Procedure Code, s. 521.

²⁵ *Knight v. Bowers*, (1885) 14 Q. B. D. 845.

PRACTICE.

Evidence.—Prove (1) that the accused sold, or offered, or exposed for sale, or issued from a dispensary for medicinal purposes, the drug or medical preparation.

(2) That it was so sold, etc., by him, as a drug or medical preparation different from what it is.

(3) That he knew of such difference at the time it was so sold, etc.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

277. Whoever voluntarily corrupts or fouls¹ the water of any public spring or reservoir,² so as to render it less fit for the purpose for which it is ordinarily used,³ shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Fouling water of public spring or reservoir.

COMMENT.

The water of a public spring or reservoir belongs to every member of the public in common, and, if a person voluntarily fouls it, he commits public nuisance.

Ingredients.—The section requires (1) voluntary corruption or fouling of water; (2) the water must be of a public spring or reservoir; and (3) the water must be rendered less fit for the purpose for which it is ordinarily used.

1. 'Voluntarily corrupts or fouls.'—See s. 39, *supra*. The purpose for which the water is ordinarily used must be considered in determining whether there has been a voluntary corrupting within the meaning of this section.

'Corrupts or fouls'—The words "corrupts or fouls" mean some act which physically defiles or fouls the water.¹ Bathing in a tank² or spitting into a public well³ fouls drinking water. But angling with an unfoul bait does not.⁴ Fishing with basket-nets in a tank, the water of which was used for drinking purposes, the use of the baskets having caused a slight disturbance of the mud and so rendered the water rather less fit than usual for drinking;⁵ and cultivating paddy in the bed of a tank, the water of which was used as of right by the public for drinking purposes,⁶ were held to be offences under this section. The act of a woman of a lower caste taking water from public cisterns of water does not amount to corrupting or fouling.⁷ Similarly, a person of a low caste drawing water from a public well cannot be said to corrupt or foul the well.⁸

2. 'Public spring or reservoir.'—These words do not include a public river.⁹ The word 'public' is nowhere defined. But a 'public place' is a place where the public go, no matter whether they have a right to go or not.¹⁰ Similarly a public spring will be a spring used by the public whether rightly or not. The strewing of branches in a river for fishing purposes was held, therefore, to be no offence under this section.¹¹

The words 'public spring' do not include a continuous stream of water running along the bed of a river;¹² nor the water of a rivulet standing in pools from which water is drawn for drinking purposes;¹³ nor the water of a *nullah*.¹⁴ Where a dog-killer buried the carcass of a dog in the bed of a public river near a town, it was held that a

¹ *Bhagi*, (1900) 2 Bom. L. R. 1078; *Pandia Mahar*, (1900) 13 C. P. L. R. 92.

² *Muthian*, (1897) 1 Weir 229. See, however, (1878) 1 Weir 228.

³ *Ramkaranlal*, (1916) 13 N. L. R. 68, 18 Cr. L. J. 650, [1916] AIR (N) 15.

⁴ *Srinivasa Naik*, (1882) 1 Weir 231.

⁵ *Punni Besoyi*, (1883) 1 Weir 231.

⁶ *Ramatripati*, (1881) 1 Weir 229.

⁷ *Bhagi*, (1900) Bom. L. R. 1078.

⁸ *Pandia Mahar*, (1900) 13 C. P. L. R. 92.

⁹ *Nama Rama*, (1904) 6 Bom. L. R. 52, 1

Cr. L. J. 6.

¹⁰ *Wellard*, (1884) 14 Q. B. D. 63, 66.

¹¹ *Halodhur Poroe*, (1877) 2 Cal. 383. See also *Patha*, (1868) Cr. R. July 1869, Unrep. Cr. C. 14.

¹² *Vitti Chokkan*, (1881) 4 Mad. 229; *Anihony*, (1884) 1 Weir 230.

¹³ *Hari*, (1885) Cr. R. Sept. 1885, Unrep. Cr. C. 215.

¹⁴ *Nilappa*, (1828) Cr. R. No. 17 of 1898, Unrep. Cr. C. 963.

conviction under this section could not be sustained, although there was evidence that the people of the vicinity bathed in, and drank water from, the river and also used for domestic purposes water taken from the river in the bed of which the carcass was buried, because the section applied to corrupting the water of a spring or reservoir.¹⁵

In an indictment against a gas company for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish were destroyed, and the water was rendered unfit for drinking, etc., it was held that the circumstance that by the diminution of fish, a considerable number of fishermen were thrown out of employ, was not of itself sufficient ground to sustain such indictment.¹⁶

3. 'So as to render it less fit...used.'—The water must have been rendered less fit for the purposes for which it is ordinarily used.

PRACTICE.

Evidence.—Prove (1) that the spring or reservoir is public.

(2) That the accused caused the water thereof to become corrupt or foul.

(3) That he did so voluntarily.

(4) That such corrupting or fouling rendered the same less fit for use than it ordinarily was before the accused did as above.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

278. Whoever voluntarily vitiates the atmosphere¹ in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

Making atmosphere noxious to health.

COMMENT.

Prosecutions against offensive trades which give out bad smells will come under this section. As the contamination of atmosphere affects the people living in the neighbourhood, this section is not so general as the last one which deals with the fouling of the water of a stream or reservoir. This section and s. 336 provide punishment for similar acts causing danger to human life and personal safety. It is not essential under either of them that hurt be actually caused.

Scope.—The section is directed against a public nuisance and not a private nuisance. Where the accused threw a human skull which was in a highly offensive condition into the house of the complainant, but there was nothing to show that the atmosphere was made noxious to the other persons dwelling in the locality, it was held that he was not guilty of an offence under this section though his conduct was most reprehensible and offensive.¹⁷

1. 'Voluntarily vitiates the atmosphere.'—See s. 39, *supra*, as to the meaning of the word 'voluntarily.' The act done must be noxious to the health of persons in general dwelling or carrying on business in the neighbourhood. It is not necessary that the alleged nuisance should produce smells injurious to health; it is sufficient if they be offensive to the senses. Thus, allowing a large stock of bones to remain uncovered in the open for a long time so as to become rotten and to emit a smell noxious to people living in or passing by the vicinity is a public nuisance.¹⁸

Offices of nature.—The act of performing the offices of nature in a public street is not an offence under this section.¹⁹ No reasons are given for this decision, but it seems that a mere solitary act like this is not likely to vitiate the atmosphere.

English cases.—Making acid spirit of sulphur, and thereby impregnating the air with offensive smells,²⁰ and steeping hides near a highway,²¹ are held to be public nuisances.

¹⁵ *Anthony*, (1884) 1 Weir 230.

¹⁶ *Medley*, (1834) 6 C. & P. 292.

¹⁷ *Rahim Mian*, (1928) 10 P. L. T. 87, 30 Cr.

L. J. 556, [1929] AIR (P) 118.

¹⁸ *Verckefeld*, (1906) 34 Cal. 73.

¹⁹ *Mahadshet*, (1884) Cr. R. May 1884, Unrep. Cr. C. 200.

²⁰ *White*, (1757) 1 Burr. 333.

²¹ *Pappineau*, (1726) 2 Stran. 686.

PRACTICE.

Evidence.—Prove (1) that the accused caused the atmosphere to be vitiated.

(2) That he did so voluntarily.

(3) That such vitiation was in its nature noxious to health.

(4) That it was noxious to the health of persons dwelling or carrying on business in the neighbourhood of the place, or passing along a public way.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

279. Whoever drives any vehicle, or rides, on any public way¹ in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person,² shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

COMMENT.

Under this section the effect of driving or riding must be either that human life was in fact endangered or that hurt or injury was likely to be caused.

Ingredients.—The section requires two essentials :—

1. Driving of a vehicle, or riding on a public way.

2. Such driving or riding must be so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person.

1. 'Drives any vehicle, or rides, on any public way.'—"If a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage... If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood".²² If a man drives at an unusually rapid pace he will be liable for injury caused thereby, although he calls out to the person injured to get out of the way in time. The fact that streets are unusually crowded from any public procession, or other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally answerable for any accidents ensuing from driving at a rate, and with those precautions, which he might have ordinarily observed.²³

A person driving a carriage is not bound to keep on the regular side of the road; but if he does not, he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road.²⁴ He must satisfy the Court that he was not rash or negligent in driving on the wrong side.²⁵ It is not always rash and negligent to drive on the wrong side of the road. Much would

²² Per Lord Esher, M. R., in *Le Lievre v. Gould*, [1898] 1 Q. B. 491, 497.

²³ *Murray*, (1852) 5 Cox 509.

²⁴ *Pluckwell v. Wilson*, (1882) 5 C. & P. 375.

²⁵ *Babu*, (1920) 23 Bom. L. R. 358, 22 Cr. L. J. 324.

* In Burma the following section is added by Burma Act VI of 1941, s. 1 :

279 A. Whoever throws or causes to fall or strike at, against into or upon any vehicle in a public place, any wood, stone, acid or other matter or thing, with intent or knowledge that he is likely to endanger the safety of any person being in or upon such vehicle, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to rupees five hundred, or with both.

Explanation (1).—For the purpose of this section, "vehicle" means a wheeled conveyance capable of being used in a street.

Explanation (2).—It is not an offence punishable under this section to throw water at any vehicle in a public place during the Thingyan Festival.

Explanation (3).—Nothing contained in this section shall be deemed to prevent any person from being prosecuted under other section of this Code or under any other law, for any act or omission.

depend upon other conditions.¹ If he was negligent he would be liable.² In cases of negligent driving, the law or usage of the road is not the criterion of negligence. Therefore, where defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damages, it was held that it was for the jury to decide the question of negligence, without regard to the law of the road.³ Drivers of motor cars should not attempt to pass a car in front of them by going on to the wrong side of the road unless they can see the road in front is so absolutely clear of traffic coming from the opposite direction that they can get back again on to the proper side of the road without any risk of accident. It is only when the road is so clear that there can be no possible chance of an accident that any attempt may be made to pass the car in front of the driver.⁴ Where the accused, while driving a motor car on the wrong side of the road at a blind corner between two roads of considerable traffic, came in collision with a motor bicycle and caused damage to the side car of the bicycle, it was held that he was guilty of an offence under this section.⁵

A person driving a car must keep it in a state of control sufficient to enable him to avoid running into any passenger who may fail to step off the road.⁶

Furious driving.—The accused was in charge of a horse and trap, of which trap he was the sole occupant. He was asleep in the trap, and the horse proceeded through a village at a furious pace. A police constable attempted to stop the vehicle, but failed to do so. It was held that the accused was the driver of the vehicle, though asleep and was guilty of driving a carriage at a furious pace so as to endanger the life or limb of a passenger who in this case was the constable on duty.⁷

On a straight and open road a speed of thirty miles cannot necessarily and of itself be described as an excessive and rash speed.⁸

Driving bullocks without nose-strings.—A person driving a cart, the bullocks of which have no nose-strings, is not guilty of rash driving under this section.⁹

'Rides.'—If the accused was riding rashly or negligently, without exercising that care for the safety of others which a prudent man might reasonably be expected to exercise, he would be guilty under this section. If he was riding so fast that he would be unable to stop the horse if a foot-passenger got in the way, he would be liable, provided the foot-passenger acted in a reasonable manner.¹⁰

'Public way.'—Any way which is common to all subjects, whether directly leading to a town, or beyond a town as a thoroughfare to other towns, or from town to town, may properly be called a public way.¹¹ There must be a definite enduring track-way in some particular direction. Merely temporary and transitory tracks not passable in all seasons cannot be regarded as public ways.¹²

2. **'So rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person.'**—"A rash act is primarily an over-hasty act and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and caution"¹³ The most formally scientific analysis of negligence is that of Austin.¹⁴ He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, "are broadly distinguished by differences."

¹ *Ram Sewak*, (1933) 10 O. W. N. 823, 34 Cr. L. J. 1154, [1933] AIR (O) 391.

² *Jiva Ram*, [1932] A. L. J. R. 519, 33 Cr. L. J. 309, [1932] AIR (A) 69.

³ *Wayde v. Lady Carr*, (1828) 2 Dow. & Ry. 255, followed in *Jehangir D. Davar*, (1911) 13 Bom. L. R. 126, 12 Cr. L. J. 167, where a conviction under s. 2 of the Bombay Motor Vehicles Act (II of 1904), s. 2, was set aside. In Madras there is a special rule passed under the Motor Vehicles Act prohibiting a car to be driven on the wrong side of the road: *Rathnam*, [1912] M. W. N. 539, 13 Cr. L. J. 487.

⁴ *Babu*, (1920) 23 Bom. L. R. 358, 22 Cr. L. J. 324.

⁵ *Yar Mahomed*, (1921) 26 Cr. L. J. 253, 16 S. L. R. 147, [1924] AIR (S) 97. See *Charan*

Singh, (1925) 23 A. L. J. R. 790, 26 Cr. L. J. 1254, [1925] AIR (A) 798.

⁶ *Kanshi*, (1927) 28 P. L. R. 99, 27 Cr. L. J. 566, [1926] AIR (L) 361.

⁷ *Chatterton v. Parker*, (1914) 24 Cox 312.

⁸ *Ram Sewak*, (1933) 10 O. W. N. 823, 34 Cr. L. J. 1154, [1933] AIR (O) 391.

⁹ *Ganpati*, (1869) Cr. R. Aug. 1869, Unrep. Cr. C. 19. See *Bali*, (1888) Unrep. Cr. C. 396.

¹⁰ *Balunki*, (1887) 1 C. P. L. R. 112.

¹¹ *Campbell v. Lang*, (1853) 1 Macq. 451.

¹² *Schwinge v. Dowell*, (1862) 2 F. & F. 445; *Chapman v. Cripps*, (1862) 2 F. & F. 864.

¹³ *Nga Myat Thin*, (1898) P. J. L. B. 426, 427.

¹⁴ Austin on Jurisprudence, Vol. I, 4th Edn. p. 444.

"In cases of Negligence, the party performs not an act to which he is obliged. He breaks a positive duty.

In cases of Heedlessness or Rashness, the party does an act from which he is bound to forbear. He breaks a negative duty.

In cases of Negligence, he adverts not to the act, which it is his duty to do.

In cases of Heedlessness, he adverts not to *consequences* of the act which he does.

In cases of Rashness, he adverts to those consequences of the act; but, by reason of some assumption *which he examines insufficiently*, he concludes that those consequences will not follow the act in the instance before him."

'Negligence' has been defined to be the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.¹⁵

'Negligence'...[is not] an affirmative word...it is a negative word; it is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed.¹⁶

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. *Culpable negligence* is acting without the consciousness that the illegal and mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.¹⁷

An injury shall be deemed to be negligently caused whensoever it is not wilfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to the occasion, or without due care taken to ascertain the nature and probable consequences of such act; or when it results from the not exercising reasonable caution in the doing of any act, either as regards the means used or the manner of using them, or from the doing of any act without using reasonable caution for the prevention of mischief, or from the omitting to do any act which a person using reasonable caution would not have omitted to do.¹⁸ When 'negligently' is a part of the definition of an offence, it implies that the act constituting the offence shall have been done, or caused, by the alleged offender himself, proof that it was done by the alleged offender's servant, without more, will not bring the charge home.¹⁹

Criminal negligence or criminal rashness is an important element in offences punishable under ss. 279, 280, 284-289, 304A, 336-338.

'Endanger human life.'—It is not necessary that the rash or negligent act should result in injury to life or property.²⁰ It is not necessary to prove that any person was on the road, at the time, and the Court may take into consideration the probability of persons using it being placed in danger.²¹ No rider or driver can tell when a pedestrian may happen to arrive on a road, consequently he cannot drive or ride rashly or negligently even at a time when the road happens to be temporarily unoccupied by any pedestrian or by any vehicle. And this is so not only because any person or any vehicle may happen to arrive on the road at any time, but also because the driver or the rider is to look to his own safety as well and cannot at all indulge in a riding or driving which may endanger his own life.²² The mere fact that a public road happens, at the moment, to be empty is not *per se* a ground for acquitting a person of the offence under this section, for his rash driving or riding in such public road is likely to cause injury to human life, even though in point of fact he had, by the inter-

¹⁵ *Blyth v. Birmingham Waterworks Company*, (1856) 11 Ex. 781, 784.

¹⁶ *Per Willes, J., in Grill v. General Iron Screw Collier Company*, (1866) 35 L. J. C. P. 321, 330.

¹⁷ *Nidamarti Nagabhushanam*, (1872) 7 M. H. C. 119; *Ketabdi Mundul*, (1879) 4 Cal. 764.

¹⁸ 10th Par. R., 16; *Tofel Ahmad Miya*, (1933) 61 Cal. 253.

¹⁹ *Chisholm v. Doulton*, (1889) 22 Q. B. D. 736.

²⁰ (1871) 6 M. H. C. Appx. 32; *Nabi Bakhsh*, (1910) P. W. R. (Cr.) No. 2 of 1912.

²¹ *Hormusji Nowroji Lord*, (1894) 19 Bom. 715.

²² *Abdul Latif*, (1943) 46 P. L. R. 93, 45 Cr. L. J. 639, [1944] AIR (L) 163.

vention of Providence, not endangered the safety of any person.²³ Supposing that a person driving a vehicle in a crowded thoroughfare urges the horses to such speed that it is impossible for him to stop their course suddenly, and that a passenger is knocked down by them and killed on the spot, the driver would be found guilty of culpable homicide. Now if the passenger was just saved by the timely effort of another person pulling him out of the way, would not a want of due regard for human life on the part of the driver be, as justly inferred from the manner of his driving, proved as we may assume by the evidence of those two persons, the one who had been in imminent peril of his life and the other who happily saved him, as if the result had been a fatal accident? The want of due regard for human life upon which the criminality depends is a matter of inference from the circumstances, and wherever the circumstances proved are such that if loss of life had ensued the party committing the act would be answerable for it criminally, the same circumstances will sufficiently warrant a conviction of the simple offence where no injury has resulted.

There can be no civil action for negligence if the negligent act or omission has not been attended by any injury to any person, but bare negligence involving the risk of injury is punishable criminally, though nobody is actually hurt by it.

If actual hurt is caused the case would come under s. 337 or 338; and if death is caused, under s. 302 or 304A. It is the rash or negligent manner of driving or riding which constitutes an offence under this section. Where the accused, a motor driver, runs over and kills a woman but there is no rashness or negligence on the part of the driver so far as his use of the road or manner of driving is concerned, the accused cannot be convicted under s. 304A on the ground that the brakes of the lorry were not in perfect order and that the lorry carried no horn. The "rash or negligent act" referred to in that section means the act which is the immediate cause of death and not any act or omission which can at most be said to be a remote cause of death.²⁴

Under ss. 279, 280, 282 and 284-289 the offences against public safety are completed although the rash or negligent act results in no injury to life or property. The car of a Pork Inspector of a Municipal Corporation was chasing another car containing illicit pork. Both the cars were being driven so rashly and at such a dangerous speed as to alarm the people passing on the roads some of whom narrowly escaped being knocked down and run over. Both the cars ignored the traffic signals and crossed the junction when the signal was against them. The Pork Inspector had asked his driver to keep the chased car in sight but there was no evidence that he induced the driver to drive so rashly. The car containing illicit pork ultimately crashed but the chasing car stopped at about a distance of 100 feet from the chased car. The driver of the chasing car was convicted under this section and sentenced to six months' rigorous imprisonment and the Pork Inspector was convicted for abetment under s. 279/114. It was held that the driver was rightly convicted under this section, that although he drove at such an inordinate pace, his car was not completely out of his control, and he always had the leading car acting as a kind of pilot, and that he would always have more time than the man in front to pull up and avoid an accident. The sentence was therefore reduced to one of fine of Rs. 100.²⁵ It is a negligent act to carry any second person, whatever his age, build or weight, on a bicycle, who is liable to change his position or fall off, if this is done on a public way where there is other traffic. Such an act is likely to cause injury to others.¹

'Hurt.'—See s. 319, *infra*. Where a foot passenger was injured owing to the rash and negligent driving on not a narrow road, there being ample space for the driver to have passed the passenger, and after having knocked him down left him where he was, it was held that the driver was guilty of a serious offence punishable under this section and s. 337.²

'Injury.'—See s. 44, *supra*.

'Any other person.'—These words are very wide, and are not distinctly limited to persons on a road as distinct from the occupants of the particular vehicle which is

²³ *Ganesh Das*, (1910) 11 P. L. R. 19, 11 Cr. L. J. 362; *Kingman v. Seager*, (1937) 30 Cox 639.

²⁴ *Akbar Ali*, (1936) 12 Luck. 336.

²⁵ *Maung Tun Khin*, (1937) 30 Cr L. J. 535,

[1938] AIR (R) 97.

¹ *Bas Deo*, [1940] Ran. 127.

² *Aghan*, (1927) 4 O. W. N. 768, 28 Cr. L. J. 894, [1927] AIR (O) 441.

being rashly or negligently driven. They are wide enough to include the occupants of the vehicle itself who have as much right to be protected against rash and negligent driving on the part of the driver as have other people on the road.³

Abetment.—When a person in charge of a motor vehicle places it under the control of another with the actual knowledge that such person has no licence to drive and constructive knowledge that he was not trained to drive any motor vehicle is guilty of abetment of the offence of rash and negligent driving if such offence is committed by the person driving the vehicle while the person in charge of the vehicle, sitting by his side, could have prevented the accident.⁴

Liability of master for rash driving of his servant.—In case of collision or injury arising out of rash driving the actual driver and not the owner of the carriage is liable under this section;⁵ whereas in a civil suit the injured party has an option to sue any of them. In a criminal case every man is responsible for his own act; there must therefore be some personal act.⁶ From the mere fact that the occupant of a car does not insist on the driver's driving at a moderate pace, it cannot be presumed that he instigated the driver to drive at a reckless pace.⁷

Contributory negligence.—The doctrine of contributory negligence does not apply in criminal actions.⁸ The accused will be liable even though there has been a degree of negligence on the part of the prosecutor which would incapacitate him from bringing a civil suit. While contributory negligence would not be a defence entitling the accused to an acquittal, it might be a factor for consideration in determining the sentence.⁹

There is a duty on every user of the road to make a reasonable use of it for the purposes of passing along it, and to allow others to do so also. Motorists are not the only persons who owe a duty of care. Others also have a responsibility and must conform to the ordinary usages of the road. In cases of negligence the law or usage of the road is not the criterion of negligence. The test is whether the accident could have been avoided by the accused if he had exercised that care and diligence which ordinarily cautious persons using the road in similar circumstances would have done.¹⁰

The accused was on the wrong side of the road, but he took all possible precautions by driving his car slowly and by putting his hand up to give his signal to the complainant when he saw the complainant's car coming on from the opposite direction at an excessive speed; but in spite of all this, the accident occurred. This accident would not have occurred if the complainant had not been driving his car at an excessive speed. It was held that the accused was not guilty of negligence.¹¹

Joint liability.—A motor car, which had been left unattended in a street, was removed by two persons without the knowledge and assent of the owner, but without felonious intent on the part of either person, and for the purpose of a "joy-ride". Subsequently an old woman was knocked down by the car and died as the result of her injuries. The accused was at the time riding as a passenger in the car, and there was no evidence that he had at any time taken any part in the driving, nor was there any evidence of how the car was being driven prior to the collision; but there was evidence that, at the time of the collision, which was long after dark, the car was being driven at a very fast speed, without sufficient lights, and that, although the brakes were violently applied, it did not stop before it had travelled some thirty yards from the place of impact. The jury convicted both the driver and the passenger of manslaughter. It was held that the jury was entitled to draw the inference that a common purpose to drive the car in a criminally negligent manner existed between the driver and passenger, and the passenger, as well as the driver, was properly convicted.¹²

³ *Ejaz Ahmad*, (1935) 11 Luck. 481.

⁴ *Provincial Government, Central Provinces and Berar v. Saidu*, [1947] Nag. 144.

⁵ *A. W. Larrimore v. Pernendoo Deo Rai*, (1870) 14 W. R. (Cr.) 32.

⁶ *Allen*, (1835) 7 C. & P. 153; *Green*, (1835) 7 C. & P. 156.

⁷ *Maung Tun Khin*, (1937) 39 Cr. L. J. 535, [1938] AIR (R) 97.

⁸ *Kew*, (1872) 12 Cox 355; *Jones*, (1870) 11 Cox 544; *Dant*, (1865) 10 Cox 102, 34 L. J. (M.

C.) 119; *Longbottom*, (1849) 3 Cox 439; *Swindall*, (1846) 2 C. & K. 230; *Blenkinsop v. Ogden*, [1898] 1 Q. B. 783. See 6 M. H. C. Appx. 31.

⁹ *Kanshi*, (1927) 28 P. L. R. 99, 27 Cr. L. J. 566, [1926] AIR (L) 861.

¹⁰ *Honnarayan*, (1933) 30 N. L. R. 317, 35 Cr. L. J. 696; [1934] AIR (N) 65.

¹¹ *F. G. Robson*, (1934) 36 Cr. L. J. 178, [1934] AIR (R) 194.

¹² *Baldessarre*, (1930) 29 Cox 193.

Special statute.—Where there is a special statute, such as the Bombay Motor Vehicles Act (Bom. Act II of 1904), which penalises the rash driving of a motor, the punishment should be under such statute.¹³ The accused cannot be prosecuted under this section when once he is convicted under the Motor Vehicles Act for rash driving, but he can be prosecuted under s. 338 of the Penal Code for the consequences of such rash driving.¹⁴

The accused cannot be convicted under this section as well as s. 338.¹⁵

PRACTICE.

Evidence.—Prove (1) that the accused was driving a vehicle or that he was riding.

(2) That it was a public way on which he was driving or riding.

(3) That he was driving or riding in a rash or negligent manner.¹⁶

Negligence cannot be inferred from the mere fact of a person having been run over.¹⁷

(4) That the driving or riding was such as to endanger human life, or was such as to be likely to cause hurt or injury.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

280. Whoever navigates any vessel¹ in a manner so rash or negligent² as to endanger human life,³ or to be likely to cause hurt⁴ or injury⁵ to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The same rules apply to navigation on a river as on a highway, and persons, who navigate a river improperly either by too much speed or by negligent conduct, are as much liable as if the accident occurred on a public highway either by furious driving or negligent conduct.

This section therefore is analogous to the preceding section. Section 279, however, applies only in the case of a 'public' road, whereas this section is not limited to public navigable waters, but would also include waterways in private property.

Scope.—This section deals with the case of inland navigation. Rash and negligent navigation on the high seas will not be punished under the Code. The Indian Merchant Shipping Act,¹⁸ the Pilgrim Ships Act,¹⁹ and the Native Passengers Ships Act²⁰ deal with the safety of passengers on the high seas.

1. 'Vessel.'—See s. 48, *supra*.

2. 'Rash or negligent.'—See Comment on s. 279, *supra*. The negligence to render the defendant liable must be the *causa causans*, or the proximate cause of the injury, and not merely a *causa sine qua non*.²¹ The immediate cause of the accident should be rashness or negligence on the part of the navigator. In considering the question of degree, the question of contributory negligence has also to be taken into account not as a defence to the indictment, but for the purpose of determining causations and fixing a measure of the liability of the navigator. Where the navigator does some act which causes the accident, he will be guilty of the offence under this section, but a mere omission on his part in not doing the whole of his duty is not sufficient to make him guilty. Where the accused navigator did all he could to save the situation but

¹³ *Bayne*, (1906) 8 Bom. L. R. 414, 3 Cr. L. J. 494; *Jiwa Ram*, [1932] A. L. J. R. 519, 33 Cr. L. J. 309, [1932] AIR (A) 69.

¹⁴ *Gur Narain*, (1927) 29 Cr. L. J. 271, 26 A. L. J. R. 160, [1928] AIR (A) 191.

¹⁵ *Ragho Prasad*, (1939) 20 P. L. T. 403, 40 Cr. L. J. 759, [1939] AIR (P) 338.

¹⁶ *Ram Sewak*, (1933) 10 O. W. N. 823, 34 L. C.—41

Cr. L. J. 1154, [1933] AIR (O) 391.

¹⁷ *Pillagan*, (1895) 1 Weir 232.

¹⁸ Act VII of 1880.

¹⁹ Act XIV of 1895.

²⁰ Act X of 1887.

²¹ *Bailiffs of Romney Marsh v. Trinity House*, (1870) L. R. 5 Ex. 204, 208.

could not avoid the collision, he was held to be not guilty.²² It is the primary duty of steam vessels to keep out of the way of vessels lying at anchor. The fact that a launch runs into a cargo boat at anchor is in itself *prima facie* evidence of negligent navigation.²³ Where a ferry-boat contractor was convicted under this section and s. 109 of abetting the rash navigation of a vessel, on the evidence that the boat hired by him in fulfilment of the contract was upset through not containing sufficient ballast, it was held that there was no evidence to show that the contractor intentionally omitted to provide the ferry-boat with what he knew to be necessary for safe navigation, and that the conviction, therefore, could not be supported.²⁴

To make the captain of a steam vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission, on his part, in not doing the whole of his duty, is not sufficient. But, if there be sufficient light, and the captain of a steamer is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter.²⁵

Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against; and this obligation may be transferred with the transfer of possession and control to another person; and, on the abandonment of possession and control, the obligation ceases.¹

3. 'Endanger human life.'—See s. 279, *supra*.

4. 'Hurt.'—See s. 319, *infra*. 5. 'Injury.'—See s. 44, *supra*.

PRACTICE.

Evidence.—Prove (1) that it was a vessel which was being navigated.

(2) That the accused was navigating the same.

(3) That he was doing so in a rash or negligent manner.

(4) That the navigation was such as to endanger human life, or was such as to be likely to cause hurt or injury.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

281. Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

Intentional exhibition of false light, mark or buoy with a view to mislead any navigator is punishable under this section. If the act is not intentional but due to negligence then this section will not apply.

PRACTICE.

Evidence.—Prove (1) that the accused exhibited the light, mark or buoy in question.

(2) That such light, mark or buoy was false.

(3) That the accused did as in (1), intending, or knowing that such false exhibition would be likely to mislead any navigator.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

²² *Kamdar Ali Serang*, (1911) 14 C. L. J. 656,

15 C. W. N. 835, 12 Cr. L. J. 362.

²³ *Lal Meah*, (1911) 12 Cr. L. J. 577.

²⁴ *Sakaram*, (1870) Cr. R. July 1870, Unrep.

Cr. C. 35.

²⁵ *Green*, (1885) 7 C. & P. 156.

¹ *White v. Crisp*, (1854) 10 Ex. 312.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did exhibit a false light (*or mark or buoy*) when a certain vessel called——(*if the name of the vessel is known it should be specified*) was sailing (*specify the place*)—— knowing or intending it to be likely that the exhibition of the said false light (*or mark or buoy*) would mislead the officer in charge of the navigation of the said vessel; and thereby committed an offence punishable under s. 281 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

282. Whoever knowingly or negligently conveys, or causes to be conveyed¹ for hire,¹ any person by water in any

Conveying person by water for hire in unsafe or overloaded vessel.

vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term

which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section provides against the negligence of carriers by water; whereas no specific provision is made for the negligence of carriers by land. Boatmen plying for hire on rivers, at ferries, etc., whose boats are overloaded, or are not in a fit condition safely to carry passengers, are criminally responsible for their neglect. Under this section no liability will attach to the owner if the ship sinks with her crew and the captain only; but it will afford no protection if a single passenger goes to the bottom, though he may have been carried gratuitously.

Object.—The motive for specifically providing for the case of a common carrier by water is that he exercises an employment affecting the public in general, and the probable consequences of negligence in carrying by water are much more serious than they ordinarily are in carrying by land.

1. 'Knowingly or negligently conveys, or causes to be conveyed, etc.'—

The word 'knowingly' has here a significance similar to 'rashly'. Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public in general or to the individual in particular, which, having regard to the circumstances, it was the imperative duty of the accused person to have adopted.² Where a person with the assistance of two others plied a ferry-boat, which was out of order, and had a crack, and he took in one hundred passengers, and as a consequence the boat was upset, and seven persons were drowned, it was held that he should be convicted under this section.³ Certain persons whom the accused, a ferryman, was rowing across a river, were drowned by the sinking of the boat which was an old one, with some holes in the bottom, over which planks had been nailed. It was held that the accused was guilty under this section.⁴ Where the lessee of a public ferry knew that boats were usually overloaded but took no steps against it and allowed his boatmen to overload them as they liked and in consequence a boat sank with some passengers, it was held that the lessee was guilty of criminal negligence and liable under this section.⁵

PRACTICE.

Evidence.—Prove (1) that the accused conveyed a person for hire, or caused the same to be done.

(2) That the mode of conveying that person was, in a vessel, by water.

(3) That such vessel at the time was in such a state, or so loaded, as to be dangerous to the life of that person.

(4) That when such person was thus conveyed, the accused acted negligently or with a knowledge of the state of such vessel.

² *Tofel Ahmad Miya*, (1933) 61 Cal. 253.

³ *Khoda Jagta*, (1864) 1 B. H. C. 137.

⁴ *Magenie Behara*, (1869) 11 W. R. (Cr.) 3.

⁵ *Tofel Ahmad Miya*, *supra*.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge,¹ causes danger, obstruction or injury to any person in any public way or public line of navigation,² shall be punished with fine which may extend to two hundred rupees.

Danger or obstruction in public way or line of navigation.

COMMENT.

This section refers to parties who do acts so as to cause danger, obstruction or injury to any person in any public way,⁶ or public line of navigation. It does not refer either to a public nuisance or to the intention of the accused. A public nuisance may be caused without any deliberate intention of causing it. The obstruction may be caused by negligence and in nine cases out of ten it is so caused.⁷

Every man is so bound to use his property as not to injure others. Holt, C. J., laid down the strict principle of law—*sic utere tuo ut alienum non lædas* (every one must so use his own as not to do damage to another). The offence punishable by this section is the nuisance of causing obstruction, etc., in a public way or navigable river or canal.

All injuries to a public way, as by digging a ditch or making a hedge across it or laying logs of timber in it, or ploughing it up, or by doing any other act which will render it less commodious to the public, will be punishable under this section.

Ingredients.—The section requires two essentials :—

1. A person must do an act or omit to take order with any property in his possession or under his charge.

2. Such act or omission must cause danger, obstruction or injury to any person in any public way or line of navigation.

1. 'By doing any act, or by omitting to take order with any property in his possession, etc.'—Here the word 'act' is contrasted with 'omitting' though it includes omission. See s. 32, *supra*.

'To take order.'—That is, to dispose of the property in one's possession or charge in such a way as to prevent danger, obstruction, or injury. The defendant was the owner and occupier of a vacant piece of land. He had surrounded it by a hoarding, but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a public nuisance. It was held that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance.⁸ Where obstruction was caused to a public way by the erection of a hut and not by the exposing of goods for sale in the said hut by the accused, who had rented it from the person who had raised the hut, it was held that the accused could not be convicted of an offence under this section.⁹

'Property.'—See s. 22, *supra*. 'Possession.'—See s. 27, *supra*.

2. 'Causes danger, obstruction or injury to any person in any public way or public line of navigation.'—Every unauthorized obstruction of a highway to the annoyance of the King's subjects is an indictable offence. Thus, it is an offence for stage coaches to stand plying for passengers in public streets.¹⁰ A permanent obstruction on a highway, erected and placed there without lawful authority, which renders the way less commodious to the public, is an unlawful act and a public nuisance although it be not placed upon the hard or metalled part of the highway or upon a foot-path artificially formed upon it, and although sufficient space for the public traffic remains.¹¹

⁶ *Bholanath Banerjee*, (1867) 7 W. R. (Cr.) 31.

⁷ *Ram Krishna*, (1935) 36 Cr. L. J. 893, [1935] A. L. J. R. 1057, [1935] AIR (A) 746.

⁸ *Attorney-General v. Todd Heatley*, [1897] 1 Ch. 560.

⁹ *Narain Adhikari*, (1904) 8 C. W. N. 369, 1 Cr. L. J. 244.

¹⁰ *Cross*, (1812) 3 Camp. 224.

¹¹ *The United Kingdom Electric Telegraph Company (Limited)*, (1862) 9 Cox 187.

Under this section it must be established that the act of the accused had caused 'danger, obstruction, or injury' to any particular person or class of persons.¹² Thus, the spreading of fishing nets by the side of a thoroughfare in a town, when it did not cause obstruction to any particular person or persons, was held to be no offence.¹³ Where the danger or obstruction is not caused to any particular person the person obstructing would be guilty under s. 290 and not under this section.¹⁴ But in a later case the same High Court has held that where the evidence showed that an obstruction placed on a road must necessarily prevent vehicles from passing at all and foot-passengers from passing without inconvenience, it was a necessary inference that persons were obstructed and that it was not necessary to expressly prove that any specific individual was actually obstructed.¹⁵

Where the accused allowed a prickly-pear fence, which formed a boundary between accused's yard and the road, to extend itself over a part of the road, and an obstruction of the road was thereby caused, it was held that his act was punishable. The Court said: "Prickly-pear is a plant which naturally extends itself very rapidly; and it is the duty of those who use it as a hedge by the side of a public road to take care that the road is not obstructed by its growth."¹⁶ The accused, who had a toy shop, exhibited in the windows of their shop, overlooking a public road, certain clock-work toys during the *Divali* festival. A large crowd of people collected on the road to witness the toys, in consequence of which there were dangerous rushes, several persons were knocked down and great obstruction and danger were caused to those using the road. The accused were asked by the police to stop the exhibition but they did not obey. On these facts, the Magistrate convicted the accused of offences under this section and s. 114. It was held that there was obstruction, danger and injury to the persons using the public way, which amounted to a public nuisance, and that the efficient cause of the nuisance was the act of the accused, inasmuch as in working the toys in the manner they did, their object was to attract a crowd, and as they knew that a crowd would be attracted by what they did, they must be regarded as having intended that consequence.¹⁷

'Public way.'—See s. 279, *supra*. Where the privilege of a way¹⁸ is enjoyed only by a particular section of the community or by the inhabitants of two or three villages and not by others, the way is not a public way within the meaning of this section.¹⁸ A pathway which lies over private land and which is used by the villagers and perhaps by the inhabitants of some other villages also, but with regard to which there is no evidence of such universal user as to raise an inference of dedication to the public in general, is not a public way such as is contemplated by this section. There can be a dedication to the public for a limited purpose, e.g. access to a particular building, and consequently a pathway that does not join a public thoroughfare at either end does not militate against its public character.¹⁹ Where a cart-track lay in the private land of the accused who had put up a wall across it and claimed a right to close, it was held that they could not be convicted under this section.²⁰

Ways permitted to be used by a section of the public are private ways, generally having their origin in custom, but such ways can be converted into ordinary highways after user by the public sufficient to raise a presumption of dedication to the public in general. Evidence in support of public claim must be cogent.

An encroachment made by an adjacent land-owner on the space occupied by the highway cannot be legalised by possession for any length of time. The public have the right to the free use of any portion of the highway.²¹

¹² *Khader Moidin*, (1881) 4 Mad. 235; *Virappa Chetti*, (1896) 20 Mad. 433; *Jugul Das Dalal*, (1893) 20 Cal. 665; *Beni Madhav Chakravarti*, (1897) 25 Cal. 275; *Ram Singh*, (1882) 11 C. L. R. 462. The former Chief Court of Lower Burma held likewise: *Maud Ally*, (1900) 1 L. B. R. 48.

¹³ *Khader Moidin*, *ibid*.

¹⁴ *Virappa Chetti*, *ibid*.

¹⁵ *Venkappa*, (1913) 38 Mad. 305; *Umesh, Chandra Kar*, (1887) 14 Cal. 655. See *Jitan*, (1920) 1 P. L. T. 564.

¹⁶ *Palakora Kathersa*, (1888) Weir (3rd Edn.) 140.

¹⁷ *Noor Mahomed*, (1911) 13 Bom. L. R. 209, 35 Bom. 368. See *Lyons, Sons & Co v. Gulliver*, [1914] 1 Ch. 631, 644.

¹⁸ *Prannath Kundu*, (1929) 57 Cal. 526.

¹⁹ *Ibid*.

²⁰ *Muthu Goundan*, [1939] M. W. N. 1259, (1939) 50 L. W. 593, 41 Cr. L. J. 391, [1940] AIR (M) 216.

²¹ *Vadilal Devchand*, (1931) 33 Bom. L. R. 663, 32 Cr. L. J. 1163, [1931] AIR (B) 326.

'Public line of navigation.'—An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not thereby be occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection.²² On the trial for an indictment for a nuisance in a navigable river and common King's highway called the harbour of C, by erecting of an embankment in the waterway, was held to be a public nuisance although the inconvenience was counterbalanced by the public benefit in some other way.²³

English cases.—A wagoner occupying one side of a public street in a city, before his warehouses, in loading and unloading his wagons for several hours at a time both day and night, kept one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, was held guilty of nuisance.²⁴ Where a person, having a house in a street, exhibited effigies at his windows and thereby attracted a crowd to look at them which caused the footway to be obstructed, so that the public could not pass as they ought to do, it was held that he was guilty of nuisance.²⁵ Where a person removed the pavement and dug trenches in the roadway and footway of a public thoroughfare in order to lay down service pipes for the supply of gas from mains to private houses, it was held that this was not a temporary obstruction of the highway as might be necessarily incidental to the enjoyment of his property.¹ Where the accused, for the purposes of profit to themselves, placed telegraph posts upon a highway, and did permanently keep them there, such posts being of such sizes and dimensions as to obstruct and prevent the passage of carriages and horses or foot-passengers, it was held that the accused were liable for nuisance.² The accused in the night time altered the position of two arms of a semaphore signal on a railway station, so as to change the signal from "all clear" to "danger" and "caution", respectively, and also altered the colour of two distant signals on the line from white to red, thereby changing the signal from "clear" to "danger." The alteration caused a train, which would have passed the station without slackening speed, to slacken speed, and to come nearly to a stand. Another train going in the same direction, and on the same rails, was due at the station in half an hour. It was held that the accused had obstructed a train.³ A person improperly went on a line of railway, and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by the inspector of the line when desirous of stopping a train. The driver was thereupon induced to diminish the speed from twenty to four miles per hour. It was held that this amounted to an obstruction.⁴

PRACTICE.

Evidence.—Prove (1) that the accused caused the danger, obstruction⁵ or injury in question.

(2) That the same was caused by his act, or omission, to take order with property in his possession or under his charge.

(3) That the person put in danger, or obstructed, or injured, was then in a public way or public line of navigation.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

284. Whoever does, with any poisonous substance, any act¹ in a manner so rash or negligent² as to endanger human life,³ or to be likely to cause hurt⁴ or injury⁵ to any person,

²² *Attorney-General v. Terry*, (1874) L. R. 9 Ch. 423.

²³ *Ward*, (1836) 4 Ad. & El. 384. See *Umesh Chandra Kar*, (1887) 14 Cal. 656; *Jugal Das Dalal*, (1893) 20 Cal. 665.

²⁴ *Russell*, (1805) 6 East 427.

²⁵ *Carlile*, (1834) 6 C. & P. 636.

¹ *The Stoke Fenton and Longton Gas Company v. The Longton Gas Company (Limited)*, (1860)

29 L. J. (M. C.) 118.

² *Baron Lionel De Rothchild v. The United Kingdom Electric Telegraph Company (Limited)*, (1862) 31 L. J. (M. C.) 166, 9 Cox 137.

³ *Hadfield*, (1870) L. R. 1 C. C. R. 253.

⁴ *Hardy*, (1871) L. R. 1 C. C. R. 278.

⁵ *Ghulam Raza*, (1923) 25 Cr. L. J. 707, [1925] AIR (L) 153; *Lalla Prasad*, (1920) 19 A. L. J. R. 125, 22 Cr. L. J. 331.

or knowingly or negligently omits to take such order⁶ with any poisonous substance in his possession⁷ as is sufficient to guard against any probable danger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

COMMENT.

Under this section "a person in possession of a poisonous substance should have negligently omitted to take such order with it as is sufficient to guard against any probable danger to human life from such substance. The gist of the offence is culpable negligence. The fact that a person has the custody of any dangerous substance, suffices itself to impose upon him the duty of being careful : and he is criminally responsible if he negligently omits to take such order with the substance as is sufficient to guard against any probable danger from such substance to human life, whether the substance be poison, or fire, or a combustible or explosive substance or machinery... it is not necessary, to constitute an offence under that section, that the negligent omission punishable under it should be followed by any disastrous consequences."⁸

This section proceeds on the principle that carelessness, when sufficient in degree, is to be regarded as criminal notwithstanding that it may not have occasioned hurt.

1. 'Act.'—See s. 32, *supra*. 2. 'Rash or negligent.'—See s. 279, *supra*.

3. 'Endanger human life.'—See s. 279, *supra*. 4. 'Hurt.'—See s. 319, *infra*.

5. 'Injury.'—See s. 44, *supra*.

6. 'To take such order.'—See s. 283, *supra*. Where the accused, a sergeant in the police, took over a desk containing poisonous powders and other powders, which might easily be mistaken one for the other, without taking any precaution whatever to guard against misuse of the poison, and the only order he took with the poison subsequently was to hand over the key of the receptacle in which the powders were kept, to a subordinate official, who by mistake issued some of the poisonous powders to a Deputy Inspector suffering from fever, who took one of the powders and died, it was held that the accused was guilty under this section.⁷

7. 'Possession.'—See s. 27, *supra*.

PRACTICE.

Evidence.—Prove (1) that the substance in question is poisonous, and if taken, would be dangerous to life, or likely to cause hurt or injury.

(2) That the accused did an act therewith, which endangered, or was likely to endanger, human life or was likely to cause hurt or injury.

(3) That he did such act rashly or negligently.

Or prove (1) as above, and further—

(2) That the accused was in possession of such substance.

(3) That he omitted to take such order therewith, as was sufficient to guard against a probable danger to human life therefrom.

(4) That such omission was negligent, or with a knowledge of such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

285. Whoever does, with fire or any combustible matter, any

Negligent conduct with respect to fire or combustible matter. act¹ so rashly or negligently² as to endanger human life,³ or to be likely to cause hurt⁴ or injury⁵ to any other person,

or knowingly or negligently⁶ omits to take such order⁷ with any

⁶ Per Plowden, J., in *Hosein Beg*, (1882) P. R. No. 16 of 1882, at pp. 19, 20.

⁷ Per Plowden, J., in *Hosein Beg*, (1882) P. R. No. 16 of 1882, at pp. 19, 20.

fire or any combustible matter in his possession⁸ as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section further extends the provisions of the preceding section.

1. 'Act.'—See s. 32, *supra*.

2. 'Rashly or negligently.'—See s. 279, *supra*. The section is not applicable where the act of the accused is wilful and not rash or negligent. The accused had a quarrel with his wife about some rice. He got angry, broke the crockery, and then went out and set fire to the eaves of his house, thereby causing risk of injury to house-owners in the neighbourhood but doing no actual mischief. It was held that this section was not applicable as the accused's act was wilful and not rash or negligent.⁸ The owner of a house in which a fire breaks out cannot be convicted under this section, without proof of actual carelessness or an illegal omission from which rashness or negligence can be inferred.⁹

3. 'Endanger human life.'—See s. 279, *supra*.

4. 'Hurt.'—See s. 319, *infra*.

5. 'Injury.'—This word includes any harm illegally caused to the property of any other person, and is not confined to injury to the person only. While a marriage procession was going on, the accused, who was one of the procession, used fireworks on the road, which burnt two bundles of straw with which a *mandap* (a temporary structure) belonging to the complainant was thatched, thereby causing him an injury. It was held that the accused was guilty under this section.¹⁰ The accused was similarly convicted of negligent conduct with respect to fire or combustible matter, in that he was found smoking a *bidi* (cigarette) close to half-pressed cotton bales lying close to the press-house in the compound of a company.¹¹ See s. 44, *supra*.

6. 'Knowingly or negligently.'—See s. 286, *infra*.

7. 'Take such order.'—See s. 283, *supra*.

8. 'Possession.'—See s. 27, *supra*.

CASES.

Fire balloons.—Letting off fire ballons is no offence.¹²

English cases.—Keeping great quantities of gunpowder so as to endanger the safety of houses in the vicinity,¹³ or keeping of a dangerous, ignitable and explosive fluid called naphtha near dwelling-houses,¹⁴ amounts to nuisance.

PRACTICE.

Evidence.—Prove (1) that the accused did an act that endangered, or was likely to endanger, life, or was likely to cause hurt or injury.

(2) That such act was done with fire or some combustible matter.

(3) That such act was done rashly or negligently.

Or prove (1) that the accused had in his possession some fire or combustible matter.

⁸ *Hari*, (1877) Unrep. Cr. C. 126.

⁹ *Mi On*, (1881) S. J. L. B. 134; *Nga Sein*, (1891) S. J. L. B. 569.

¹⁰ *Natha Lalla*, (1868) 5 B. H. C. (Cr. C.) 67.

¹¹ *Krishna*, (1878) Unrep. Cr. C. 134.

¹² *Nga Bo Gale*, (1899) P. J. L. B. 628.

¹³ *Taylor*, (1742) 2 Strange 1167. In *Bennett*, (1858) 8 Cox 74, 28 L. J. (M.C.) 27, the accused had kept a quantity of fireworks for a long

time but owing to the negligence of his servant it caught fire and set ablaze a house in which a person was burnt to death. It was held that the accused could not be convicted of manslaughter as the proximate cause of death was the negligence of his servant.

¹⁴ *Lister's Case*, (1857) Dearsley & B. 209, 26 L. J. (M.C.) 196.

(2) That he omitted to take such order therewith, as was sufficient to guard against a probable danger to human life therefrom.

(3) That such omission was negligent or with knowledge of such probable danger.¹⁵

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

Preventive powers.—See ss. 133 and 144 of the Criminal Procedure Code.

286. Whoever does, with any explosive substance,¹ any act so rashly or negligently² as to endanger human life,³ or to be likely to cause hurt⁴ or injury⁵ to any other person,

or knowingly or negligently⁶ omits to take such order⁷ with any explosive substance in his possession⁸ as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The last section deals with 'fire or combustible matter', this section, with 'explosive substance', otherwise the provisions of both the sections are alike.

Scope.—The first part of this section is not confined to cases where the explosive substance is in the possession of the accused at the time of the injury but it also applies to a case where the injury takes place after it has left his possession and is being conveyed to its destination.¹⁶

1. 'Explosive substance'.—No definition of this expression occurs in the Code, but under the Explosive Substances Act, 1908, this expression is "deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement".¹⁷

Revolver not an explosive substance.—An Assistant Collector left a loaded six-chambered revolver upon his office-box on the platform of a railway station while he went into the station-master's room to change his clothes. His peon took up the revolver and apparently not knowing to handle it, one chamber went off wounding a police constable, who was standing near, in the eye. It was held that the peon could not be convicted, under this section, as a 'revolver' was not an 'explosive substance', though had rashness or negligence on the part of the peon been shown, he would have been guilty under s. 337.¹⁸

2. 'Rashly or negligently'.—See s. 279, *supra*.

3. 'Endanger human life'.—See s. 279, *supra*. The substance must be of such a nature and kept in such large quantities and under such local circumstances as to create real danger to life and property. A well-founded apprehension of danger, which would alarm a man of steady nerves and reasonable courage passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent.¹⁹ The accused, having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house-door locked placed the gun loaded, with the hammer down on the cap, on a cot outside his house, and went for a short time to a neighbouring house. In his absence the child of a neighbour came to the cot and began playing with the

¹⁵ *Nga Ka*, (1903) U. B. R. (P. C.) 7; *Nga Cho*, (1887) S. J. L. B. 411; *Nga Ya Po*, (1885) S. J. L. B. 337.

¹⁶ *Anantnarayana Pattar*, (1898) 1 Weir 236.

¹⁷ Act VI of 1908, s. 2.

¹⁸ *Kasiya Pillai*, (1886) 1 Weir 235.

¹⁹ *Lister's Case*, (1857) Dearsley & B. 209, 26 L. J. (M.C.) 196.

gun, which went off and killed the child. It was held that he could not be convicted under this section as it could not be said that the accused must have known, or ought to have considered it to be probable, that a child or children would be likely to be playing about in that place, and that it or they would be likely to handle or play with the gun, and that the danger which actually occurred was not such a probable danger as that he could be held responsible.²⁰ This case has been distinguished in a Bombay case in which the accused was out in his field with his gun—a single-barrel muzzle-loader—and on returning to his sister's house for tea left the gun leaning against a wall on the verandah of the house. Some cats playing about near the house knocked the gun down, and it went off and caused injuries to a woman who had afterwards come and seated herself on the verandah. There was no evidence to show whether the hammer was at full cock or not, but it seemed more probable that the hammer had not been fully let down. It was held that the conduct of the accused amounted to this offence.²¹

4. 'Hurt'.—See s. 319, *infra*. 5. 'Injury'.—See s. 44, *supra*.

6. 'Knowingly or negligently'.—The word 'knowingly' is evidently used in this section advisedly and the word 'intentionally' advisedly not used. "Whatever distinction there may be between 'knowingly or negligently' and 'rashly or negligently' ... consciousness is involved in both, while intention is not ... If a person omit to take precautions in respect of explosives in his possession sufficient to guard against any probable danger to human life, being conscious of the probability of danger resulting from such omission, he 'knowingly' does that which under this section renders him liable to punishment; ... if a person omits to take such precautions without such consciousness, he is liable, by reason of his negligence, if he 'has not exercised the caution incumbent on him', and which, if he had exercised it, would have created in him the consciousness that his omission was likely to cause danger".²²

7. 'Take such order'.—See s. 283, *supra*. 8. 'Possession'.—See s. 27, *supra*.

PRACTICE.

Evidence.—Prove the same points as those required for s. 285, showing that the act of the accused was done with 'any explosive substance'.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

287. Whoever does, with any machinery, any act¹ so rashly or negligently² as to endanger human life³ or to be likely to cause hurt⁴ or injury⁵ to any other person, or knowingly or negligently⁶ omits to take such order⁷ with any machinery in his possession⁸ or under his care⁹ as is sufficient to guard against any probable danger¹⁰ to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency

²⁰ *Chenchugadu*, (1885) 8 Mad. 421.

²¹ Per Mirza and Broomfield, J.J., in *Laaman Baharantrao Deshpande*, (1930) Crim. Revn. No 397 of 1929, decided on January 10, 1930

(Unrep. Bom.).

²² Per Brandt, J., in *Chenchugadu*, (1885) 8 Mad. 421, 422.

with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.²³

An owner of machinery is criminally liable if he compels his servants to work it in an unsafe condition knowing it to be so, in a manner likely to endanger human life; and under such circumstances the fact that he has employed a competent man to look after the machinery is not a sufficient answer to the charge. If he employs a competent man to work it and leaves him unfettered, he cannot be held criminally responsible for any accident due to the errors of his employee.²⁴

1. 'Act'.—See s. 32, *supra*. 2. 'Rashly or negligently'.—See s. 279, *supra*.

3. 'Endanger human life'.—See s. 279, *supra*. 4. 'Hurt'.—See s. 319, *infra*.

5. 'Injury'.—See s. 44, *supra*.

6. 'Knowingly or negligently'.—See s. 286, *supra*.

7. 'Take such order'.—See s. 288, *supra*. 8. 'Possession'.—See s. 27, *supra*.

9. 'Or under his care'.—These words would include an engineer, and all mechanics. The expression used in s. 283 is 'under his charge'.

10. 'Probable danger'.—This section does not require that the owner of machinery should provide perfect security against every possibility of danger. It is enough if he takes reasonable precautions and so much care as is sufficient to guard against such danger as can be expected within the bounds of probability.²⁵ The accused was the owner of a flour mill; a boy took some wheat to be ground there. While the wheat was being ground in the mill, the lid and hopper fell from the top of the mill on to the foot of the boy and his foot was broken. It was held that the accused was not guilty of an offence under this section.¹

CASE.

A shaft with a leather belting was installed in a flour mill for water supply but part of the belting protruded outside the factory building. Two girls who resided in a neighbouring house went into the compound of the flour mill to play and one of them went too near to the belting, was caught therein and killed. The other girl attempted to save her, and in doing so was injured, and crippled for life. It was held that the manager and the mistri in charge of the mill were guilty under this section.²

PRACTICE.

Evidence.—Prove (1) that the accused did an act that endangered, or was likely to endanger, life, or was likely to cause hurt or injury.

(2) That such act was done with a machinery.

(3) That such act was done rashly or negligently.

Or prove (1) that the accused had in his possession or under his care some machinery.

(2) That he omitted to take such order therewith as was sufficient to guard against a probable danger to human life therefrom.

(3) That such omission was negligent or with knowledge or such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

288. Whoever, in pulling down or repairing any building, knowingly or negligently¹ omits to take such order with that building as is sufficient² to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may ex-

Negligent conduct with respect to pulling down or repairing buildings.

²³ Per Wills, J., in *Hindle v Birtwistle*, [1897] 1 Q. B. 192, 195.

²⁴ *Kanhaya Lal*, (1906) P. R. No. 8 of 1906.

²⁵ *Mulraj Dhir*, (1930) 31 Cr. L. J. 1232,

[1930] AIR (P) 507.

¹ *Ibid.*

² *Mohri Ram*, (1930) 31 P. L. R. 858, 31 Cr. L. J. 1175, [1930] AIR (L) 453.

tend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section deals with negligent conduct with respect to pulling down or repairing buildings. If a building is situated on a public way and is in a dangerous condition and likely to injure persons using the way then s. 283 will apply and not this section.

1. 'Knowingly or negligently'.—See s. 286, *supra*.

2. 'Such order...as is sufficient'.—The degree of care required by this section will vary in proportion to the actual necessity of the case. If the building is in a populous place more care will be necessary than when it is in a place less frequented by people.

PRACTICE.

Evidence.—Prove (1) that the accused was pulling down or repairing a building.

(2) That he omitted to take sufficient order therewith to guard against a probable danger of the fall thereof, or any part thereof.

(3) That such fall would probably endanger human life.

(4) That such omission was negligent, or with knowledge of such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

289. Whoever knowingly or negligently¹ omits to take such order² with any animal³ in his possession⁴ as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal,⁵ shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to animal.

COMMENT.

This section deals with improper or careless management of animals.

1. 'Knowingly or negligently'.—The offence consists principally in a knowing or negligent omission, and not merely in an omission which is not an offence.³ See Comment on s. 286, *supra*.

2. 'Take such order'.—See s. 283, *supra*. The tethering of a horse in a narrow street where people cannot pass without going near the animal's hind legs is a negligent omission to take order with the animal sufficient to satisfy the requirements of this section.⁴

3. 'Animal'.—See s. 46, *supra*. This section does not refer to savage animals alone, but to any animal, e.g. a pony,⁵ or a dog.⁶

In the case of wild and savage animals, a savage or mischievous temper is presumed to be known to their owner and to all men as a usual accompaniment of such animals; and, hence, a positive duty is cast on the owner to protect the public against the mischief resulting from such animals being at large. Anyone who keeps such a wild animal as a tiger or a bear, which escapes and does damage, is liable without any proof of the animal's ferocity. In such a case it may be said *res ipsa loquitur*.

In the case of animals which are tame and mild in their general temper no mischievous disposition is presumed. It must be shown that the accused knew that the animal was accustomed to do mischief. Some evidence must be given of the existence of an abnormally vicious disposition.⁷ A single instance of ferocity, even a knowledge that it has evinced a savage disposition, is sufficient notice.⁸

³ (1866) 5 W. R. (Cr. L.) 8.

⁴ *Gogumal Mulchand*, [1940] Kar. 445.

⁵ *Chand Manal*, (1872) 19 W. R. (Cr.) 1.

⁶ *Mg. Shwe Zin v. Mg. Po Ngwe*, (1923) 2 B. L. J. 8. 25 Cr. L. J. 565, [1923] AIR (R) 147.

⁷ (1880) 1 Weir 238; *Baker v. Snell*, [1908] 2 K. B. 225; *Lowery v. Walker*, [1911] A. C. 10.

⁸ See the authors' "The Law of Torts", 134th Edn., c. xx, p. 330.

"Before the owner or keeper of the animal can be convicted under this section. it must be made out that the animal was known to be ferocious, and that it was negligently kept. It is, however, not necessary to show that the animal had actually bitten or injured another person before it bit or injured the complainant: it would be enough to show that, to the knowledge of the owner, it had evinced a savage disposition. e.g. by attempting to bite".⁹ Where the accused's buffalo attacked the complainant's buffalo and injured the latter by breaking its leg, he was held not guilty of this offence as there was no evidence to show that the buffalo was of a savage disposition as against human beings.¹⁰ Where a person was injured by a buffalo, which was known to be a dangerous animal, the herdsman who was present and failed to avert the injury and the owner of the buffalo were held to have committed an offence under this section.¹¹

4. 'Possession'.—See s. 27, *supra*. The animal must be in the actual possession of the person against whom a charge is brought under this section, whoever may be the owner of it. Where the accused, a horsekeeper, harnessed his master's horse, put him into his carriage, and then went away, leaving the horse and carriage standing in the road of the compound of his master's house, without any justification, it was held that the accused was guilty of an offence under this section, since the horse was not the less in the actual possession of the servant, because it was for some purpose in the constructive possession of his master.¹² A bull was let loose by the father of the accused some years ago. On its becoming vicious it was ordered to be shot. The accused having claimed its ownership was convicted of this offence. It was held that it could not be said that the animal was in the possession of the accused and therefore the conviction was illegal.¹³ A Hindu set at large, in accordance with a religious usage, a young bull, which a considerable time afterwards became dangerous. He was prosecuted and convicted under this section. It was held that as the bull was not then in his possession and was not dangerous when set at large, the conviction was bad.¹⁴

5. 'Probable danger to human life, or any probable danger of grievous hurt from such animal'.—'Grievous hurt' is defined in s. 320, *infra*. Unless there is a probability of danger to human life, or of danger of grievous hurt no negligent omission to take such care of an animal as to guard against such danger will be punishable under this section. Where a pony kicked a child on a road, a conviction under this section was set aside, because there was no such negligence as would produce danger to human life, or grievous hurt;¹⁵ but where a pony, which was tied negligently, got loose, and ran through a crowded bazaar, it was held that the conviction was good, because the pony on such an occasion might create danger to the lives or limbs of men, women and children walking in the bazaar.¹⁶ Where the accused allowed a bull, which had a savage disposition to attack bullocks, to be at large, it was held that he was liable under this section as he had knowledge that there was probable danger to human life or limb.¹⁷ Where the accused's dog bit the complainant and thereby caused hurt, it was held that he was liable under this section and not under s. 323.¹⁸ Where the accused's bullock escaped from a heard and finding its way into a hospital, which was close by the accused's house, ate up some clothes, it was held that he was not guilty, because it was through no negligence of his that the bullock escaped and after the escape he had done all he could to find it.¹⁹ The mere fact that a rope tied to a bullock, when violently strained, broke, was held to afford no proof of negligence.²⁰ The accused owned an ape which escaped by breaking its chain. It was afterwards caught but escaped again. On this he was convicted under this section, but the High Court quashed the conviction holding it must be established in the affirmative that the accused knowingly or negligently omitted to take such order with the animal as was sufficient to guard against probable danger to human life or probable danger of grievous hurt from such animal.²¹

⁹ Per Meres, J. C., in *Thaukra Aung*, (1885) S. J. L. B. 353, 354.

¹⁰ *Pandu*, (1884) Unrep. Cr. C. 197.

¹¹ *Shamlay*, (1906) 3 N. L. R. 90, 6 Cr. L. J. 100.

¹² *Natha*, (1881) Cr. R. April 1881, Unrep. Cr. C. 163.

¹³ *Fatta*, (1889) P. R. No. 32 of 1889.

¹⁴ *Shambu Dial*, (1904) P. R. No. 5 of 1904, 1 Cr. L. J. 501, 5 P. L. R. 308.

¹⁵ (1867) 3 M. H. C. Appx. 33.

¹⁶ *Chand Manal*, (1872) 19 W. R. (Cr.) 1.

¹⁷ *Shivbharan*, (1916) 18 Bom. L. R. 682, 17 Cr. L. J. 383, [1916] AIR (B) 196 (2).

¹⁸ *Mg. Shwe Zin v. Mg. Po Ngwe*, (1923) 2 B. L. J. 8, 25 Cr. L. J. 565, [1923] AIR (R) 147.

¹⁹ *Lingappa*, (1892) Unrep. Cr. C. 606.

²⁰ *Subbaraya Padayachi*, (1890) 1 Weir 237.

²¹ *Muhammad Sadiq*, (1904) 1 A. L. J. R. 605, 1 Cr. L. J. 1059.

PRACTICE.

Evidence.—Prove (1) that the animal was in the possession of the accused.

(2) That the accused omitted to take sufficient order therewith to guard against probable danger to human life or of grievous hurt therefrom.²²

(3) That such omission was negligent, or with knowledge of such probable danger.

If the animal is not naturally fierce or vicious, the onus of proving negligence lies on the prosecution.²³

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

290. Whoever commits a public nuisance in any case not other-

Punishment for
public nuisance in
cases not other-
wise provided for. wise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

COMMENT.

In several sections of this Chapter punishments are provided for various specific public nuisances. This section provides for the punishment of any nuisance falling within the four corners of the definition given in s. 268 but not punishable under any other section.

PRACTICE.

Evidence.—Prove (1) that the accused did an act or was guilty of an illegal omission.

(2) That such act or omission caused injury, danger, or annoyance.

(3) That such injury, danger, or annoyance was common to the public or the people in general who dwell or occupy property in the vicinity.

Or prove (1) that the accused did an act or was guilty of an illegal omission.

(2) That the act or omission in question must necessarily cause injury, obstruction, danger, or annoyance.

(3) That such injury, danger, or annoyance must necessarily be caused to persons who may have occasion to use any public right.²⁴

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

Imprisonment in default of fine.—Such imprisonment should be simple only, according to the Bombay High Court;²⁵ but, according to the Madras High Court, the award of rigorous imprisonment is not illegal.¹

Offence under special Act.—The fact that there was a special law to meet a particular offence does not prevent the punishment of the offenders under the Penal Code, if an offence which could have been rightly punished under it was established.² The accused should be given an opportunity to meet the charge.³

Prosecution should be against proper person.—A prosecution cannot be instituted against the chariman of a municipality under this section for keeping a rubbish depot in the neighbourhood of houses but should be against the municipal corporation.⁴

291. Whoever repeats or continues a public nuisance, having

Continuance of
nuisance after in-
junction to dis-
continue. been enjoined¹ by any public servant² who has law-
ful authority to issue such injunction³ not to repeat
or continue such nuisance, shall be punished with
simple imprisonment for a term which may extend
to six months, or with fine, or with both.

²² (1867) 3 M. H. C. Appx. 33.

²³ *Brojonarain Pubraj*, (1865) 2 W. R. (Cr.)

51. ²⁴ *Onooram v. Lamessor*, (1868) 9 W. R. (Cr.) 70.

²⁵ *Santu bin Lakhappa Kore*, (1868) 5 B. H. C. (Cr. C.) 45.

¹ *Yellamandu*, (1882) 5 Mad. 157; contra,

Mala Obigadu, (1882) 1 Weir 239.

² *Onooram v. Lamessor*, (1868) 9 W. R. (Cr.)

70.

³ *Raghunath Kandu*, (1925) 24 A. L. J. R. 168, 27 Cr. L. J. 152, [1926] AIR (A) 227.

⁴ *The Chairman of the Municipal Council, Ellore*, (1894) 1 Weir 248.

COMMENT.

This section punishes a person continuing a nuisance after he is enjoined by a public servant not to repeat or continue it. Sections 142 and 143 of the Code of Criminal Procedure, for instance, empower a Magistrate to forbid an act causing a public nuisance. The Civil Procedure Code also empowers a Court to issue a temporary injunction.

1. 'Enjoined.'—It must be proved that the accused had on some previous occasion committed the particular nuisance, and had been personally enjoined not to repeat or continue it, and had repeated and continued it.⁵ A District Magistrate or Sub-divisional Magistrate, or any other Magistrate empowered by the Provincial Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance.⁶

2. 'Public servant'.—See s. 21, *supra*.

3. 'Injunction'.—The injunction should be before the Court; a proclamation to the public, or a portion of the public, is not sufficient. Strict proof of all the circumstances constituting the offence and especially of one which is not *malum in se* should be required as the basis of a conviction.⁷

PRACTICE.

Evidence.—Prove (1) the issue of the injunction.

(2) That such injunction was legally issued.

(3) That the injunction is one which restrains the repetition or continuance of a public nuisance.

(4) That the accused was enjoined by such injunction not to repeat or continue such nuisance.

(5) That he has repeated or continued the same public nuisance.

Before a conviction can be held under this section, there must be proof that there was a previous conviction of an offence and an injunction by a public servant to desist from continuing such nuisance.⁸

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

The order of the Magistrate forbidding the continuance of the nuisance, or evidence of notice of such character as to make plain the precise terms of the order and notice, should be recorded in the case.⁹

292. Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene¹ book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

⁵ *Jokhu*, (1886) 8 All. 99.

⁶ Criminal Procedure Code, s. 143.

⁷ *Gunya*, (1886) Cr. R. No. 39 of 1886,

Unrep. Cr. C. 295.

⁸ *Mohesh Chunder*, (1873) 30 W. R. (Cr.) 55.

⁹ *Gunya*, (1886) Cr. R. No. 39 of 1886, Unrep. Cr. C. 295.

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

COMMENT.

This and the following section were inserted by s. 2 of the Obscene Publications Act (VIII of 1925) for the purpose of giving effect to the International Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications signed at Geneva on behalf of the Governor-General in Council on September 12, 1923.

This section gives effect to Article I of the International Convention.

Intention.—The intention of the seller and distributor of obscene literature must be gathered from the character of the matter contained in such books. If a person chooses to sell and distribute what is obscene, it must be presumed that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It is not sufficient for him to say that his intentions were good. It is his public act that must be the test of his intentions, and having done an unlawful act it is no answer to say that he thought it lawful.¹⁰

1. 'Obscene'.—"The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall".¹¹ If a publication is detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it may come, it will be an obscene publication, which it is the intention of the law to suppress.¹² If in fact the work is one which would certainly suggest to the minds of the young of either sex or even to persons of more advanced years, thoughts of most impure and libidinous character, its publication is an offence, though the accused has in view an ulterior object which is innocent or even laudable.¹³ Anything "calculated to inflame the passions" is obscene.¹⁴ Anything distinctly calculated to incite a reader to indulge in acts of indecency or immorality is obscene, e.g. a book containing a description of defective sexual enjoyment with advice for heightening and prolonging such enjoyment in the case of normal persons.¹⁵ A book may be obscene although it contains but a single obscene passage.¹⁶ A religious or classical work does not become obscene, simply on account of its containing some objectionable passages, because the tendency of such publications is not to deprave or corrupt morals. If objectionable passages in a religious book are extracted and printed separately and they deal with matters

¹⁰ *Indarman*, (1881) 3 All. 837; *Thakar Datt*, (1917) P. R. No. 25 of 1917, 18 Cr. L. J. 126, [1917] AIR (L) 288.

¹¹ Per Cockburn, C. J., in *Hicklin*, (1868) L. R. 3 Q. B. 360, 371, followed in *Indarman*, (1881) 3 All. 837; *Hari Singh*, (1905) 28 All. 100; *Parashram Yeshwant*, (1895) 20 Bom. 193; *Sarat Chandra Ghose*, (1904) 32 Cal. 247; *Public Prosecutor v. Markondeyulu*, (1916) 5 L. W. 237, 18 Cr. L. J. 153, [1918] AIR (M) 1195; *Thakar Datt*, (1917) P. R. No. 25 of 1917, 18 Cr. L. J. 126, [1917] AIR (L) 288; *Rahimatali*, (1919) 22 Bom. L. R. 166, 22 Cr. L. J. 513, [1920]

AIR (B) 402; *Kailashchandra Acharjya*, (1932) 60 Cal. 201; *Sree Ram Saksena*, [1940] 1 Cal. 581.

¹² *Hari Singh*, (1905) 28 All. 100.

¹³ *Kherode Chandra Roy Chowdhury*, (1911) 39 Cal. 377.

¹⁴ Per Baker, J., in *Ambalal Paragji*, (1929) Criminal Appeals Nos. 17 and 18 of 1929, decided by Patkar and Baker, JJ. on April 12, 1929 (Unrep. Bom.).

¹⁵ *Thakar Datt*, (1917) P. R. No. 25 of 1917, 18 Cr. L. J. 126, [1917] AIR (L) 288.

¹⁶ *Indarman*, (1881) 3 All. 837.

which are to be judged by the standard of human conduct, as where they relate to immoral acts of human beings, and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, the publication may not be justified, though the passages form part of a religious book.¹⁷ If the detailed passages in a book are of an obscene character, the author's liability in respect of those passages will not be saved or avoided merely by reference to other passages in the book which may contain moral precepts of an unexceptionable character. The important point to look at is rather the form of the expression than the actual meaning. For the same meaning may be obscenely expressed by one form of language, and yet by the use of another form of language may be couched in expressions free from reproach.¹⁸ Obscene passages are not excused because the rest of the publication is unobjectionable.¹⁹ It is no justification that the matter published is written by an eminent writer or is composed in a style not easily understood by all,²⁰ or that the publication is a medical one and sold only to registered subscribers.²¹ Where a book is intended to give advice to married people on how to regulate the sexual side of their lives to the best advantage, it will not come within the purview of this section.²²

Clause (d).—In the Punjab a special Act has been passed for the purpose of suppressing indecent advertisements (The Punjab Suppression of Indecent Advertisements Act, Punj. Act VII of 1941).

Exception.—Under the Exception religious sculptures, paintings, and engravings are excepted. But works of art are never considered obscene.

Nude pictures.—Nude pictures which exhibit a work of art will not fall under this section. It may be interesting to note the observations of an English author on this subject. "In countries, like India, where coolies wear next to nothing and some women freely expose their charms, men and women wearing costumes which they would be taken up for, if walking in Piccadilly, it seems absurd to say that photographs of the nude are in themselves obscene." A picture of a woman in the nude is not *per se* obscene. For the purpose of deciding whether the picture is obscene or not, one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, the person in whose hands it is likely to fall, etc.²³ But pictures of a bawdy character, if filthy and disgusting, will be considered obscene. Publication of an advertisement of a book (*Kashmiri Kok Shastra*) saying that it contained "pictures of eighty-four postures of men and women with interesting descriptions" when it did not in fact contain pictures of men and women cohabiting was held not to come within the purview of this section.²⁴

Advocating checks to conception.—There is nothing obscene in advocating checks to conception, or in the explanation of what these checks are, in the mere statement of the places where, and the prices at which, they can be procured.²⁵

Purchase to entrap seller.—The sale of an obscene print to a person in private, he having in the first instance requested that such prints should be shown to him, his object being to prosecute the seller, is sufficient to sustain the charge.¹

Liability of newspaper proprietor for act of his servant.—The mere fact that a person is the proprietor and publisher of a newspaper is not sufficient to render him criminally liable in respect of matter inserted therein by one of his servants. There must be a distinct finding that the matter complained of was inserted by the order or owing to the negligence of the proprietor.²

¹⁷ *Kherode Chandra Roy Chowdhury*, (1911) 39 Cal. 377; *Ghulam Hussain*, (1916) P. R. No. 5 of 1917, 18 Cr. L. J. 505, [1917] AIR (L) 219.

¹⁸ *Vishnu Krishna*, (1912) 15 Bom. L. R. 307, 14 Cr. L. J. 248.

¹⁹ *Thakar Datt*, (1917) P. R. No. 25 of 1917, 18 Cr. L. J. 126, [1917] AIR (L) 288.

²⁰ *Public Prosecutor v. Markondeyulu*, (1916) 5 L. W. 237, 18 Cr. L. J. 153, [1918] AIR (M) 1195.

²¹ *Thakar Datt*, (1917) P. R. No. 25 of 1917, 18 Cr. L. J. 126, [1917] AIR (L) 288.

²² *Harnam Das*, (1947) 48 Cr. L. J. 910, L. C.—42

[1947] AIR (L) 383.

²³ *Sree Ram Saksena*, [1940] 1 Cal. 581.

²⁴ *Jagat Narain Lall*, (1928) 29 Cr. L. J. 773, [1928] AIR (P) 649.

²⁵ *Framji*, (1892) Unrep. Cr. C. 620.

¹ *Carlile*, (1845) 1 Cox 229.

² *Mohammad Mohsin*, (1890) 10 A. W. N. 175; *Mumtaz Ali*, (1905) P. R. No. 35 of 1905, 6 P. L. R. 588, 2 Cr. L. J. 717. See *De Marny*, [1907] 1 K. B. 388, where the accused inserted an advertisement relating to the sale of obscene books and photographs.

CASES.

A society called "The Protestant Electoral Union" exposed for sale at their office a pamphlet entitled "The Confessional Unmasked", showing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession. The pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. The pamphlet also contained a preface and notes and comments condemnatory of the tenets and principles of the authors of the work from which the extracts were made. About one-half of the pamphlet related to casuistical and controversial questions, but the remainder of it was obscene. A member of the Society kept and sold these pamphlets. It was held that the publication of such a pamphlet was an offence as the inevitable effect of the publication must be to injure public morality.³ Subsequently to this case, a pamphlet was published giving a correct report of the trial by one G for selling "Confessional Unmasked", but setting out that work in full. It was held that the pamphlet, though a report of judicial proceedings, was an obscene book.⁴ A pamphlet which ridiculed the Head Priest of the community of Bohras and which abounded in passages expressing or presenting to the mind or view something which delicacy, purity and decency forbade to be expressed or exposed came within the purview of this section.⁵

The accused published a pamphlet containing a series of quotations from the Koran with his comments. There were several passages in it of an objectionable nature but there was one relating to the Virgin Mary which was perverted by the incompleteness of the quotation and commented on in a very offensive form, the language employed being not such as might be used in a bona fide controversial treatise. It was held that he was guilty under this section.⁶

A fictitious biography, describing only a series of sexual adventures, both natural and unnatural, which the author had had from boyhood onwards and which, it is apparent, he vastly enjoyed, and ascribing similar indulgences to highly placed members of the society who are easily recognizable, would be obscene, although there might not be any gross details or indecent language and although pious remarks about the ruinous effect of sexual vices might be thrown in here and there in a flippant manner.⁷

PRACTICE.

Evidence—Prove (1) that the book, etc., is of an obscene nature.

(2) That the accused—

(a) sold, let to hire, distributed, publicly exhibited or in any manner put into circulation, or for purpose of sale, hire, distribution, public exhibition or circulation made, produced or had in his possession any obscene book, pamphlet, paper, drawing, painting, representation of figure or any other obscene object whatsoever, or

(b) imported, exported or conveyed any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object would be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) took part in, or received profits from, any business in the course of which he knew or had reason to believe that any such obscene objects were, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertised or made known by any means whatsoever that any person was engaged or was ready to engage in any act which was an offence under this section, or that any such obscene object could be procured from or through any person, or

(e) offered or attempted to do any act which was an offence under this section.

The Court is entitled to rely on its own judgment as well as on evidence of witnesses in deciding whether a book is obscene or not.⁸

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first class.⁹

³ *Hicklin*, (1868) L. R. 3 Q. B. 360.

⁴ *Steele v. Brannan*, (1872) L. R. 7 C. P. 261.

⁵ Per Hayward, J., in *Rahimatali*, (1919) 22 Bom. L. R. 166, 22 Cr. L. J. 513, [1920] AIR (B) 402, (Shah J., dissenting).

⁶ *Hari Singh*, (1905) 28 All. 100.

⁷ *Kailashchandra Acharjya*, (1932) 60 Cal. 201.

⁸ *Ibid.*

⁹ As amended by s. 8 (2) of Act VIII of 1925.

Power of destruction.—On a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had.¹⁰

Charge.—A charge under this and s. 294 should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which, he found on the evidence, had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, if the case has been transferred, may either try the case *de novo* or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.¹¹ But when the prosecution case is that the whole of the publication is obscene, then although the charge may not have specified the passages considered offensive and although the English practice of depositing the publication together with particulars to its offensive character may not have been followed either, the High Court will not interfere in revision if the defence was not misled, and no objection was taken at the trial.¹²

Punishment.—The section says nothing about intention or about medical works or about agency of distribution or about immunity because only concrete cases are dealt with; or the rest of the publication is unobjectionable; but these points nevertheless indirectly affect the *quantum* of punishment.¹³

293. Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Sale, etc., of obscene objects to young person.

COMMENT.

This section was substituted for the original section by s. 2 of the Obscene Publications Act (VIII of 1925). It merely enhances the punishment where the obscene objects are sold, etc., to persons under the age of twenty years.

"In the final Act of the International Conference which drafted the convention, it was stated that the conference generally was of opinion that the offence of offering, delivering, selling or distributing obscene objects must be held to have been aggravated when committed in respect of minors. The Council [of the League] considered that it would be preferable to leave each State free to fix the age under which a person should be considered to be a minor for the purposes of this provision."¹⁴

The principle of this recommendation has been given effect to in this section.

PRACTICE.

Evidence.—Prove (1) that the book, etc., is of an obscene nature.

(2) That the person to whom it was sold, etc., or offered or attempted to be sold was under the age of twenty years.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first class.¹⁵

Power of destruction.—On a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had.¹⁶

Obscene acts and songs.

294. Whoever, to the annoyance¹ of others, (a) does any obscene act² in any public place,³ or

¹⁰ Criminal Procedure Code, s. 521.

¹¹ *Upendronath Doss*, (1876) 1 Cal. 356; *Min St.*, (1884) S. J. L. B. 262.

¹² *Kailashchandra Acharjya*, (1932) 60 Cal.

201.

¹³ *Thakar Datt*, (1917) P. R. No. 25 of 1917,

18 Cr. L. J. 126, [1926] AIR (L) 288.

¹⁴ Statements of Objects and Reasons, *Gazette of India*, 1924, Part V, p. 126.

¹⁵ As amended by s. 3 (2) of Act VIII of 1925.

¹⁶ Criminal Procedure Code, s. 521.

(b) sings, recites or utters any obscene songs,⁴ ballad or words. in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENT.

Object.—This section was substituted for the original section by the Indian Criminal Law Amendment Act (III of 1895), s. 3. The object of the first clause is to meet a case of indecency common in the Presidency of Madras. It has reference to an unreported case in that Presidency.

1. '**Annoyance.**'—Unless annoyance is caused the act will not be punishable. There must be definite evidence that annoyance was caused to a particular person or persons in general.

2. '**Obscene act.**'—Indecent exposure of one's person or sexual intercourse in a public place will be punished under this section.

3. '**Public place.**'—See Comment on s. 159, *supra*, as to the meaning attached to this expression.¹⁷ Acts such as indecent exposure of one's person in an omnibus,¹⁸ in a public urinal,¹⁹ or in a place where the public go,²⁰ will fall under this section. In England it has been held that an indecent exposure in a place of public resort, if actually seen by only one person, no other person being in a position to see it, is not a common nuisance.²¹ If the act be done where a great number of persons may be offended by it, and several see it, it is sufficient. Where a man exposed himself indecently on a roof at the back of a house so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any place open to the public, and seven persons in one house saw the exposure, it was held that he could be convicted for his act.²²

4. '**Songs.**'—A *lavni* is not necessarily an obscene song. It may be, and often it is, so, but it must be proved that the words of it are actually obscene before a conviction can be supported under this section.²³

PRACTICE.

Evidence.—Prove (1) that the accused did some act; or that the accused sang, recited or uttered any obscene songs, ballad or words.

(2) That this was done in or near a public place.

(3) That it was of an obscene nature.

(4) That it caused annoyance to others.

Omission to set out obscene words in evidence.—Where the obscene words used by the accused were not set out in the evidence, it was held that the omission was not a sufficient ground for setting aside a conviction.²⁴

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

A conviction under this section for uttering an obscene abuse in a public place may amount to a conviction for an offence involving a breach of the peace within the meaning of s. 106, Criminal Procedure Code.²⁵

Sentence.—A sentence of three months' rigorous imprisonment for using obscene language in a public place was held to be unduly severe.¹

294A. Whoever keeps any office or place for the purpose of drawing any lottery¹ not being a State lottery or a lottery authorised by the Provincial Government² shall be punished with imprisonment of either description

Keeping lottery office.

¹⁷ See also *Govind*, (1908) 10 Bom. L. R. 1047, 8 Cr. L. J. 481.

¹⁸ *Holmes Case*, (1853) Dears. Cr. C. 207, 22 L. J. (M. C.) N. S. 122.

¹⁹ *Harris*, (1871) L. R. 1 C. C. R. 282.

²⁰ *Wellard*, (1884) 14 Q. B. D. 63; *Saunders*, (1875) 1 Q. B. D. 15.

²¹ *Webb's Case*, (1848) 1 Den. Cr. C. 338. See *Elliot's Case*, (1861) L. & C. 103.

²² *Thallman*, (1863) 33 L. J. (M. C.) 58.

²³ *Ganu Gurav*, (1867) 4 B. H. C. (Cr. C.) 25.

²⁴ *Narasamma*, (1882) 1 Weir 251.

²⁵ *Mi Kun Ya*, (1904) U. B. R. (P. C.) 4.

¹ *Parliam.*, (1923) 2 B. L. J. 98.

for a term which may extend to six months, or with fine, or with both.

And whoever publishes³ any proposal to pay any sum, or to deliver any goods,⁴ or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery⁵ shall be punished with fine which may extend to one thousand rupees.

COMMENT.

This section was inserted by the Indian Penal Code Amendment Act (XXVII of 1870), s. 10. A lottery stands on the same footing as gambling because both of them are games of chance. The object of this section is to save people from the effects of unauthorised lotteries.

"Every lottery is either authorized or not authorized by Government. The section does not touch authorized lotteries, but intends to save people from the effects of those not authorized (1st) by prohibiting the keeping of offices or places for drawing them, and (2ndly) by prohibiting the publication of any advertisement relating to them. After the first prohibition, the chance of any office being kept in British India for drawing lotteries not authorized by Government is very small indeed. But people not subject to our laws may contrive to open offices for that purpose out of British India, but still near our own doors—at Navsari or Daman for instance, and then send advertisements to all the widely-circulated newspapers throughout British India. In that case, if the section were to be narrowly construed as applying only to lotteries to be drawn in British India, the object aimed at by the second prohibition, to prevent the mischief of people in British India being drawn into temptation by such publications, would be very nearly, if not utterly, defeated. The words of the section are wide enough to include foreign lotteries, and we have no reason to suppose the Legislature intended to exclude advertisements relating to them from the operation of section 294A."²

Ingredients.—The first part of the section deals with keeping a lottery office. It has two essentials:—

1. Keeping of any office or place for the purpose of drawing any lottery.
2. Such lottery must not be authorized by Government.

The second part of the section deals with the publisher of any proposal regarding a lottery.

The ingredients of the offence under the second part of this section are, first, there must be a lottery, secondly, there must be a drawing of any ticket, lot, number or figure in such lottery, and, thirdly, there must be a publication of a proposal to pay any money or to deliver any goods or to do or forbear doing anything for the benefit of any person on any event or contingency relative or applicable to such drawing.³

1. 'Whoever keeps any office or place for the purpose of drawing any lottery.'—The fact that an association of persons, the business carried on by which is in the nature of a lottery, is registered, does not exempt the persons keeping the office from liability under this section.⁴

'Keeps any office or place.'—The offence is the keeping of an office or place for the purpose of a lottery. Using a place once is not keeping it for that purpose. In order to constitute a keeping there must be something habitual.⁵ A certain degree of habitualness or continuity of operation is intended as also a fixed or ascertained locality for the drawing.⁶ The members of the committee of a club who exercise full control over club matters, inclusive of the premises, "keep" the premises of the club.⁷

The words "office or place" for the purpose of drawing any lottery mean an office or place intended to be the scene of the actual drawing of the lottery, and do not include an office or place kept only for the correspondence and other work con-

² Per Nanabhai Haridas, J., in *Manchrejji Kavasji Shapurji*, (1885) 10 Bom. 97, 101.

³ *Vazirally*, (1928) 30 Bom. L. R. 1426, 53 Bom. 57.

⁴ *Ramanjam Chetti*, (1890) 1 Weir 252.

⁵ *Martin v. Benjamin*, [1907] 1 K. B. 64.

⁶ *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, 588, F.B.

⁷ *A. J. Cooke*, (1914) 7 L. B. R. 319, 7 Burma L. T. 187, 15 Cr. L. J. 243, [1914] AIR (LB) 23.

nected with a lottery advertised "as going to be in some public place to be selected later on."⁸ It is, however, not necessary that the place should be kept solely for the purpose of drawing a lottery.⁹ Where a house is kept open for a double purpose, viz. as an honest social club for those who do not desire to play, as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.¹⁰

Clause (1) applies to cases in which it is shown that the accused did keep an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys, and which they held out to the public as the place where the lottery would finally be drawn. It is not necessary that the lottery should be actually drawn. It is enough if all the preliminary work is carried on and moneys are received for the purpose of a lottery.¹¹

"The purpose of drawing any lottery' would seem to involve substantially the same notion as 'the event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery' and the ruling in *Emperor v. Vazirally*¹² would apply to s. 294A, first part, as much as to the second part of the section. The Magistrate has stated in his judgment that it would not be necessary to prove actual drawing in bringing the offence home to the accused. This seems to be a view of the law which is opposed to the ruling of our Court in *Emperor v. Vazirally*."¹³

'Drawing.'—The word 'drawing' is used in its physical sense; the actual drawing of lots is an essential ingredient of the offence under this section.¹⁴ It does not mean conducting. The Legislature did not intend to give it any such comprehensive and unusual meaning.¹⁵ The meaning of 'drawing' relative to a lottery is that lots should be drawn by some mechanical or human agency involving their chance extraction. Where there is no physical or mechanical drawing to determine the lucky lots which depend on a sort of arithmetical progression based on an original number to be determined merely by the chance death of a bond-holder, there is no drawing within the meaning of the section.¹⁶ The accused was running a lottery in which the only substantial prize fell to the agent who sold the largest number of tickets. The ticket bearing the highest number among those sold by that agent was a number upon which all the other lucky numbers were based. The holders of those lucky numbers received a small prize of one rupee. It was held that the accused was not guilty, although he was conducting a lottery, because he had not been keeping an office or place for the purpose of drawing a lottery, and had not been publishing any proposal to pay any sum on any contingency relative to the drawing of any ticket, lot, or number, or figure in any such lottery.¹⁷

'Lottery.'—A lottery is a scheme for distribution of prizes by lot or chance.¹⁸ It is a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person purchasing tickets is made wholly dependent upon the drawing or casting of lot.¹⁹ Tickets are only the tokens of the chance purchased, and it is the purchase of this chance which is the essence of a lottery. It is only when the chances of a prize are obtained wholly gratuitously that the scheme would not be a lottery.²⁰ It makes no difference that the distribution is part of a genuine mercantile transaction.²¹

⁸ *Madan Gopal*, (1910) P. R. No. 17 of 1910.

¹¹ P. L. R. 260, 11 Cr. L. J. 382; *Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu*, (1932) 56 Mad. 26.

⁹ *G. C. Chakrabatty*, (1916) 9 B. L. T. 124, 17 Cr. L. J. 143; *A. J. Cooke*, (1914) 7 L. B. R. 319, 7 Burma L. T. 187, 15 Cr. L. J. 248, [1914] AIR (LB) 28.

¹⁰ *A. J. Cooke*, *ibid*.

¹¹ *Ramaswami Mudaliar*, (1922) 44 M. L. J. 595, 16 L. W. 757, 23 Cr. L. J. 688, [1923] AIR (M) 187.

¹² (1928) 30 Bom. L. R. 1426, 53 Bom. 57.

¹³ *Per Mirza, J.*, in *Narshilal Ranchhodlal*, (1390) Cr. Rev. No. 479 of 1929, decided by *Mirza and Broomfield, JJ.*, on February 12

1930 (Unrep. Bom.).

¹⁴ *Vazirally*, (1928) 30 Bom. L. R. 1426, 53 Bom. 57.

¹⁵ *Public Prosecutor v. Kalkura*, [1942] Mad. 802.

¹⁶ *Gurbakhsh Singh*, (1934) 16 Lah. 51.

¹⁷ *Public Prosecutor v. Kalkura*, *supra*.

¹⁸ *Gurbakhsh Singh*, (1934) 16 Lah. 51; *Taylor v. Smetten*, (1883) 11 Q. B. D. 207.

¹⁹ *Kamakshi Achari v. Appavu Pillai*, (1863) 1 M. H. C. 448; *Oxford New English Dictionary*.

²⁰ *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, 583, F.B.

²¹ *G. C. Chakrabatty*, (1916) 9 B. L. T. 124, 17 Cr. L. J. 143.

A prize chit transaction, in which the prize winner is ascertained by drawing lots and is under no liability to pay future subscriptions after the prize is won and whose extent of gain depends upon the chance of the draw, amounts to a lottery.²² A scheme may fairly be regarded as a lottery if it is clear that whatever other benefit the subscriber or competitor may get in return for his money, the chance of getting the prize was also part of the bargain and must have entered into his calculation. It is the fact of the prize and not the source from which it is paid that is the deciding factor. Any and every advantage which a person subscribing to a scheme may hope to get will amount to a "prize" if his getting it will depend on the drawing of lots. The fact that promoters hoped to reimburse themselves in due course from out of the interest earned will not make the payments to the subscribers who are lucky in the early drawings any the less a prize.²³ When a scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate the scheme.²⁴

The principle underlying a lottery is that there should be a distribution of prizes determined solely by chance; but if the results of the lotteries are such that no prize at all is distributed and the organizer of the lottery pockets the whole of the stakes advanced the transaction does not cease to be a lottery. The actual distribution of a prize or prizes and contribution of the whole stake by the adventurers are not essential, the essential factor in the case is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance and if chance so decrees that no prize is to be distributed to the adventurers and the stakes are to be appropriated by the organizer of the lottery, the scheme is none the less a lottery.²⁵

The necessary effect of a lottery is to beget a spirit of speculation and gaming that is often productive of serious evils.

Neither under the English law nor under the Penal Code is it made an offence to buy a ticket in a lottery. Mere purchase of tickets does not amount to aiding the accused in keeping a place for the drawing of a lottery within the meaning of s. 107.¹

Agreement for contributions to be repaid by lot is not lottery.—A transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot. Where twenty persons agreed that each should subscribe 200 rupees by monthly instalments of ten rupees, and that each in his turn as determined by lot should take the whole of the subscriptions for one month, it was held that the agreement was not illegal.² An agreement whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contribution, the common fund being lent to each subscriber in turn, was held to be not illegal.³

2. 'Authorized by Provincial Government.'—The lottery must have been authorized by the Provincial Government. It would not be sufficient to show that it has been authorized by British Government of another country, e.g. Australia.⁴ A Collector is not authorized to sanction a lottery, and the mere act of taking income-tax on the profits of a lottery will not constitute authorization.⁵ The withholding of prosecution for a certain period by the Crown does not amount to an authorization of the lottery prior to that date.⁶

3. 'Publishes.'—The word 'publishes' includes both the person who sends

²² *The Udumalpet Nidhi, Ltd.*, (1934) 57 Mad. 844.

²³ *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, 575, 576, F.B., overruling *Shannuga Mudali v. Kumaraswami Mudali*, (1925) 48 Mad. 661, and *Narayana Ayyangar v. Vellachami Ambalam*, (1927) 50 Mad. 696, F.B.

²⁴ *Wallingford v. Mutual Society*, (1880) 5 App. Cas. 685; *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, F.B.

²⁵ *Mukandi Lal*, (1917) P. R. No. 85 of 1917, 18 Cr. L. J. 768, [1917] AIR (L) 93; *Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu*, (1932) 56 Mad. 26.

¹ *Sesha Ayyar v. Krishna Ayyar*, sup., pp.

573, 574.

² *Kamakshi Achari v. Appavu Pillai*, (1863) 1 M. H. C. 448.

³ *Vasudevan Nambudri v. Mommod*, (1898) 22 Mad. 212. See *Doraisami Mudaly*, (1890) 1 Weir 251; *Wallingford v. Mutual Society*, (1880) 5 App. Cas. 685; *O'Connor v. Bradshaw*, (1850) 20 L. J. Ex. 26.

⁴ *Mancherji Kavasji Shapurji*, (1885) 10 Bom. 97.

⁵ *A. J. Cooke*, (1914) 7 L. B. R. 819, 15 Cr. L. J. 243, [1914] AIR (LB) 23.

⁶ *Public Prosecutor v. Soosai Pillai*, [1938] 1 M. L. J. 724, 47 L. W. 573, 39 Cr. L. J. 916, [1938] AIR (M) 715.

a proposal as well as the proprietor of a newspaper who prints the proposal as an advertisement. It is not necessary that there should be some public advertisement in the sense of a written publication in newspapers or handbills. If a number of persons go about canvassing for subscribers on the basis of a scheme settled beforehand by its promoters, this would amount to a publication of the proposal.⁷ Publication is established by the very fact that the proposal forms have been printed in the press.⁸

"The intention of the Legislature appears to have been, not only that chances, &c., in the lottery should not be sold, but also that the public should not be informed where such chances, &c., could be purchased. And they enacted, that no person should publish these proposals to the world, that the poor and ignorant sort of people might not know where these transactions were going on."⁹

Mere publication in a newspaper will make the proprietor liable. Under the Press and Registration of Books Act¹⁰ the printer or publisher is responsible for every thing that appears in the newspaper.¹¹ He can, however, escape liability by showing that he was absent bona fide, that is, not with the purpose of evading responsibility, when a particular thing complained of was printed.¹²

Where ticket-books relating to a lottery were delivered by the accused to several persons with a view to the tickets therein being sold by these persons to others, it was held that the delivery of the ticket-books could not be considered in any sense to be a mere casual or gratuitous delivery and the accused was guilty of an offence under this section.¹³

Publication of advertisement.—The proprietor of a Bombay newspaper who published an advertisement in his paper relating to a Melbourne lottery was convicted under this section.¹⁴ Publication of an advertisement of a Rs. 52,500 lottery, by which a ginning factory was to be raffled at Rs. 5 tickets was held to be an offence within this section.¹⁵ Where on the face of a lottery ticket it is stated that the prize, if any, due to the number on the ticket will be paid, it contains a proposal inviting persons to take part in the lottery, and offering such a ticket for sale amounts to a publication of the said proposal and constitutes this offence.¹⁶ A mere publication on a trade hand-bill that tickets in a lottery (unauthorized) can be had at a particular place is no offence since it does not constitute a publication of a proposal to pay any sum on any event or contingency relating or applicable to the drawing of any ticket in any lottery not authorized by Government.¹⁷ But the publication of the words "detailed prize lists will be supplied to all subscribers to the lottery" amounts to an offence under this section.¹⁸

Publication of proposal.—The accused published a circular notifying different prizes on horses winning at the Derby race and on starters, and also other special prizes. The circular stated: "The sweep will close on May 23, 1924, and the draw under the supervision of the patrons stated in the tickets will take place on May 26, 1924." The accused having been charged with publishing the proposal for a lottery, it was held that he was guilty of the offence charged, since he had published a proposal to pay a sum for the benefit of a person on an event or contingency relative or applicable to the drawing of the ticket in a lottery; and it did not matter that the payment proposed to be made was not made by the person advertising.¹⁹ An announcement was made in the *Sun*, an evening paper, sold at half-penny, that for a certain period in certain issues of the newspaper spots of varying size and shape would be printed in various parts of the issues. It was also stated that on a certain day an announcement would appear in the paper showing the exact configuration of certain spots

⁷ *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, 584, F.B.

⁸ *Lilomai Mamul*, (1940) 42 Cr. L. J. 613, [1941] AIR (S) 91; *Dew v. Director of Public Prosecutions*, (1920) 89 L. J. K. B. 1166, 37 T. L. R. 22, 26 Cox 664.

⁹ Per Grose, J., in *Smith*, (1791) 4 T. R. 414, 419.

¹⁰ Act XXV of 1867, s. 4.

¹¹ *Phanendra Nath Mitter*, (1908) 35 Cal. 945.

¹² *Har Swarup v. Muhammad Siraj*, (1928) 50 All. 806.

¹³ *Diwan Chand Jolly*, (1929) 31 Cr. L. J.

692, [1930] AIR (L) 81.

¹⁴ *Mancherji Kavasji Shapurji*, (1885) 10 Bom. 97.

¹⁵ *Malla Reddi*, (1926) 50 Mad. 479.

¹⁶ *D'Souza*, (1925) 27 Cr. L. J. 777, 20 S. L. R. 192, [1926] AIR (S) 213.

¹⁷ *Rachappa*, (1924) 26 Bom. L. R. 968, 26 Cr. L. J. 222, [1925] AIR (B) 26; *Vazirally*, (1928) 30 Bom. L. R. 1426, 53 Bom. 57.

¹⁸ *Kandaswamy*, [1937] M. W. N. 731.

¹⁹ *Chimanlal*, (1925) 27 Bom. L. R. 363, 26 Cr. L. J. 980, [1925] AIR (B) 243.

which were to be declared to be winning spots, and that the person who had cut out from the various issues of the paper and sent to the office of the paper a portion of the newspaper containing the facsimile of what had been declared to be the winning spot would receive a prize. It was also announced that the prizes differed for different spots. The winning spots were arbitrarily selected by the proprietors of the newspaper and the winning of the prizes depended wholly upon chance. It was held that this was a publication of a proposal and scheme for a lottery.²⁰

The accused and another person ordered 500,000 circulars to be printed and prepared for posting. These circulars contained a proposal and scheme for the sale of tickets in a lottery. The envelopes for the circulars were supplied ready addressed by the accused, and the printers were paid by the accused by means of cheques signed by the other person. The printers printed 200,000 of the circulars, placed them in envelopes and closed and stamped the envelopes and delivered them to the accused, who took them away for the purpose of posting them. A large quantity of the envelopes was stopped in the course of post under instructions from higher authorities in the post office. Some of the envelopes were found open, but the contents of the others were not examined in the post office, and all were prevented from reaching the addressees. The accused was convicted under s. 41 of the Lotteries Act, 1823 (4 Geo. IV, c. 60), of 'publishing' a proposal and scheme for the sale of tickets in a lottery. It was held that although none of the circulars had reached the addressees, yet, as the proposal was made known to the printers, there was a sufficient publication within the Act, and the conviction must be affirmed. Earl of Reading, C.J., said that "once it is established... that the appellant was responsible for sending the circular to the printing company to be printed, and that it was printed, there is an end to this appeal, for it is inconceivable that none of the printers read the circular. It was sent for the express purpose of being reproduced. When received for that purpose the printers must have read it. But it is argued that nevertheless, that was not the publishing of a proposal. To my mind the fallacy of that argument consists in saying that publication only means making known the nature of the proposal. The moment the document has been made known to another, then it is published."²¹

4. 'Goods'.—This word includes both movable and immovable property.²²

5. 'Any such lottery'.—This expression means any lottery not being a State lottery or not authorized by Provincial Government.²³ It includes a foreign lottery.²⁴

CASES.

Transactions deciding prizes by chance amount to lottery.—*English cases.*—A horse race being about to be run, 155 persons subscribed £1 each upon the terms that the names of the horses should be placed on separate cards, in one box, and the names of the subscribers on separate cards in another box, and that two disinterested persons should draw these cards by chance, one from each box, after the other, and that the person whose name was drawn next after the name of the winning horse should be entitled to £100 out of the entire fund. It was held that this amounted to a lottery.²⁵ The programme of an entertainment stated that at its conclusion the proprietor "would distribute amongst the audience a shower of gold and silver treasure on a scale utterly without parallel, besides a shower of smaller presents, all of which would be impartially divided amongst the audience and given away". The seats of the audience were numbered. At the conclusion of the entertainment the proprietor called out a number on a seat, and delivered one of the articles to the person occupying that seat; and in that way distributed all the articles amongst the audience. It was held that this was a lottery.¹ A transaction in which tickets were drawn by subscribers of a shilling which entitled them at all events to what was professed to be a shilling's worth of goods, and also the chance of certain bonuses of goods of

²⁰ *Hall v. McWilliam*, (1901) 20 Cox 33. See, to the same effect, *Bottomley v. Director of Public Prosecutions*, (1914) 24 Cox 578.

²¹ *Dew v. Director of Public Prosecutions*, (1920) 89 L. J. K. B. 1166, 1167, 26 Cox 664, 667.

²² *Malla Reddi*, (1926) 50 Mad. 479.

²³ *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, 593, F.B.

²⁴ *Mancherji Kavasji Shapurji*, (1885) 10 Bom. 97.

²⁵ *Allport v. Nutt*, (1845) 14 L. J. C. P. 272; *Gatty v. Field*, (1846) 15 L. J. Q. B. 408.

¹ *Morris v. Blackburn*, (1864) 2 H. & C. 912.

greater value than the shilling, was held to be an illegal lottery.² The appellant erected a tent, in which he sold packets, each containing a pound of tea, at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know, until after the sale, what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it. It was held that the act of the appellant did constitute a lottery.³ H kept a sweetstuff shop, and sold penny packets of American caramel. Several packets contained a half-penny in addition to a fair penny-worth of sweets. There had been no advertisement as to these inclosures. It was held that H was guilty of keeping a lottery.⁴ The proprietor of a paper conducted competitions in the following manner. A sentence was inserted in the paper with one word missing; intending competitors were required to cut out a coupon attached to the paper, to write the missing word on the coupon and send it, together with a fee of 1s. for each coupon, to the proprietor. The missing word was decided upon before the commencement of the competition. The entrance fees were divided among the successful competitors. It was held that the competition constituted a lottery.⁵ A publican arranged at his beer-house a sweepstake on a coming horse race. There were sixty-one entries, each person paying 6d. to the publican. Three prizes of 15s., 10s. and 5s., respectively, were offered by the publican on the result of the race; and one of the conditions of the sweepstakes was that the person who won the first prize should pay the publican at the beer-house for two gallons of beer to be consumed in his house, the person who won the second prize should pay for one gallon, and the person who won the third prize should pay for two quarts of beer. The winners of the prizes were ascertained by a drawing at the beer-house, and the prizes were given by the publican to the winners, less the price of the beer which was deducted by him from the prizes. It was held that the sweepstake was an illegal lottery.⁶

The proprietors of a weekly newspaper caused medals to be distributed gratuitously among members of the public; each medal bore a distinctive number and the words, "Keep this, it may be worth £100. See the *Weekly Telegraph* to-day"; the winning numbers, which were arbitrarily selected by the newspaper proprietors and were unknown to the distributors, were published weekly in the newspaper. There were no coupons, and it was not necessary that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize; information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the scheme was to induce persons to inspect or buy the paper, and the circulation in fact increased considerably during the progress of the scheme. It was held that, although it was possible for an individual holder of a medal to obtain a prize without paying anything for his chance, the medal holders as a body collectively contributed sums of money to the fund out of which the money came for the prizes, and that the scheme was a lottery.⁷

Tickets, each bearing a different number, were sold for 6d. each upon the terms that the purchaser of the ticket bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle as a prize. The bicycle was presented as a gift by a firm of cycle manufacturers for the purposes of advertisement, no part of the money paid by the purchasers of the tickets being used for acquiring the bicycle. It was held that as each purchaser of a ticket bought a chance, and the holder of the ticket bearing the winning number was determined by chance, the scheme constituted a lottery and it was immaterial that no part of the money paid by the purchasers of the tickets was used for the purpose of the prize.⁸

The respondent, the proprietor of a music hall entertainment, who was giving a performance in a provincial theatre, announced to the audience that, "being possessed of a certain amount of wealth", he would distribute some of it, and his assistants would be supplied with postal orders, to be given away as he thought fit. Under his directions the assistants went along the seats, and they handed postal orders of small amounts to persons nearest to them. Other postal orders for larger sums were handed to members

² *Harris*, (1866) 10 Cox 352.

³ *Taylor v. Smetten*, (1883) 11 Q. B. D. 207;
Dhana, (1933) 35 Cr. L. J. 1249, 28 S. L. R.

112, [1933] AIR (S) 69.

⁴ *Hunt v. Williams*, (1888) 52 J. P. 821.

⁵ *Barclay v. Pearson*, [1893] 2 Ch. 154.

⁶ *Hardwick v. Lane*, [1904] 1 K. B. 204.

⁷ *Willis v. Young*, [1907] 1 K. B. 448.

⁸ *Bartlett v. Parker*, [1912] 2 K. B. 497.

of the audience who answered questions put by him to them from the stage as to their circumstances, and in other instances to persons who stated their circumstances and requested the gift of an order. It was held that the distribution of the postal orders was made and determined by chance and without the exercise of any real judgment on the part of the respondent; and that the respondent had, therefore, 'exercised a lottery' contrary to s. 2 of the Lotteries Act, 1699.⁹

A newspaper published an offer of prizes for the correct solution of a crossword puzzle. A number of correct words in the puzzle were not difficult to arrive at, but some of the clues could be answered by one of two or more alternative words, and, where alternative answers existed, the word selected beforehand as correct was not always the most appropriate or the one bearing the best relation to the clue. It was held that the competition was to be regarded as a lottery in that the correct solution was not to be picked out of the efforts of the competitors in competition with each other, but was to be the one most nearly coinciding with a set of words chosen beforehand by a person unknown to the competitors.¹⁰ A limited company employed agents to distribute tickets bearing the names of races, horses and jockeys, and also the name of the company, and an offer to exchange the tickets for goods on demand. A member of the public receiving a ticket was entitled to bet on the combinations named on the ticket, in which case if he won he received the amount of his bet; if he lost he was entitled to exchange the ticket for goods worth six pence, through the firm's agents. By conditions on the ticket he paid no money to the agents, but undertook to pay six pence if he lost. The company and its directors were convicted at petty sessions under the Betting and Lotteries Act, 1934, and appealed. It was held that the scheme was a lottery and that the appearance of the name of the company on the tickets, together with evidence that the same agent had distributed similar tickets which had been exchanged by the company for goods, was evidence connecting the agent with the company.¹¹

Indian cases.—Where the agreement for the sale of bonds was: "Every subscriber pays Rs. 10-8-0 and gets a bond for Rs. 10. This sum is guaranteed by one of seven banks and not only is negotiable, but can be cashed at the bank at par at any time. The draws were to start when 2,000 tickets had been sold, and at stated intervals further drawings were to be made until every one had got a prize or had had their money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize, or decided to withdraw their money. Thus, the original ten rupees was absolutely safe, the extra eight annas was to cover the cost of correspondence, etc." It was held that the agreement showed that there was a scheme for the distribution of prizes by lot or chance and the accused who put forward the scheme were guilty of an offence within the second part of this section.¹²

The accused, the sole agent in India of a certain brand of cigarette manufactured at Belfast, sent ten notes of five rupees each to the manufacturers, who put each note in a separate packet of cigarettes, mixed those packets with other packets which contained no notes, and sent them out to the accused in India. The accused published hand-bills advertising the prize of Rs. 5 which could automatically be obtained by purchasers of the cigarettes, which were sold at the same rate as before. On a prosecution of the accused under the second part of this section, it was held that the scheme by the accused for distribution of prizes by lot or chance amounted to a lottery, and the publication of hand-bills did not fall under this section (second part) inasmuch as there was no proposal to pay the sum on any event or contingency relative to the drawing of any lot. The word 'drawing' is used in the first and second part of this section in its physical sense; the actual drawing of lots is an essential ingredient of the offence under the section.¹³

The accused invited the public to subscribe a large sum for an association whose object was said to be for the relief of people in debt or distress. There was no provision for the return of the capital sum, but one-sixth of the interest derived therefrom was to be used for the objects of the association, whilst the remainder became divisible

⁹ *Minty v. Sylvester*, (1915) 25 Cox 247.

¹⁰ *Coles v. Odhams Press Ltd.*, (1935) 30 Cox 329.

¹¹ *Gordon, Mackay & Co. v. Watson*, [1936] 2 A. E. R. 33.

¹² *Madan Gopal*, (1910) P. R. No. 17 of 1910,

¹³ Cr. L. J. 382.

¹³ *Vazirally*, (1928) 30 Bom. L. R. 1426, 53 Bom. 57.

every three months among the subscribers as cash bonuses of various amounts. These bonuses were to be distributed by lot. It was held that the transaction was a lottery within the meaning of this section.¹⁴ A prize chit transaction, in which the prize winner was ascertained by drawing lots and was under no liability to pay future subscriptions after the prize was won and whose extent of gain depended upon the chance of the draw was held to amount to a lottery.¹⁵ A prize chit was started with the object of creating a fund for a temple. It consisted for 625 subscribers, the monthly subscription being Rs. 3. The number of months for which the subscriptions had to be paid was fifty. The arrangement was that a drawing was to take place every month, one ticket was to be drawn out of 625 tickets and the subscriber who drew the ticket was to be paid Rs. 150 without any liability to pay for future instalments. That process was to be repeated month after month till the fiftieth month. After the fiftieth month the remaining 575 subscribers were to be each paid in a particular order Rs. 150, that is the amount actually paid by them, and the chit fund was to be closed. It was held that the chit fund was a lottery.¹⁶ A cycle and gramophone dealer was conducting a chit transaction in his business premises. There were one hundred subscribers in each section to the chit, each paying a subscription of Rs. 8 per month and the transaction covered a period of twenty months with monthly drawings. The subscriber whose number or name was drawn at one of the monthly drawings was given a specified article and was thereafter relieved of the liability to pay further subscriptions. At the end of the period of twenty months, each of those who had not been successful in the monthly drawings was given the specified article, with the result that those whose numbers or names were drawn earlier derived a far greater benefit than those whose numbers or names were drawn later or were not drawn at all, and the extent of the gain depended upon the chance of the draw. The above-mentioned conditions relating to the chit transactions were also published by him. It was held that the chit transaction amounted to a lottery and the person might rightly be said also to be keeping a place for the purpose of drawing a lottery and, in any view, inasmuch as he published proposals to deliver goods on an event or contingency relative or applicable to the drawing of the ticket, lot, or number, he was guilty of an offence under the latter part of this section.¹⁷ Where in a scheme every person who purchased a ticket at the entrance of a show was by so doing contributing to the common fund from which prizes were to be taken and every such purchaser of an entrance ticket had an equal chance to draw back four hundred times as much as he had put in, it was held that the scheme came within the meaning of the word 'lottery'.¹⁸

The circular of the Irish Sweep Stake which was referred to in one of the letters written by or found in the possession of the accused, stated that the Irish Hospital Sweep Stake was expected to reach the huge total of £5,000,000 or seven crores of rupees. The said letter stated that applications should be made with Rs. 7-8-0 per ticket to the accused. The ticket itself contained a proposal for the payment of different sums for the benefit of the holders of such tickets. The money would be divided on each unit of £100,000 as follows. Fifty first prizes of £30,000 or over four lacs of rupees each, fifty second prizes of £15,000 or over two lacs of rupees each, fifty third prizes of £10,000 or over one and a quarter lac of rupees each, 1,200 prizes of Rs. 12,000 to 15,000 each and 5,000 cash prizes of £200 or Rs. 2,750 each. It was held that the case fell within the mischief of this section.¹⁹

Transaction requiring skill for winning prizes is not lottery.—The accused published a newspaper containing an advertisement of a "coupon competition", which was to be carried out by means of coupons, to be filled up by the purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third and fourth in a race. For every coupon filled up after the first the purchaser paid a penny, and the accused promised a prize of £100 for naming the first four horses correctly. It was held that the transaction did not amount to a lottery.²⁰ The accused published a newspaper containing an offer of a money prize for a correct

¹⁴ *A. D. Raj*, (1932) 10 Ran. 232.

¹⁵ *The Udumalpet Nidhi Ltd.*, (1934) 57 Mad. 844.

¹⁶ *Sesha Ayyar v. Krishna Ayyar*, (1935) 59 Mad. 562, F.B.

¹⁷ *Public Prosecutor v. Munisami Naidu*, (1934) 57 Mad. 923; *Universal Mutual Aid and Poor Houses Association Limited v. Thoppa*

Naidu, (1932) 56 Mad. 26.

¹⁸ *O. D. Harder*, (1934) 36 Cr. L. J. 219 (2), [1934] AIR (S) 149.

¹⁹ 539, 34 Cr. L. J. 518, [1933] AIR (C) 332.

²⁰ *Rabindranath Dhar*, (1932) 56 C. L. J. 539, *Stoddart v. Sagar*, [1895] 2 Q. B. 474. See *Stoddart*, (1900) 88 L. T. 538; *Caminada v. Hulton*, (1891) 60 L. J. (M. C.) 116, 17 Cox 307.

prediction of the number of births and deaths in London during a named week. Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer. It was held that the competition, not being one the result of which depended entirely on chance, was not a lottery.²¹ The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word; that all the sentences reaching the editor of the newspaper should receive careful consideration; and that the decision of the editor as to the prize-winners should be final. It was held that as the competition was one involving some degree of skill on the part of the competitors, and as there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, the competition was not one the result of which depended entirely on chance, and that it was, therefore, not a lottery.²²

Keeping lottery.—The accused kept an eating house, exhibited placards headed “Great Eastern Money Club”, “White’s Race Club for the Radcliffe Cup”, etc., and sold tickets in respect thereof. Prizes were drawn and the holders of the tickets whose numbers were drawn for prizes received the same, and the accused delivered the prizes to such ticket-holders, but there was no evidence to connect the accused with any drawing by lottery or otherwise for the prizes. It was held that the above evidence was sufficient to support a conviction against the accused of keeping a lottery.²³

PRACTICE.

Evidence.—Prove (1) that the accused had kept an office or place.

(2) That the office or place was used for the purpose of drawing a lottery.

(3) That such lottery was not authorized by Government.

For the second clause of the section prove—

(1) That the accused published the proposal in question.

(2) That the nature of such proposal was to pay, etc., on an event or contingency as described in the section.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

Where a person is convicted under this section of the offence of using obscene words on a public road to the annoyance of others, an order directing him to enter into a bond under s. 106 of the Criminal Procedure Code cannot be made unless there is a finding that active criminal intimidation or assault has actually occurred in consequence of the obscene abuse.²⁴

Sanction.—No Court shall take cognizance of an offence under this section unless upon a complaint made by order of, or under authority from, Government.²⁵

²¹ *Hall v. Cox*, [1899] 1 Q. B. 198.

²² *Scott v. Director of Public Prosecutions*, [1914] 2 K. B. 868.

²³ *Crawshaw*, (1860) 8 Cox 375.

²⁴ *Maung Kyi Nyo*, [1940] Ran. 256.

²⁵ Criminal Procedure Code, s. 196.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

"THE principle on which this chapter has been framed is a principle on which it would be desirable that all Governments should act, but from which the British Government in India cannot depart without risking the dissolution of society; it is this, that every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another".¹

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons¹ with the intention of thereby insulting the religion of any class of persons² or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section punishes the injuring or defiling of a place of worship with intent to insult the religion of a class of persons. Intention is the gist of the offence under it. Mere defilement of a place of worship is not enough.

Ingredients.—This section requires two essentials:—

1. Destruction, damage, or defilement of (a) any place of worship, or (b) any object held sacred by a class of persons.

2. Such destruction, etc., must have been done (i) with the intention of insulting the religion of a class of persons, or (ii) with the knowledge that a class of persons is likely to consider such destruction, etc., as an insult to their religion.

1. 'Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons'.—Any person, whether a worshipper in the place or not, comes within the purview of this section by the use of the word 'whoever'.

'Defiles'.—The word 'defile' is not to be restricted in meaning to acts that would make an object of worship unclean as a material object, but extends to acts done in relation to the object of worship which would render such object ritually impure.² "The words 'destroy' and 'damage' have obviously a physical or material signification, and on the usual principle of construction of *ejusdem generis* a similar meaning is to be assigned to the word 'defile'. 'Defile' itself is a word of hybrid origin, but the main root 'file', 'foul', is English, and it may ordinarily be understood, especially in collocation with such words as 'destroy' and 'damage', in the primary physical sense".³

This word does not include animate objects according to the Allahabad and the Calcutta High Courts, but refers only to inanimate objects such as churches, mosques, temples and marble or stone figures representing gods.⁴ The killing of a cow by a Mahomedan, within sight of a public road frequented by Hindus, is not punishable under this section.⁵ Where a bull dedicated and set at large at the *shradh* of a Hindu in accordance with a religious usage was killed by certain Mahomedans secretly and at

¹ Note J, p. 136.

² *Sivakoti Swami*, (1885) 1 Weir 253; *Bheema Goundan*, (1891) 1 Weir 256; *Kuttichami Moothan v. Rama Pattar*, (1918) 41 Mad. 980.

³ Per Burgess, J. C., in *Nga Po San*, (1894) 1 U. B. R. (1892-1896) 199, 200.

⁴ *Imam Ali*, (1887) 10 All. 150, F.B.; *Romesh*

Chunder Sannyal v. Hiru Mondal, (1890) 17 Cal. 852; *Ali Muhammad*, (1917) P. R. No. 10 of 1918, 19 Cr. L. J. 314, [1918] AIR (L) 365, F.B., overruling *Hakim*, (1884) P. R. No. 27 of 1884.

⁵ *Imam Ali*, (1887) 10 All. 150, F.B.

night in the presence of none but Mahomedans, it was held that no offence was committed.⁶ Similarly, the killing of a cow with the intention or knowledge of offending the religious susceptibilities of Hindus is not an offence under this section.⁷

'Any place of worship, or any object'.—"There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred; as an example of the former, I may refer to a place of sepulture not actually consecrated, as in the case of ground specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity or where an idol or altar is kept; and such distinction appears to have been kept in view by the Legislature, for while s. 295 deals with the latter class of objects and places, s. 297 deals more especially with trespasses on places of sepulture and places set apart for the performance of funeral rites and as depositories for the remains of the dead".⁸

No particular period is required by law to establish an object as one of religious reverence. The tomb of a saint would become an object of veneration from the date it was built.⁹

The use of a hut on an agricultural land, without the permission of the landlord, as a public mosque with the *azan* or public call to prayers is entirely unwarranted; and, if the hut is not a mosque but a particular community were only attempting to convert it into one, it is not "a place of worship" under the law.¹⁰

'Any class of persons'.—This expression may include any religious sect however small in number. The application of this section is not limited only as between those who follow different religions. It also applies to different sects or classes of Hindus who are animated by sectarian feelings.¹¹ A complainant and his family do not form a "class of persons" within the meaning of this section. Four accused entered the premises of the complainant and only one of them demolished the wall which he was constructing and took a deity, that was worshipped by the complainant and his family, from a niche and threw it into a drain, it was held that the complainant and his family members could not constitute a class of persons within the meaning of this section but the accused could be convicted under s. 297.¹²

2. 'With the intention of thereby insulting the religion of any class of persons'.—The authors of the Code say: "The question whether insults offered to a religion ought to be visited with punishment does not appear to us at all to depend on the question whether that religion be true or false. The religion may be false, but the pain which such insults give to the professors of that religion is real. It is often, as the most superficial observation may convince us, as real a pain and as acute a pain as is caused by almost any offence against the person, against property or against character. Nor is there any compensating good whatsoever to be set off against this pain. Discussion, indeed, tends to elicit truth; but insults have no such tendency; they can be employed just as easily against the purest faith as against the most monstrous superstition. It is easier to argue against falsehood than against truth; but it is as easy to pull down or defile the temples of truth as those of falsehood; it is as easy to molest with ribaldry and clamour men assembled for purposes of pious and rational worship, as men engaged in the most absurd ceremonies. Such insults, when directed against erroneous opinions, seldom have any other effect than to fix those opinions deeper, and to give a character of peculiar ferocity to theological dissension: instead of eliciting truth they only inflame fanaticism.

"All these considerations apply with peculiar force to India. There is perhaps no country in which the Government has so much to apprehend from religious excitement among the people. The Christians are numerically a very small minority of the population, and in possession of all the highest posts in the Government, in the tribunals and in the army. Under their rule are placed millions of Mahomedans, of differing

⁶ *Romesh Chunder Sannyal v. Hiru Mondal* (1890) 17 Cal. 82; *Pir Ali*, (1919) 21 Cr. L. J. 453, [1920] AIR (P) 550.

⁷ *Ali Muhammad*, (1917) P. R. No. 10 of 1918, 19 Cr. L. J. 314, [1918] AIR (L) 365, F.B.

⁸ Per Brandt, J., in *Ratna Mudali*, (1886) 10 Mad. 126, 127.

⁹ Per Baker, J., in *Mahomedali Alabakhsh*,

Crim. Appeal No. 14 of 1929, decided by Patkar and Baker, JJ., on April 3, 1929 (Unrep. Bom.).

¹⁰ *Bechan Jha*, (1941) 23 P. L. T. 81, 42 Cr. L. J. 579, [1941] AIR (P) 492.

¹¹ *Sivakoti Swami*, (1885) 1 Weir 253.

¹² *Amir Hassan*, (1939) 21 P. L. T. 121, 41 Cr. L. J. 810, [1940] AIR (P) 414.

sects, but all strongly attached to the fundamental articles of the Mahomedan creed, and tens of millions of Hindoos, strongly attached to doctrines and rites which Christians and Mahomedans join in reprobating. Such a state of things is pregnant with dangers which can only be averted by a firm adherence to the true principles of toleration. On those principles the British Government has hitherto acted with eminent judgment, and with no less eminent success; and on those principles we propose to frame this part of the Penal Code".¹³

Under this section it must be distinctly proved that there was an intention on the part of the accused to insult the religion of a class of persons. This intention could be ascertained from the nature of the act done. Where there is no intention to wound the religious susceptibilities there will be no offence. Where a person, as the result of a quarrel with a relation, threw a basket containing cooked food (fowl, fish, rice etc.) into a well and without any intention of wounding the religious susceptibilities of anyone, he was held not to have committed an offence under this section.¹⁴ The accused (Hindus) were charged under this section, in that they removed some old building materials belonging to a mosque, and thereby insulted the religious feelings of Mahomedans. It was held that there was no reason to believe that the accused in acting as they did, had any intention of insulting the religion of the Mahomedan residents of the village, or that they did so even with the knowledge that any class of persons was likely to consider the removal of the materials an insult to their religion.¹⁵ Where a Hindu had sexual intercourse with a woman secretly and at night within an enclosure surrounding the tomb of a Mahomedan *fakir*, it was held that he had committed an offence under s. 297 and not under this section.¹⁶ Where the accused, a goldsmith by caste, performed certain ceremony by pouring cocoanut water over the idol of god Siva, it was held that if the temple in which the ceremony was performed was one of a class in which the worshippers were not allowed to touch the idol or pour cocoanut water on it, except through persons specially appointed for the purpose, and bound to observe certain special rules, and if the accused performed the ceremony with the object of ridiculing openly the established rule, a conviction under this section might be supported.¹⁷ The presence of Moothans, a sub-caste of Sudras whose status is equal to that of Nairs, in such portions of a Hindu temple as are open to non-Brahmins is not a 'defilement' within the meaning of this section.¹⁸ The entry of a Mahar into a temple and his touching the idol do not amount to defilement under this section.¹⁹ Where the accused destroyed the sacred thread worn by the complainant, who was an *Ahir* and therefore not entitled to wear it, it was held that this did not amount to an insult to the complainant's religion under this section or s. 295A.²⁰

Place of worship.—A *kyaung* is a place of worship.²¹ Where the accused, who were of low caste, entered into the precincts of a temple, it was held that unless there was an intention to insult the religion of a class of persons they could not be convicted of an offence under this section.²²

PRACTICE.

Evidence.—Prove (1) that the place was one of worship or that the object was a sacred one.

(2) That the same was held sacred by a class of persons.

(3) That the accused destroyed, damaged, or defiled the same.

(4) That he did so (a) with the intention of thereby insulting the religion of a class of persons; or (b) with the knowledge that a class of persons is likely to consider such destruction, etc., as an insult to their religion.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

¹³ Note J, p. 136.

¹⁴ *Waman*, (1898) Cr. R. No. 40 of 1898, Unrep. Cr. C. 979.

¹⁵ *Jan Muhammad v. Narain Das*, (1888) 3 A. W. N. 39.

¹⁶ *Ratna Mudali*, (1886) 10 Mad. 126.

¹⁷ *Sivakoti Swami*, (1885) 1 Weir 253. See *Ratna Mudali* supra.

¹⁸ *Kuttichami Moothan v. Rama Pattar*, (1918) 41 Mad. 880.

¹⁹ *Atma Ram*, (1928) 25 Cr. L. J. 155, [1924] AIR (N) 121.

²⁰ *Sheo Shankar*, (1940) 15 Luck. 696.

²¹ (1894) 1 U. B. R. (1892-1896) 198.

²² *Mt. Zingoo*, (1893) 7 C. P. L. R. (Cr.) 45.

Charge—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows :—

That you, on or about the——day of——, at——, destroyed (or damaged or defiled) a certain place of worship, to wit——, [or a certain object, to wit——,] held sacred by (specify the class of persons) with the intention of thereby insulting the religion of (specify the class of persons insulted) [or with the knowledge, etc.]; and thereby committed an offence punishable under s. 295 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

295A. Whoever,¹ with deliberate and malicious intention² of outraging the religious feelings³ of any class⁴ of His Majesty's subjects, by words, either spoken or written,⁵ or by visible representations⁶ insults or attempts⁷ to insult the religion or the religious beliefs⁸ of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

COMMENT.

This section was introduced by the Criminal Law Amendment Act (XXV of 1927), s. 2, owing to the agitation following the decision of the Lahore High Court in the notorious *Rangila Rasul* case²³ in which it was held that s. 153A was not meant to stop polemics against a deceased religious leader however scurrilous and in bad taste such attacks might be. But in a subsequent case, known as the *Risala-i-Vartman* case,²⁴ in which this decision has not been referred to, it was decided that a scurrilous, vituperative, and foul attack on a religion or on its founder would come within the purview of s. 153A. The *Rangila Rasul* case was expressly dissented from in *Kali Charan Sharma v. King Emperor*²⁵ in which it was held that the book entitled "*Vichitra Jivan*" depicting the life of the Prophet Mohammed promoted feelings of enmity between Hindus and Mahomedans. The Legislature has enacted a special provision dealing with such offences. See Comment on s. 153A, *supra*.

The offence under this section is more serious than the one under s. 298. The prosecution must establish that the intention of the accused to outrage was malicious as well as deliberate, and directed to a class of persons and not merely to an individual. What is punishable under this section is not so much the matter of discourse, written or spoken, as the manner of it. If the words used caused persons to feel insulted but were only such as might possibly wound and in fact did so, then there is no offence under this section; if the words used were bound to be regarded by any reasonable man as grossly offensive and provocative, and were maliciously intended to be regarded as such, then an offence is committed. And it is no defence to a charge under this section for any one merely to say that he was writing a pamphlet in reply to one written by an adherent of another religion who has attacked his own religion. Prior to the enactment of this section, if the words were written, s. 298 had no application and recourse was held to s. 153A. If the intention of the accused is to wound the feelings of an individual orally by words or sound or gesture or by placing some object in the sight of such individual the offence falls under s. 298, and it is no defence for the accused to say that he did so in order to call attention to some matter in need of reform, as this is not the proper way to secure reform.¹

Object.—In the Statement of Objects and Reasons it was stated: "The prevalence of malicious writings intended to insult the religion or outrage the religious feelings of various classes of His Majesty's subjects has made it necessary to examine the existing provisions of the law with a view to seeing whether they require to be strengthened. Chapter XV of the Indian Penal Code, which deals with offences relating to

²³ *Raj Pal*, (1927) 28 P. L. R. 514, 28 Cr. L. J. 721, [1927] AIR (L) 590.

²⁴ *Devi Sharan Sharma*, (1927) 28 P. L. R. 497, 28 Cr. L. J. 794, [1927] AIR (L) 594;

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Kali Charan Sharma, (1927) 50 All. 157.

²⁵ (1927) 50 All. 157.

¹ *Shree Hpi*, [1939] Ran. 302.

religion, provides no penalty in respect of writings of the kind described above. Such writings can usually be dealt with under s. 153A of the Indian Penal Code as it is seldom that they do not represent an attempt to promote feelings of enmity or hatred between different classes. It must be recognized, however, that this is only an indirect way of dealing with acts which may properly be made punishable themselves, apart from the question whether they have the further effect of promoting feelings of enmity or hatred between classes. Accordingly it is proposed to insert a new section in Chapter XV of the Indian Penal Code, with the object of making it a specific offence intentionally to insult or attempted to insult the religion or outrage or attempt to outrage the religious feelings of any class of His Majesty's subjects".²

Scope.—This section has no retrospective effect, but if a new edition of a book, which was published before the enactment of that section, is published after its enactment, the author of the book can be convicted under this section if his connection with the publisher is established.³

1. 'Whoever'.—See Comment on s. 124, *supra*.

2. 'Deliberate and malicious intention'.—See Comment on s. 298 as to the meaning of 'deliberate intention'.

The word 'maliciously' is used in s. 219, *supra*. See Comment on that section.

The Select Committee in their report stated that the essence of the offence is "that the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention. We have accordingly decided to adopt the phraseology of section 298 which requires deliberate intention in order to constitute the offence with which it deals".⁴

"Further, we were impressed by an argument to the effect that an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made. We have therefore amplified the words 'with deliberate intention' by inserting reference to malice, and we think that the section which we have now evolved will be both comprehensive and at the same time of not too wide an application".⁵

3. 'Outraging the religious feelings'.—Section 298 uses the word 'wounding': this section uses the word 'outraging'. 'Outraging' is a much stronger word than 'wounding'. In Murray's Dictionary 'outrage' is explained as "to wrong grossly, treat with gross violence or indignity". The Select Committee in their report stated: "We think that to penalise even an intentional outrage or attempted outrage upon the religious feelings of any class would be casting the net too wide for the cases with particular reference to which the Bill has been introduced. At the same time, we realize that the reference to the outraging of religious feelings was inserted to provide for the case of an insult to the founder of a religion or a person held sacred by the followers of a particular religion where such an outrage does not amount to an insult of the religion. It has in one instance been held that an insult to the founder of a religion is not necessarily an insult to the religion although it may outrage the religious feelings of the followers of that religion. We have therefore provided that the new section shall only apply in cases where a religion is insulted with the deliberate intention of outraging the religious feelings of its followers".⁶

4. 'Class'.—See Comment on s. 153A, *supra*.

5. 'Written'.—See Comment on s. 124A, *supra*.

6. 'Visible representations'.—See Comment on s. 124A, *supra*.

7. 'Attempts'.—See Comment on s. 124A, *supra*.

8. 'Religious beliefs'.—The Select Committee in their report stated that "to make it clear that an attack on a founder is not omitted from the scope of the sec-

² *Gazette of India*, dated August 20, 1927, Part V, p. 213.

³ *Shib Sharma (Shiva Sharma)*, (1941) 16 Luck. 674.

⁴ *Gazette of India*, dated September 17, 1927

Part V, p. 251.

⁵ *Gazette of India*, dated September 17, 1927, Part V, pp. 251-52.

⁶ *Ibid.*, p. 251.

tion, we have specifically made punishable an insult to the 'religious beliefs' of the followers of any religion".⁷ "The violently abusive and obscene diatribe against the founder or prophet of a religion or against a system of religion may amount to an attempt to stir up hatred or enmity against the persons who follow that religion. To attribute to the Mahomedan religion the teachings of the doctrine of Dawood, a heretic, is insulting to that religion, and if done, deliberately and maliciously, would fall under s. 295A. There is a further reference to God, who, according to the Mahomedan religion, is a celibate, having given permission to Mahomedan males to have as many as four wives to boot and have as many non-Mahomedan women as they like and other liberties with regard to women. I agree with the Sessions Judge as regarding this as insulting to the Mahomedan religion and if the insult is malicious and deliberate with the intention of outraging the feelings of Mahomedans the publication would be an offence under s. 295A".⁸

Power to prevent religious disorders.—Under s. 42 (1) of the Bombay District Police Act (Bom. Act IV of 1890) the District Magistrate or First Class Magistrate has power to stop harangues or dissemination of pictures, symbols, mimic representations which may inflame religious animosity or hostility between different classes. Under the City of Bombay Police Act (Bom. Act IV of 1902), s. 23 (2) (c), the Commissioner of Police is invested with similar powers.

Confiscation.—The Provincial Government is empowered under s. 99A, Criminal Procedure Code, to forfeit any newspaper, book, or document which is deliberately and maliciously intended to outrage the religious feelings of any class of His Majesty's subjects by insulting the religion or the religious beliefs of that class.

PRACTICE.

Evidence.—Prove (1) that the accused spoke or wrote the words or made the visible representations.

As to evidence of publication see Comment on s. 124A.

(2) That the accused thereby insulted or attempted to insult the religion or the religious beliefs of a class of His Majesty's subjects.

(3) That the accused did so with the deliberate and malicious intention of outraging the religious feelings of that class.⁹

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Presidency Magistrate.

The Select Committee in their report stated: "We desire to observe that by the reference to a Court of Session we mean a Court of Session sitting with assessors."¹⁰

Sanction.—Sanction of Government is necessary for prosecution under this section.¹¹ The Select Committee in their report stated: "We are of opinion that a provision requiring the sanction of Government to the institution of a prosecution under this section is necessary in order to avoid fictitious or vindictive proceedings which would not be likely to result in a conviction".¹²

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, by writing (*or speaking*) the words (*mention them*) (*or by visible representations, viz.—*) insulted (*or attempted to insult*) the religion (*or the religious beliefs*) of a class of His Majesty's subjects, to wit—, with the deliberate and malicious intention of outraging the religious feelings of that class, and thereby committed an offence punishable under s. 295A of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session*).

And I hereby direct that you be tried [by the said Court (*when tried by a Presidency Magistrate omit these words*)] on the said charge.

⁷ *Gazette of India*, dated September 17, 1927, Part V, pp. 251, 252.

⁸ Per Baker, J., in *Ambalal Paragji*, (1929) Crim. Appeals Nos. 17 and 18 of 1929, decided by Patkar and Baker, JJ., on April 12, 1929 (Unrep. Bom.).

⁹ *Swami Chida Nand*, (1929) 31 P. L. R.

880, 32 Cr. L. J. 962, [1930] AIR (L) 350.

¹⁰ *Gazette of India*, dated September 17, 1927 Part V, p. 252.

¹¹ Criminal Procedure Code, s. 196.

¹² *Gazette of India*, dated September 17, 1927, Part V, p. 252.

296. Whoever voluntarily causes disturbance to any assembly¹ lawfully engaged in the performance of religious worship,² or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Disturbing religious assembly.

COMMENT.

Assemblies held for religious worship, or for the performance of religious ceremonies, are hereby protected from intentional disturbance.

Ingredients.—The section has the following essentials:—

1. Causing of disturbance voluntarily.
2. The disturbance must be caused to an assembly lawfully engaged in religious worship or religious ceremonies.

1. 'Voluntarily causes disturbance to any assembly'.—See s. 39, *supra*, as to the meaning of the word 'voluntarily'. Under this section proof of intention is unnecessary, as the Code supposes an intention to insult, if the disturbance, in fact, follow immediately as the result of the offender's act. Assemblies lawfully engaged in the performance of religious worship or religious ceremonies are hereby protected from voluntary disturbance and insult, be that religion true or false.

To constitute a 'disturbance' within the meaning of this section, a religious service need neither be stopped nor actually prevented from being carried on; nor need a religious assembly be really disturbed.¹³ The word 'disturb' means 'molest' or 'vex'. Peaceful worship must not be interfered with. Where one party could hear little or nothing of what the other recited, it was held that no disturbance "was caused within the meaning of this section".¹⁴ Where the accused spread false rumours which caused a religious procession to come to an end, it was held that they could not be convicted of causing disturbance within the meaning of this section.¹⁵

Mere playing of music before a mosque cannot amount to an offence under this section though a deliberate intention to disturb may not be necessary. Before that section could apply it must be found as a fact that there was a substantial and not merely fanciful disturbance of the worship.¹⁶

'Assembly'.—For the purpose of this section three persons gathering together for purposes of worship are sufficient to constitute an assembly.¹⁷

2. 'Lawfully engaged in the performance of religious worship'.—The assembly must have been lawfully engaged in the performance of such worship or ceremonies, i.e., they must be doing what they have a right to do.¹⁸ If the ceremony is commenced by an act which is not lawful, it cannot be said that the persons engaged in it are lawfully engaged from the mere circumstance of their falling into a posture of worship though such worship may be real.¹⁹

A religious assembly held in a public street, or thoroughfare, so as to cause obstruction, cannot be said to be "lawfully engaged" within the meaning of this section. In a full bench case of the Madras High Court²⁰ Subrahmania Ayyar, J., has observed that the object of this section presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in the assemblies exclusively; and not when they engage in worship in an unquiet place open to all the public as a thoroughfare. The user of a highway for religious worship is altogether wanting in lawfulness. Bhashyam Ayyangar, J., expressed the same opinion. But Davies and Benson, JJ., while agreeing that no disturbance was caused by the accused in the case before them, did not share the same view as Subrahmania Ayyar and Bhashyam Ayyangar, JJ., did, as to the lawfulness of religious worship on the highway. The former Chief Court of the Punjab adopted the view of Subrahmania Ayyar and

¹³ *Setvarajalu Naiker*, (1889) 1 Weir 259.

¹⁴ *Vijayaraghava Chariar*, (1903) 26 Mad. 554, F.B.

¹⁵ *Mohammad Hussain*, (1919) 17 A. L. J. R. 820, 20 Cr. L. J. 421, [1919] AIR (A) 188.

¹⁶ *Kolimi Mahabub Sahib*, [1945] 2 M. L. J. 200, [1945] M. W. N. 569.

¹⁷ *Aftab Mohd. Khan*, [1940] A. L. J. R. 206, 214, (1939) 41 Cr. L. J. 647, [1940] AIR (A) 291.

¹⁸ *Jaipal Gir v. Dharmapala*, (1895) 23 Cal. 60; *Ramzan*, (1885) 7 All. 461, 474, F.B.

¹⁹ *Jaipal Gir v. Dharampala*, (1895) 23 Cal. 60. ²⁰ *Vijayaraghava Chariar*, (1903) 26 Mad. 554, F.B.

Bhashyam Ayyangar, JJ. Where some boys were beating drums to summon people for joining a Moharram procession and on being asked by the accused, whose horse was frightened, they did not stop, and the accused then seized the drums, but restored them the next day, it was held that the accused's acts did not constitute an offence under this section, inasmuch as no assembly could be "lawfully engaged" within the meaning of this section on a highway.²¹ But where certain Lodhas, who, with the sanction of the public authorities, had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession, it was held that such attack constituted a disturbance to the performance of a religious ceremony.²² Where some Muhammadans took a *tazia* procession through a private grove as a result of which a dispute ensued between Hindus and Muhammadans and the accused were convicted of an offence under this section, and it appeared that the Muhammadans had not established any right to take the *tazia* through the grove, it was held that no offence under this section was committed.²³

The worship must be a real worship and not a cloak for doing something else, and the assembly must be lawfully engaged in worship.²⁴

CASES.

Disturbance caused by saying 'amin'.—A mosque was used by members of a sect of Mahomedans called the Hanifis, according to whose tenets the word 'amin' (amen) should be spoken in a low tone of voice. While the Hanifis were at prayers, R, a Mahomedan of another sect, entered the mosque, and in the course of the prayers according to the tenets of his sect, called out "amin" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship under this section. The Allahabad High Court ordered the case to be retried.²⁵ But in a subsequent case it was held that a mosque is a place where all sects of Mahomedans are entitled to go and perform their devotions as of right, according to their conscience; and a Mahomedan pronouncing the word 'amin' loudly, in the honest exercise of conscience, commits no offence or civil wrong,¹ though he may by such conduct cause annoyance to his fellow-worshippers in the mosque.² Any person, Mahomedan or not, who goes into a mosque not bona fide for a religious purpose but mala fide, for the purpose of disturbing others engaged in their devotions, will render himself criminally liable.³

Disturbance caused by saying 'mantra'.—Where the worshippers were reciting one *mantram* (precept from a religious work) and the accused recited another *mantram* in their presence and hearing, so as to distract the minds of the former from the act in which they were engaged, it was held that the act of the accused amounted to a disturbance of religious worship within the meaning of this section. To constitute the offence, it is not necessary that there should be an actual stay or interruption of the service.⁴

Disturbance caused by music.—Where the accused passed in a procession before a mosque with music while religious worship was going on between certain hours which, to the knowledge of the accused, were fixed for such worship by the District Magistrate, it was held that the accused by their action disturbed the worship and were guilty under this section, and that it was not necessary that the accused should have an active intention to disturb religious worship, if knowing they were likely to disturb it by their music they took the risk and did actually cause disturbance.⁵

English case.—Where in a contest for situation of a clerk to a meeting house, one clerk pulled the other from the desk, it was held to be a disturbance, although the statute prohibiting disturbance was intended principally to apply to persons who would oppose a form of worship inconsistent with their own tenets.⁶

²¹ *Dhalu Ram*, (1909) 10 P. L. R. 466, 10 Cr. L. J. 445.

²² *Masit*, (1911) 34 All. 78.

²³ *Bulgar Sing*, (1932) 10 O. W. N. 582, 34 Cr. L. J. 778, [1933] AIR (O) 196.

²⁴ *Jaipal Gir v. Dharmapala*, (1895) 23 Cal. 60.

²⁵ *Ramzan*, (1885) 7 All. 461, F.B.

¹ *Ata-ullah v. Azim-ullah*, (1889) 12 All. 494,

F.B. See *Fuzul Karim v. Haji Mowla Buksh*, (1891) 18 I. A. 59, 18 Cal. 448; *Moulvie Abdus Subhan v. Kurban Ali*, (1908) 12 C. W. N. 289.

² *Jangu Ahmadullah*, (1889) 13 All. 419, F.B.

³ *Ibid.*

⁴ *A. Krishnatatachari*, (1884) 1 Weir 259.

⁵ *The Public Prosecutor v. Sunku Seethiah*, (1910) 34 Mad. 92.

⁶ *Hube*, (1794) 5 T.R. 542.

PRACTICE.

Evidence.—Prove (1) the existence of the assembly in question.

(2) That such assembly was, at the time of the offence, engaged in performing religious worship or ceremony.

(3) That the assembly being engaged in such performance was lawful.

(4) That the accused caused disturbance of such assembly when so engaged.

(5) That the accused did as above voluntarily.

It is not necessary that the accused should have had an active intention to disturb religious worship. If he knew that he was likely to disturb it, it is sufficient.⁷

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, voluntarily caused disturbance to an assembly, to wit—, lawfully engaged in the performance of religious worship (*or religious ceremonies*) ; and thereby committed an offence punishable under s. 296 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

297. Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge¹ that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted² thereby,

commits any trespass³ in any place of worship⁴ or on any place of sepulture,⁵ or any place set apart for the performance of funeral rites⁶ or as a depository for the remains of the dead, or offers any indignity to any human corpse,⁷ or causes disturbance to any persons assembled for the performance of funeral ceremonies,⁸

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Object.—The section deals more especially with trespasses on places of sepulture and places set apart for the performance of funeral rites and as depositories for the remains of the dead. It extends the principle laid down in s. 295 to places which are treated as sacred.

The offence at which it strikes is intimately bound up with the commission of a trespass or, subject to that, of deliberately offering an indignity to a corpse or causing disturbance to a body of persons assembled for religious purpose.⁸

1. 'Intention . . . knowledge'.—The essence of this section is an intention, or knowledge of likelihood, to wound feelings or insult religion, and when with that intention or knowledge trespass on a place or sepulture, indignity to a corpse, or disturbance to persons assembled for funeral ceremonies, is committed, the offence is complete.⁹ Where owing to a dispute between the parties a delay occurred in digging a grave, and the corpse was not present, it was held that this section was not applicable.¹⁰ The section "does not make an act committed in defiance of it an offence when that act is committed with the intention of wounding the feelings of any person ; it is equally an offence if committed with the knowledge that the feelings of any person are likely to be wounded or the religion of any person is likely to be insulted thereby."¹¹ Persons who entered upon a burial place and ploughed up the graves were held to have committed an offence under this section, notwithstanding that their entry on the land was by the consent of the owner thereof.¹² Where the accused, who formed part of a

⁷ *The Public Prosecutor v. Sunku Seethiah*, (1910) 34 Mad. 92.

⁸ *Mustaffa Rahim v. Motilal*, (1909) 10 Cr. L. J. 160.

⁹ *Burhan Shah*, (1887) P. R. No. 26 of 1887.

¹⁰ *Ibid.*

¹¹ *Per Knox, J.*, in *Subhan*, (1896) 18 All. 395.

¹² *Ibid.*

committee whose duty it was to collect subscriptions to defray the cost of erecting a wall round a cemetery, stopped a corpse at the gate and demanded a fee before admitting it into the cemetery, and some discussion ensued during which the corpse was placed on the ground, but the party bearing the corpse were then admitted without payment, it was held that there was no indignity within the meaning of this section.¹³ Four co-owners of a plot of land used to bury their dead in that land. Two of them opened a saw-pit close to the graves of a third co-owner's relatives but did not disturb any of the graves. It was held that they had not committed any offence under this section.¹⁴

This section refers to "feelings" but not to "religious feelings". The kind of "feelings" which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual rather than a material nature, feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride. Section 298 expressly refers to "religious feelings."¹⁵

2. 'Likely to be insulted.'—An act which is done with the knowledge that a person is likely to consider that act as an insult to his religion, is an act by which 'religion is likely' to be insulted within the meaning of this section.

3. 'Commits any trespass.'—The word 'trespass' here implies not merely criminal trespass as defined in s. 441, but also an ordinary act of trespass, i.e., an entry on another's land without lawful authority with the intention specified in the section. The Allahabad High Court has laid down in two cases that the word 'trespass' in this section has not the same meaning as that in the expression 'criminal trespass' defined in s. 441. Knox, J., in a case said: "...I am not prepared to construe the word 'trespass' in the present section as it is defined in the case of criminal trespass under the Penal Code. In a section of this kind I see no reason for restricting the original meaning of the word, which covered any injury or offence done, and to couple it with entry upon property."¹⁶ The Calcutta High Court has similarly observed that the word 'trespass' in this section means "any violent or injurious act committed in such place and with such knowledge or intention as is defined in that section."¹⁷ Although a person may have obtained a decree for *khas* possession in respect of a piece of land and placed in possession thereof by the civil Court, if he damages structures erected over graves standing thereon and thereby wounds the feelings of the relatives of those buried, he commits the offence of trespass within the meaning of this section.¹⁸

In a case before the former Chief Court of the Punjab one Judge expressed his agreement with the Allahabad and Calcutta view, but another Judge did not agree with it.¹⁹ The Bombay High Court has laid down that the 'trespass' contemplated in this section is such a trespass as is defined in s. 441.²⁰

The Rangoon High Court has held that the word 'trespass' means any violent or injurious act committed in such place and with such knowledge or intention as is defined in this section. The accused, who had gone to the mosque for prayers, was asked, after the service, by some others why he had on former occasions abused the Moulvi and the congregation, and on his denial, an altercation ensued, when the accused abused all and sundry employing obscene epithets and threats. It was held that in order to convict the accused, it must be proved that he, with the intention of wounding the feelings of the Moulvi and the congregation, remained unlawfully within the mosque with intent thereby to insult or annoy them and that on the facts a conviction under this section was wrong.²¹

Where a joint owner of property entered into a grove for the purpose of demarcating his share and in doing so dug up certain graves, and exposed the bones of the persons buried in spite of the remonstrances of the relations of the buried persons, it was held that he had committed an offence under this section.²² Similarly, the

¹³ *Hajee Mahamed Ghouse Sahab*, (1903) 1 Weir 287.

¹⁴ *K. M. Hamin Khan*, (1881) 3 Mad. 178.

¹⁵ *Sanoo*, [1941] Kar. 316, 318.

¹⁶ *Subhan*, (1896) 18 All. 395, 396.

¹⁷ Per Richardson, J., in *Jhulan Sain*, (1913) 40 Cal. 548, 551. Followed in *Sanoo*, [1941] Kar. 316.

¹⁸ *Abdul Kader v. Abdul Kasim*, (1932) 36

C. W. N. 544, 33 Cr. L. J. 517, [1932] AIR (C) 459.

¹⁹ *Umar Din*, (1915) P. R. No. 23 of 1915, 16 Cr. L. J. 683, [1915] AIR (L) 409.

²⁰ *Mustaffa Rahim v. Motilal*, (1909) 10 Cr. L. J. 160.

²¹ *Mustan*, (1923) 1 Ran. 690.

²² *Ram Prasad*, (1911) 38 All. 773.

erection of a shed over a visible grave belonging to the complainant's family in a dis-used grave-yard claimed to be private property of the trespasser, with the knowledge that the feelings of the complainant would be likely to be thereby wounded, was held to be an offence under this section.²³ The accused dug up and levelled certain graves existing on a plot of land which had been sold to him by the *mujawars* of an adjoining shrine whose names appeared as owners in the revenue records. The relatives of the persons buried in those graves prosecuted the accused. It was held that he was guilty under this section for the act of a person who destroyed or disturbed a place of sepulture with the intention of wounding the feelings of any person or with the knowledge that the feelings of any person were likely to be wounded was wrongful and amounted to a trespass, no matter whether the land in which the place of sepulture was included did or did not belong to such person.²⁴

4. 'Any place of worship.'—The trespass must be in a place of religious worship with the knowledge that the feelings of persons would be wounded thereby.²⁵ Where a *mahar*, a low caste man, entered into a temple, he was held guilty of an offence under this section.¹ A Hindu, who had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mahomedan *fakir* was convicted under s. 295. It was held that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under this section.² Persons having sexual connection inside a mosque were held guilty of an offence under this section.³

Four accused entered the premises of the complainant and one of them demolished the wall which he was constructing and took a deity which was worshipped by the complainant and his family from the niche and threw it into a drain. It was held that the accused were guilty under this section.⁴

5. 'Any place of sepulture.'—Trespass on any place of sepulture comes within the purview of this section. But where there have been only a few isolated and secret cases of burial in the course of many years on a piece of property, that would not be enough to constitute it a place of sepulture.

6. 'Place set apart for the performance of funeral rites.'—The section contemplates disturbance of persons engaged in performing funeral ceremonies. Obstruction to the performance of obsequies comes under this section.⁵ But a Moharram procession is not a funeral ceremony within the meaning of this section.⁶

7. 'Offers any indignity to any human corpse.'—Where certain persons were convicted of having offered an indignity to a human corpse, inasmuch as they had by using their influence prevented the grave-diggers from digging a grave for the corpse of the complainant's son, on account of the complainant not having joined the Khilafat party, it was held that the accused had not committed any criminal offence. Stuart, J., observed: "I do not propose to expatiate upon the mentality of persons who, to support their views as to what they conceive desirable in politics, use their influence to prevent a man from burying his little child. But as the law stands they have not committed any criminal offence in this particular case. The act was an act of boycotting and was not a criminal act either under the Penal Code or any other law."⁷

8. 'Causes disturbance to any persons, etc.'—The word 'disturbance' implies some active interference in, or hindrance to, the performance of the funeral ceremonies. The grand-daughter-in-law of the complainant having died, the complainant and his relations took the body out to the cremation ground and were preparing to cremate it when the accused came there and asked them not to cremate the body, and on being asked why, said that they would state the reason to the police. It was held that the mere utterance of the words "do not cremate the body", un-

²³ *Jhulan Sain*, (1913) 40 Cal. 548.

²⁴ *Umar Din*, (1915) P. R. No. 23 of 1915, 16 Cr. L. J. 683, [1915] AIR (L) 409.

²⁵ *Bhagya*, (1880) Unrep. Cr. C. 148.

¹ *Ibid.*

² *Ratna Mudali*, (1886) 10 Mad. 126; *Nga Po San*, (1894) 1 U. B. R. (1892-1896) 199; *Gaja*, (1882) 5 C. P. L. R. (Cr.) 32.

³ *Maysud Husain*, (1923) 45 All. 529.

⁴ *Amir Hassan*, (1929) 21 P. L. T. 121, 41 Cr. L. J. 810, [1940] AIR (P) 414.

⁵ *Subramania v. Venkata*, (1883) 6 Mad. 254, 257.

⁶ *Ghosita v. Kalka*, (1885) 5 A. W. N. 49.

⁷ *Amanat*, (1921) 20 A. L. J. R. 93, 94, 23 Cr. L. J. 72, [1922] AIR (A) 184.

accompanied by any attempt to prevent the cremation or by any manifestation on the part of the accused of their intention to interfere if the complainant and his relations should persist in having the body cremated, could not be regarded as a disturbance to the persons assembled for the performance of the funeral ceremonies within the meaning of this section.⁸

PRACTICE.

Evidence.—Prove (1) that the place in question was (a) a place of worship; or (b) a place of burial, etc.

(2) That the accused committed trespass therein.

(3) That he did so (i) intending thereby to wound the feelings of some person, or to insult the religion of some person; or (ii) with the knowledge that the feelings of some person would be likely to be wounded thereby, or that the religion of some person would be likely to be insulted thereby.

Or prove the following points :—

(1) The existence of the human corpse.

(2) That the accused offered any indignity thereto.

(3) That he, when offering such indignity, intended or knew, etc., as in (3) above.

Or prove the following points :—

(1) That persons were assembled for performing funeral ceremonies.

(2) That the accused caused disturbance to such persons when assembled.

(3) That he did so intending thereby, or knowing, etc., as in (3) above.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, with the intention of wounding the feelings of— (*or of insulting the religion of—*) [*or with the knowledge that the feelings of— are likely to be wounded (or that the religion of— is likely to be insulted thereby)*] committed a trespass in a place of worship, to wit—, (*or on a place of sepulture, to wit—, or etc.*), and thereby committed an offence punishable under s. 297 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

298. Whoever, with the deliberate intention of wounding the religious feelings¹ of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Uttering words,
etc., with deliberate
intent to
wound religious
feelings.

COMMENT.

Object.—The authors of the Code say : “In framing clause 282 (this section), we had two objects in view; we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause.”⁹

Scope.—This section is much wider than s. 295 and includes any action which is known to wound the religious feelings of others.¹⁰

⁸ *Mangat*, (1918) P. R. No. 2 of 1919, 20 Cr. L. J. 145.

⁹ Note J, p. 137.

¹⁰ *Mir Chhittan*, [1936] A. L. J. R. 1197, 38 Cr. L. J. 202, [1937] AIR (A) 13.

1. 'Deliberate intention of wounding the religious feelings.'—The Law Commissioners observe: "The intention to wound must be *deliberate*, that is, not conceived on the sudden in the course of discussion, but premeditated; it must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him. In other places in the Code a party is held to be guilty if he causes a certain effect the causing of which is an offence, intending to cause that effect, or *knowing that his act was likely to cause it*. Here there is a marked difference. Although the party uttering offensive words might be conscious at the moment of uttering them that they were likely to wound the feelings of his auditors, yet if it were apparent that he uttered them on the spur of the occasion, in good faith, simply to further his argument—that he did not take advantage of the occasion to utter them in pursuance of a deliberate purpose to offend—he would not, we think, be liable to conviction under Clause 282 (this section). If however a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be that he had a deliberate intention of wounding the religious feelings of his hearer."¹¹

"We are, though not without hesitation, inclined to think that in the very peculiar circumstances of this country, discourse addressed to any person with the intention of converting him from the faith he professes, which, however it may wound his religious feelings, is not couched in insulting language, nor forced upon him in an insulting manner, should not be considered a crime."¹²

"In England an attempt to convert any one from the religion of the country by the most gentle and dispassionate address, is by law an offence; to attempt the same thing by contemptuous or vituperative language is an offence which would be severely punished in practice. But the reason is that conversion is not recognised as a legitimate object. The law assumes the truth of Christianity. But it is manifest that the Law and the Legislature of this country cannot assume the truth of any religion. And, as free discussion, or, in other words, attempts at conversion, is the best criterion of the truth of any thing the truth or falsehood of which is not already assumed by law to be beyond controversy, it seems to follow that a *bona fide* attempt to convert ought not in this country to be treated as a crime, even though the intention to convert be an intention to do so by wounding the religious feelings of the persons addressed. We apprehend it is almost impossible to convert a sincere or ardent votary of any faith without wounding his religious feelings in the early stages of the process."¹³

Deliberate intention of the accused may be inferred from his words as well as from his acts.

C A S E S .

Deliberate intention to wound religious feelings.—Interpolation of a forbidden chant.—Interpolation of a forbidden chant in an authorized ritual is an offence under this section.¹⁴

Killing cow or exhibiting cow's flesh.—Killing of a cow in the presence of Hindus¹⁵ or exhibiting cow's flesh by carrying it in an uncovered state round a village,¹⁶ with the deliberate intention of wounding the religious feelings of Hindus, is an offence under this section. Where there is no deliberate intention of wounding the religious feelings of Hindus, no offence is committed under this section.¹⁷ But it has been held that the religious feelings of Mahomedans are not wounded by the slaughter of goats by *jhatka* and exposing the carcass outside or selling its flesh inside a shop, as Mahomedans do not worship goats.¹⁸

No offence if religious feelings not wounded.—Swearing on cow's flesh.—Where the accused, while his caste-people were sitting to dine at the complainant's

¹¹ 2nd Rep., s. 252.

¹² *Ibid.*, s. 254.

¹³ *Ibid.*, s. 255.

¹⁴ *Narasimha v. Shree Krishna*, (1892) 2 Mad. Jur. 236.

¹⁵ *Mir Chhittan*, [1936] A. L. J. R. 1197, 38 Cr. L. J. 202, [1937] AIR (A) 13.

¹⁶ *Rahman*, (1893) 13 A. W. N. 144.

¹⁷ *Sheikh Amjad*, (1942) 21 Pat. 315.

¹⁸ *Kirpa Singh*, (1897) 13 Cr. L. J. 601.

house, called out in the hearing of all that they would be eating cow's flesh if they took food without them, which made them leave their dishes untouched, it was held that the accused could not be convicted under this section¹⁹

Wilful pollution of food served at caste dinner.—Where certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and after telling those who were seated to move to another place, which they refused to do, threw down a shoe amongst the men who were seated, and who in consequence left the food untouched, it was held that the persons who threw the shoe could not be convicted under this section.²⁰ This decision does not seem to be satisfactory. The authors of the Code have said that "the rendering the food of a Hindoo useless to him by causing it to be in what he considers as a polluted state is an injury"²¹ necessitating punishment.

Throwing of dirty clothes.—Where a woman threw a cloth, which she had been wearing at the time of her confinement after having given birth to an illegitimate child, on a person whom she alleged to be its father, it was held that that did not amount to an offence under this section as it deals with offences relating to religion and not to castes.²²

PRACTICE.

Evidence.—Prove (1) that the accused uttered the words, or made the gesture, etc.

(2) That he did so, intending to wound the religious feelings of any person.

(3) That such intention was deliberate.

To hold a person liable under this section the intention with which the words were uttered must be strictly proved; and it is not sufficient to show that the utterer knew that his act was likely to wound the religious feelings of any body.²³

"...it is not sufficient for conviction that a person should do one of the acts described with the knowledge that he is thereby likely to wound the religious feelings of any person, nor even that he should do it with that intention, unless the intention be deliberate."²⁴

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Magistrate, Presidency, or first or second class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, uttered the word (*specify it*) in the hearing of— [or made a sound, to wit—, in the hearing of—; or made a gesture, to wit—, in the sight of—; or placed a certain object, to wit—, in the sight of—] with the deliberate intention of wounding the religious feelings of the said person, and thereby committed an offence punishable under s. 298 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

¹⁹ *Dagadi*, (1892) Unrep. Cr. C. 592.

²⁰ *Moti Lal*, (1901) 24 All. 155.

²¹ Note J. p. 137.

²² *Tukaram v. Zeli*, (1892) 6 C. P. L. R. (Cr.)

²³ *Narasimha v. Shree Krishna*, (1892) 2 Mad. Jur. 236.

²⁴ Per Plowden, J., in *Habibullah*, (1889) P. R. No. 4 of 1890, at p. 9.

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

The following offences affect the human body. viz. :

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Unlawful homicide. <ol style="list-style-type: none"> (a) Culpable homicide. (b) Murder. (c) Homicide by rash or negligent act. (d) Suicide. 2. Causing miscarriage. 3. Exposure of infants and concealment of births of children. 4. Hurt. <ol style="list-style-type: none"> (i) Simple. | <ol style="list-style-type: none"> <ol style="list-style-type: none"> (ii) Grievous. 5. Wrongful restraint and wrongful confinement. 6. Criminal force. 7. Assault. 8. Kidnapping. 9. Abduction. 10. Slavery and forced labour. 11. Rape. 12. Unnatural offence. |
|---|--|

Of Offences affecting Life.

299. Whoever causes death¹ by doing an act² with the intention of causing death,³ or with the intention of causing such bodily injury as is likely to cause death,⁴ or with the knowledge that he is likely by such act to cause death,⁵ commits the offence of culpable homicide.

ILLUSTRATIONS.

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or cause death by doing an act that he knew was likely to cause death.

Explanation 1.⁶—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.⁷—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.⁸—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

COMMENT.

This section defines culpable homicide as the act of causing death (1) with the *intention* of (a) causing death, or (b) causing such bodily injury as is likely to cause death, or (2) with the *knowledge* that he is likely by such act to cause death.

The first and second clauses of the section refer to intention apart from knowledge and the third clause refers to knowledge apart from intention. Knowledge and intention must not be confused.¹

Homicide.—Homicide is the killing of a human being by a human being.² It is either (A) lawful, or (B) unlawful.

Lawful homicide, or simple homicide, includes several cases falling under the General Exceptions (Chapter IV).

Unlawful homicide includes (1) culpable homicide not amounting to murder; (2) murder (s. 300); rash or negligent homicide (s. 304A); and (4) suicide (ss. 305, 306).

(A) **Lawful or simple homicide.**—This may be divided into two classes—

1. **Excusable homicide.**—This class includes the following cases:—

(1) Where the death is caused by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act, in a lawful manner, by lawful means, and with proper care and caution (s. 80).

(2) Where the death is caused by a child, or a person of unsound mind, or an intoxicated person, as will come under ss. 82, 83, 84 and 85.

(3) Where the death is caused unintentionally by an act done in good faith for the benefit of the person killed, when

(i) he or, if a minor or lunatic, his guardian has expressly or impliedly consented to such an act (ss. 87, 88), or

(ii) where it is impossible for the person killed to signify his consent, or where he is incapable of giving consent, and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit (s. 92).

All the above cases are dealt with in the Chapter of General Exceptions.

2. **Justifiable homicide.**—This class includes cases where the death is caused—

(1) By a person, who is bound, or by a mistake of fact, in good faith, believes himself bound, by law (s. 76).

(2) By a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given him by law (s. 77).

(3) By a person acting in pursuance of the judgment or order of a Court of Justice (s. 78).

(4) By a person who is justified or who by reason of a mistake of fact, in good faith, believes himself to be justified by law (s. 79).

(5) By a person acting without any criminal intention to cause harm, and in good faith, for the purpose of preventing or avoiding other harm to person or property (s. 81).

(6) Where the death is caused in exercising the right of private defence of person or property (ss. 100, 103).

(B) **Unlawful homicide.**—Culpable homicide is the first kind of unlawful homicide. It is the causing of death by doing—

(i) an act with the intention of causing death;

(ii) an act with the intention of causing such bodily injury as is likely to cause death; or

(iii) an act with the knowledge that the act was likely to cause death.

Without one or other of these elements an act, though it may be in its nature criminal and may occasion death, will not amount to the offence of culpable homicide.³

The existence of an evil motive is not at all necessary. Malice is not made a necessary ingredient of the definition. Whatever may be the motive which incites the action and whether or not any motive whatsoever be discoverable, if the act falls within any of the above elements, and none of the General Exceptions (Chapter IV) is applicable, it is culpable homicide.

English law.—Manslaughter is the unlawful killing of another without malice aforethought, express or implied. It is of two kinds: (1) Voluntary; (2) Involuntary.

(1) Voluntary manslaughter: where a man greatly provokes another, and the

¹ *Aung Nyun*, [1940] Ran. 441, F.B.

² Stephen's Dig. of Cr. L., Art. 289.

³ *Rahee*, (1866) Unrep. Cr. C. 6.

other kills him; or where, upon a sudden quarrel, two persons fight and one of them kills the other.

These two cases are met with by Exceptions (1) and (4) to s. 300.

(2) Involuntary manslaughter: where death is caused by accident in doing an unlawful act not amounting to felony; or where death is caused by culpable neglect, i.e. while doing a lawful act in an unlawful manner.

The first case will not be culpable homicide under the Code as will appear from ill. (e) to this section; and the second case is separately provided for by s. 304A.

Under the English law, it is neither murder nor manslaughter unless the death takes place within a year and a day from the blow or other cause. If the deceased died after that time, the law would presume that his death had proceeded from some other cause.⁴ This rule is not adopted in the Code.⁵

1. 'Whoever causes death'.—'Death' means the death of a human being (s. 46). The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of the child has been brought forth, though the child may not have breathed or been completely born.⁶ Under the English law complete emergence of the child from the womb is necessary before it is recognized as a human being. It is immaterial if the person whose death has been caused is not the very person whom the accused intended to kill (see ill. (a) and s. 301). The offence is complete as soon as any person is killed. The Madras High Court has held, though not unanimously, that it is sufficient for the purpose of this section if criminal intention or knowledge on the part of the accused existed with reference to any human being, though the death of the person who actually fell a victim to the accused's act was never compassed by him. All that the section requires is, that there should be an intention to cause death or knowledge that death is likely to be the result, and there is nothing in the section which necessitates that the homicidal intention or knowledge must be with reference to the life of the person whose death is actually caused. Illustration (a) makes it quite clear that the Legislature deliberately employed general and unqualified language in order to cover cases where the person whose death is caused, by the act of the accused, was not the person intended to be killed by him, but some other person. In this case the accused wanted to kill a person on whose life he had effected large insurances, and to secure his object gave him some sweetmeat (*halva*) in which he had mixed arsenic and mercury in a soluble form, to eat. The man ate a portion of the sweetmeat at the house of the accused's brother-in-law, but not liking its taste, threw away the remainder on the spot. A daughter of the accused's brother-in-law picked up the sweetmeat without the knowledge of the accused, ate a portion of it herself, and gave some to another child who also ate it. The two children who had eaten the poisonous sweetmeat died from the effects of it, but the intended victim survived after considerable suffering. It was held by Benson and Abdur Rahim, JJ., (Sundara Aiyar, J., dissenting) that the accused was guilty of murder. Benson, J., said that "the section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he 'causes the death' of any one by doing an act with the intention of 'causing death' to anyone, whether the person intended to be killed or anyone else. This is clear from the first illustration to the section...Nor is it necessary that the death should be caused directly by the action of the offender, without contributory action by the person whose death is caused or by some other person. That contributory action by the person whose death is caused will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the above illustration, and that contributory action by a third person will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the second illustration...The language of the section and the illustration seem to me to show that neither the contributory action of Appala Narasimhulu (the accused) in throwing away part of the sweetmeat, nor the contributory action of the girl in picking it up and eating it prevent our holding that it was the accused who caused the girl's death".⁷

⁴ 1 Hawk. P. C., c. 18, s. 9; 1 East P. C. 344.

⁵ 1st Rep., ss. 327, 380.

⁶ *Vide* Explanation 3.

⁷ *Suryanarayana Murthy*, (1912) 22 M. L. J. 333, 336, 337, [1912] M. W. N. 136, 138, 13 Cr. L. J. 145, 146.

2. 'By doing an act'.—None of the endless variety of modes by which human life may be cut short before it becomes in the course of nature extinct, is excluded. Death may be caused by poisoning, starving, striking, drowning, and by a hundred different ways.

By s. 32 words which refer to acts done extend also to illegal omissions and the word 'illegal' is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action (s. 43, *supra*).

"In order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place", says Stephen,⁸ "to ascertain the duties which tend to the preservation of life. They are as follows:—A duty in certain cases to provide the necessities of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life. Illustrations of these duties are the duty of parents or guardians, and in some cases the duty of masters, to provide food, warmth, clothing, &c., for children; the duty of a surgeon to employ reasonable skill and care in performing an operation; the duty of the driver of a carriage to drive carefully; the duty of a person employed in a mine to keep the doors regulating the ventilation open or shut at proper times. To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal. In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability."

The authors of the Code say: "When acts are made punishable on the ground that those acts produce, or are intended to produce, or are known to be likely to produce, certain evil effects, to what extent ought omissions which produce, which are intended to produce, or which are known to be likely to produce, the same evil effects to be made punishable?"

"Two things we take to be evident; first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished: secondly, that all these omissions ought not to be punished. It will hardly be disputed that a gaoler who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant entrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. It is difficult to say whether a Penal Code which should put no omissions on the same footing with acts, or a Penal Code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

"It is plain, therefore, that a middle course must be taken; but it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn, it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include..."

"What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause, a certain evil effect; omissions which have caused, which have been intended

⁸ History of Criminal Law, Vol. III, p. 10.

to cause, or which have been known to be likely to cause, the same effect shall be punishable in the same manner, provided that such omissions were, on other grounds, illegal. An omission is illegal (see clause 28) if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

"We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z food, and by that omission voluntarily causes Z's death. Is this murder? Under our rule it is murder if A was Z's gaoler, directed by the law to furnish Z with food. It is murder if Z was the infant child of A, and had therefore a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z was a bedridden invalid, and A nurse hired to feed Z. It is murder if A was detaining Z in unlawful confinement, and had thus contracted (see clause 338) a legal obligation to furnish Z, during the continuance of the confinement, with necessaries. It is not murder if Z is a beggar, who has no other claim on A than that of humanity.

"A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off, it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (Clause 273). But if A be a mere passer-by, it is not murder."⁹

It will, therefore, appear that if death is caused—

(i) by an illegal omission with the intention that such omission should cause death;

(ii) by an illegal omission with the intention that such omission should cause such bodily injury as is likely to cause death;

(iii) by an illegal omission with the knowledge that death is likely to be the result of such omission;

it will be culpable homicide.

See cases under s. 300 relating to neglect to supply medical aid or food.

Death caused by effect of words on imagination or passions.—The authors of the Code say : "The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z's death, whether his words operated circuitously by inducing Z to swallow poison or directly by throwing Z into convulsions.

"...It would be most difficult to prove to the conviction of any Court that death had really been the effect of excitement produced by words; it would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, and on very peculiar constitutions, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and, supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a criminal Court that Z, the deceased, was in very critical state of health; that A, the heir to Z's property, had been informed by Z's physicians that Z's recovery absolutely depended on his being kept quiet in mind, and that the smallest mental excitement would endanger his life; that A immediately broke into Z's sick room, and told him a dreadful piece of intelligence, which was a pure invention; that Z went into fits, and died on the spot; that A had afterwards boasted of having cleared the way for himself to a good property by this artifice; these things being fully proved, no Judge could doubt that A had voluntarily caused the death of Z; nor do we perceive any reason for not punishing A in the same manner in which he would have been punished if he had mixed arsenic in Z's medicine."¹⁰

* Note M, pp. 138, 139, 140.

¹⁰ Note M, pp. 142, 143.

The following illustrations among others stood in the original draft Code¹¹ :—

“(b) A, with the intention or knowledge aforesaid, relates agitating tidings to Z, who is in a critical stage of a dangerous illness; Z dies in consequence. A has committed the offence of voluntary culpable homicide.

“(c) A, with the intention or knowledge aforesaid, gives Z his choice whether Z will kill himself, or suffer lingering torture; Z kills himself in consequence. A has committed the offence of voluntary culpable homicide.”

The Commissioners in their First Report¹² say : “Having maturely considered the matter, we come to the same conclusion with the authors of the Code, that if death is certainly caused by words deliberately used by a person with the intention of causing that result, or with the knowledge that in the condition of the party to whom the words are spoken it is likely that they will make such an impression upon him as to cause his death, and without any such excuse as is admissible under any of the provisions in the chapter of General Exceptions, there is no sufficient reason why that person should be excepted from the penalty of culpable homicide, any more than one who has caused death by the infliction of a bodily injury which he knew to be likely to cause death. Here is the wilful doing of that which is known to be likely to produce evil, manifesting the *mens rea* essential to criminal responsibility; the evil produced is death; the efficient cause, the words spoken. It is scarcely agreeable to reason, that having traced the effect to its cause, the law should refuse to acknowledge it as an effective cause; or that the Judge should be obliged to say, it is true the effect was produced by the operation of words, but words in law are not an act, therefore the speaker is not criminally responsible.”

English law.—The English law takes no cognizance of homicide unless death results from bodily injury, caused by some act or omission, as distinguished from death occasioned by an influence on the mind, or by any disorder or disease arising from such influence.

“If a man either by working upon the fancy of another or possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease, whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet in *foro humano* it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God.”¹³

Death caused without intention whilst doing unlawful act.—If death is caused under circumstances specified in s. 80, the person causing the death will be exonerated under that section. But if it is caused in doing an unlawful act, the question arises whether he should be punished for causing it. The authors of the Code remark : “It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it would be in the highest degree barbarous and absurd.”¹⁴ But if an offender while committing a crime causes death which he did not intend to cause, or knew himself likely to cause, he should be punished for the accident. “To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence. . . . Unhappily one of these hundreds attempts to take the purse of a gentleman who has a loaded pistol in his pocket. The thief touches the trigger, the pistol goes off, the

¹¹ Page 51.

¹² Section 249.

L. C.—44

¹³ 1 Hale P. C. 429.

¹⁴ Note M, p. 148.

gentleman is shot dead. To treat the case of this pickpocket differently from that of the numerous pickpockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death; to send them to the house of correction as thieves, and him to the gallows as a murderer, appears to us an unreasonable course . . .

"We trust . . . that we have judged correctly in proposing that when a person engaged in the commission of an offence causes death by pure accident, he shall suffer only the punishment of his offence, without any addition on account of such accidental death."¹⁵ See *ill. (c)* to this section which is contrary to English law. The Court of Criminal Appeal in England has held that if the proximate cause of an act leading to death is terror caused by another, the latter may be guilty of manslaughter, though he used no violence.¹⁶ If two people are fighting in anger and one of them falls over and is killed, it is a case of manslaughter against the other.¹⁷ If a person were standing at the edge of a cliff and another were to hold up his fist before him in a fighting manner, so that he fell over and was killed, it would be a case of manslaughter against that other.¹⁸ Causing death through flight or retreat from a reasonable apprehension of serious violence is at least manslaughter.¹⁹

English law.—If a person whilst committing an unlawful act accidentally kills another he would be liable for manslaughter or murder according as his act was felony or misdemeanour.²⁰ But in subsequent cases this principle has been considerably modified.²¹

3. 'With the intention of causing death.'—By 'intention' is meant the expectation of the consequence in question. "It was an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act."²² Intention does not imply or assume the existence of some previous design or forethought. It means an actual intention, the existing intention of the moment, and is proved by, or inferred from, the acts of the accused and the circumstances of the case.²³ Thus the deliberate use by a sane man of deadly weapons, the deliberate discharge of loaded fire-arms, leads at once to the inference that his intention was to cause death. No proof of intention beyond that which such an act of itself supplies is requisite.

The presumption of law is that a man intends the natural and inevitable consequences of his own acts. It is, therefore, not necessary to take into consideration the accused's state of mind, at the time of committing the act in question, for the purpose of determining whether he intended to cause death, or not.²⁴ In a Calcutta case, Mukerji, J., has observed that it is not always quite easy to apply the rule of English criminal law that a man must be presumed to intend the natural or probable consequences of his act to the Indian criminal law in view of the distinction that the Penal Code makes between intention and knowledge. On the question of knowledge much depends on the intellectual capacity of the actor.²⁵

The existence of intention is not to be inferred unless death follows as a natural and probable consequence from the act. Where, for instance, death is caused by a push or blow, which would not cause the death of a healthy person, because the person whose death is caused suffered from a disease, it would not be fair to infer intention or even knowledge. The consequence here is far from being the natural and probable consequence of the act done, and it must be supposed that the offender never contemplated the result. Some extrinsic evidence should be adduced and called for to show the real intent or knowledge in such a case, e.g., that the offender was aware of the disease and the blow was given on the diseased part. Thus where the death is caused by an extraordinary intervening circumstance, no presumption of intention or

¹⁵ Note M, pp. 149, 150.

¹⁶ *James Curley*, (1909) 2 Cr. App. R. 96.

¹⁷ Per Jelf, J., in *ibid.*, p. 97.

¹⁸ Per Lord Coleridge, J., in *ibid.*, p. 97.

¹⁹ *ibid.*, p. 109.

²⁰ *Hodgson's Case*, (1780) 1 Leach 6.

²¹ *Edmeads*, (1828) 3 C. & P. 390; *Collison*, (1831) 4 C. & P. 565; *Howell*, (1839) 9 C. & P. 437, 450; *Lee*, (1864) 4 F. & F. 63; *Warner*,

(1833) 5 C. & P. 525.

²² Per Lord Ellenborough, C. J., in *Dixon*, (1814) 3 M. & S. 11, 15.

²³ *Ghufar*, (1887) P. R. No. 62 of 1887.

²⁴ (1886) 1 Weir 300.

²⁵ *Hazrat Gul Khan*, (1927) 32 C. W. N. 345; 353, 47 C. L. J. 240, 29 Cr. L. J. 546, [1928] AIR (C) 430. See *Gahbar Pande*, (1927) 7 Pat. 638.

knowledge can be said to arise. The intention or knowledge must be proved as a matter of fact. There must be a specific finding of the intention to cause death.¹

No constructive, but an actual, intention to cause death is required.²

The 'intention' or 'knowledge' with which an act which caused death was committed is not constructive or a presumption of law, but a matter of fact to be judged of in each case, and proof of collateral facts to explain the motives and designs of the accused is admissible.³

Where death is caused by an act which is criminal in itself irrespective of its consequences, the degree of guilt of the offender depends on the intention or knowledge with which he did the act, and the sections under which he may be convicted are 302, 304, 325, 323 and 352 with variations on account of the weapon or means used, the provocation, and so forth.⁴

In order to possess and to form an intention there must be a capacity for reason. And when by some extraneous force the capacity for reason has been ousted, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. Obviously the degree of knowledge which any particular person can be assumed to possess must vary. For instance, the same degree of knowledge cannot be attributed to an uneducated as to an educated person. But to some extent knowledge must be attributed to every one who is sane.⁵

4. 'With the intention of causing such bodily injury as is likely to cause death.'—The connection between the 'act' and the death caused thereby must be direct and distinct; and though not immediate it must not be too remote. If the nature of the connection between the act and the death is in itself obscure, or if it is obscured by the action of concurrent causes, or if the connection is broken by the intervention of the subsequent causes, or if the interval of time between the death and the act is too long, the above condition is not fulfilled.

"It is indispensable that the death should be clearly connected with the act of violence, 'not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.'"⁶

The authors of the Code observe: "We long considered whether it would be advisable to except from this definition any description of acts or illegal omissions, on the ground that such acts or illegal omissions do not ordinarily cause death, or that they cause death very remotely . . .

"There is undoubtedly a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death; but if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide."⁷

"To justify a conviction of culpable homicide of any sort against an offender who has committed an intentional act causing bodily injury to another and which act was intended for some particular individual, there must at least be a finding that the offender intended by his act to cause bodily injury likely to cause death."⁸

'Intention of causing death' and 'intention of causing such bodily injury as is likely to cause death'.—The difference between these two expressions is a difference of degrees in criminality. The latter is a degree lower in the scale of criminality than

¹ *Muvvala Kondaiya*, (1882) 1 Weir 800.

² *Gureebollah*, (1886) 5 W. R. (Cr.) 42.

³ *Must. Danyah v. Mussamut Sooh*, (1852) N. A. R. 105; see also *Jowahir Singh*, (1893) P. R. No. 33 of 1894.

⁴ *Nga San Pe*, (1902) 1 L. B. R. 259.

⁵ *Dhirajia*, [1940] All. 647, 652.

⁶ Per Glover, J., in *Mahomed Hossein*, (1864) W. R. (Gap No.) (Cr.) 31.

⁷ Note M, pp. 141, 142.

⁸ Per Fox, J., in *Shwe Ean*, (1904) 3 L. B. R. 122, 124, 12 Burma L. R. 171, 175, 3 Cr. L. J. 355, 358.

the former. But as, in both cases, the object is the same, the law does not make any distinction in punishment.⁹

Cases.—Where the accused stuffed a cloth into the deceased's mouth in order to silence him, not with any idea of killing him, it could only be presumed that the accused knew they were likely in so doing to cause his death, and so were guilty of offences under ss. 304 and 395 and not under ss. 302 and 396.¹⁰ Where the accused gave blows on the head of the deceased with sticks and they intended or knew themselves to be likely to smash their victim's skull, it was held that they must be taken to have known that they were likely to cause the death of the victim, and were, therefore, guilty of culpable homicide not amounting to murder.¹¹ Where death was caused by beating a number of blows with a *lathi* but the injuries inflicted upon the deceased were all simple except one which fractured a finger bone and death was due to shock, it was held that the assailants did not intend to cause death or bodily injury as was sufficient in the ordinary course to cause death, but they must be presumed to have known that they were likely to cause death and that they were, therefore, guilty of an offence under the second part of this section.¹² The Madras High Court has on similar facts held that the act amounted to murder.¹³

Where the accused gave a blow to the deceased with the wooden handle of a hoe measuring three feet and ten inches and weighing eighty-two tolas, and it appeared that the accused gave only one blow on the spur of the moment on the thinner part of the head, it was held that the weapon could not be said to be a formidable one and that as the intention to kill could not be presumed, the offence was culpable homicide not amounting to murder.¹⁴

5. 'With the knowledge that he is likely by such act to cause death.'—Knowledge is a strong word and imports a certainty and not merely a probability.¹⁵ The knowledge referred to in this section and s. 300 is the personal knowledge of the person who does the act.¹⁶ If a man intentionally commits an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s. 336, 337, 338 or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender and placed in their appropriate place in the class of offences of the same character.¹⁷

In judging of knowledge had by the accused, we must consider the circumstances; the blow that to one person, or under ordinary circumstances, may not, in the ordinary course of nature, be likely to cause death, may yet be imminently dangerous to another, or under special circumstances. Where the accused kicked his wife, eight or nine years of age, on the back with his bare foot, from which kick she fell down and died immediately, it was held that he was guilty of culpable homicide not amounting to murder. The Court said: "To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such character that no reasonable man could be ignorant of the likelihood of its causing death."¹⁸ Where three persons attacked a fourth with *lathis*, the blows being directed at the head of that fourth, it was held that they must be fixed with the knowledge that they were likely to cause death.¹⁹ Any person who joins a body of men who are going to use

⁹ See *Nga Min Po*, (1900) 1 U. B. R. (1897-1901) 288; *Nga Shwe Baw*, (1900) 1 U. B. R. (1897-1901) 285.

¹⁰ *Sengoda Goundan*, [1915] M. W. N. 621, 16 Cr. L. J. 614, [1916] AIR (M) 651.

¹¹ *Mana*, (1930) 32 Bom. L. R. 1143, 32 Cr. L. J. 289, [1930] AIR (B) 488; *Bhikari*, (1934) 11 O. W. N. 851, 35 Cr. L. J. 1118, [1934] AIR (O) 405; *Sumer Singh*, [1941] O. W. N. 791, [1941] A. L. J. R. 348.

¹² *Bakhshish Singh*, (1924) 26 Cr. L. J. 890, [1925] AIR (L) 549.

¹³ *Kesava Chetty*, [1931] M. W. N. 266, 34 L. W. 631, 32 Cr. L. J. 623, [1931] AIR (M) 420.

¹⁴ *Nga Po Nyein*, (1933) 35 Cr. L. J. 43, [1933] AIR (R) 338.

¹⁵ *Gabhar Pande*, (1927) 7 Pat. 638, 643.

¹⁶ *Sunder Singh*, (1935) 14 Luck. 660.

¹⁷ *Ketabdi Mundul*, (1879) 4 Cal. 764.

¹⁸ *Ketabdi Mundul*, (1879) 4 Cal. 764, 767.

¹⁹ *Harnama*, (1921) 22 Cr. L. J. 276; *Belu*, (1925) 26 P. L. R. 702, 27 Cr. L. J. 29, [1925] AIR (L) 621; *Zahid Khan*, (1938) 14 Luck. 378.

lathi to attack others must know that it is likely that death may be caused and consequently if death is caused they are all liable and are guilty of offences of culpable homicide not amounting to murder.²⁰ Presumably everybody knows that the abdomen is a most delicate and vulnerable part of the human body, and if a man with that knowledge kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen which was normal, he should be presumed to have done so with the knowledge that by so kicking he was likely to cause death.²¹

Gross negligence may amount to knowledge.—If a person without exercising due care and caution does any act under a sudden impulse he will be presumed to have knowledge of the consequences arising from his act. Where the accused struck at with a club and killed a man, being at the time under the bona fide belief that the object at which he struck was not a human being but something supernatural, but, through terror, having taken no steps to satisfy himself that it was not a human being, he was held to have committed the offence of culpable homicide not amounting to murder.²²

'Intention of causing such bodily injury as is likely to cause death': 'Knowledge that he is likely by such act to cause death'.—The practical difference between these two phrases is expressed in the punishment provided in s. 304. But the phrase 'with the knowledge that he is likely by such act to cause death' includes all cases of rash acts by which death is caused, for rashness imports a knowledge of the likely result of an act which the actor does in spite of the risk.

If a man causes death by doing an act merely with the knowledge that he is likely by such act to cause death, the act comes within this section, and not within s. 300.²³

Cases.—Knowledge of probable consequence of act.—Beating.—Where the accused assaulted a thief so severely that one hundred and forty-one marks of separate blows were found on his body and several of his ribs were broken and he died;²⁴ where the husband and the father of a woman, who had been enticed away, lay in wait for the offender and beat him with sticks on the back and chest and he died from the effect of the blows;²⁵ where the accused beat a person with his hands and feet in a most merciless manner and caused his death;¹ where a man was beaten to such an extent that one of his thighs was a mass of bruises, both his legs were fractured below the knee and various other minor injuries were inflicted on the legs and on the trunk;² where a man killed his wife by a single blow,³ or a single forcible kick on her side;⁴ and where a mother took a heavy piece of wood and struck on the head of her daughter, about whom there was a gossip in the village, and the daughter died,⁵ it was held that they had committed culpable homicide not amounting to murder and that their offence fell under the latter part of s. 304.

Where the accused broke into a dwelling-house at night and, in order to evade arrest, struck wildly with a dangerous weapon, regardless of the effect of his blows, and by so doing actually caused the death of a person, he was held guilty of culpable homicide, notwithstanding that he never intended or knew himself to be likely to cause the death of such person.⁶ R struck G three blows with a *lathi*. One blow fractured the bones of the left forearm, another fractured a bone in the right hand, while the third fractured both bones of the left leg. In the case of the third injury gangrene supervened and G died in consequence. It was held that R was guilty of either culpable homicide not amounting to murder under s. 304 or causing grievous hurt.⁷ Where the accused inflicted four wounds none of which was on vital parts of

²⁰ *Sumer Singh*, [1941] O. W. N. 791, [1941] A. L. J. R. 348.

²¹ *Mansel Pleydell*, (1926) 27 Cr. L. J. 977, [1926] AIR (L) 313.

²² *Kangla*, (1898) 18 A. W. N. 163.

²³ *Attra*, (1891) P. R. No. 9 of 1891.

²⁴ *Man*, (1873) 5 N. W. P. 235; *Sat Narain*, (1935) 11 Luck. 51.

²⁵ *Faqir Muhammad*, (1890) P. R. No. 10 of 1890.

¹ *Nur Mohammad*, (1933) 34 P. L. R. 933, 35 Cr. L. J. 65, [1933] AIR (L) 883.

² *Inder Singh*, (1928) 10 Lah. 477.

³ *Karm*, (1892) P. R. No. 5 of 1893.

⁴ *Marimuthu*, (1923) 18 L. W. 188, [1923] M.

W. N. 796, 24 Cr. L. J. 721, [1924] AIR(M) 41.

⁵ *Public Prosecutor v. Madathi*, [1942] 1 M. L. J. 224, [1942] M. W. N. 169, (1942) 55 L. W. 71, 43 Cr. L. J. 671, [1942] AIR (M) 415 (2).

⁶ *Gujjar*, (1911) P. R. No. 12 of 1911, 12 Cr. L. J. 591.

⁷ *Rama Singh*, (1920) 42 All. 302. See *Ram Asre*, (1922) 26 O. C. 18, 24 Cr. L. J. 518, [1923] AIR (O) 97, which dissents from this case. It holds that the words in this section "or with the knowledge that he is likely by such act to cause death" must be interpreted in the light of s. 300 and similarly are inapplicable to a case where specific bodily injury is intentionally caused to a particular person.

the body, and the deceased died owing to septic poisoning in respect of two of them, two and a half months after the occurrence, and was sentenced to death under s. 302, it was held that the accused's intent was not to inflict bodily injury sufficient in the ordinary course of nature to cause death, but to cause bodily injury which was likely to cause death, the degree of probability as to death ensuing not being so high as to justify a finding of murder, and the conviction was altered to one under the first part of s. 304 and the sentence reduced to ten years' rigorous imprisonment.⁸ Where two girls were struggling for the possession of a handful of gram and the elder girl aged fifteen gave a blow with a thin stick to the younger girl aged eight whereupon the uncle of the latter came running to the place and gave a blow with a *lathi* (club) on the head of the elder girl and after the girl had fallen gave two more blows on her thigh, and the blow on the head caused fracture of the skull and the girl died, it was held that the accused was guilty of culpable homicide not amounting to murder.⁹ Where the assault was committed by an impulsive young man as a result of sudden excitement, and though he gave two blows to his victim, neither of the blows was aimed at a vital part of the body, and it appeared that it could not have been present to the mind of the accused that a stab on the frontal prominence of the hip would penetrate the abdominal cavity, it was held that the accused had no intention to cause death or such bodily injury as was likely to cause death, that at the most he could be burdened with knowledge that his act was likely to cause death and that he was guilty under the latter part of s. 304.¹⁰

Exorcising evil spirit.—Where the accused, in exorcising the spirits of a girl, whom they believed to be possessed, subjected her to a beating which resulted in her death, it was held that they were guilty of culpable homicide.¹¹ Although the intention of the persons who inflict beating in such circumstances is not to cause death but to exorcise the spirit they must be taken to have known that they are likely to cause death.¹² But where the injuries caused under like circumstances were not severe, the accused was acquitted.¹³ Where a man deliberately murdered his wife under the belief that she was haunted by evil spirits and that if he killed her the evil spirits would leave her, he was held guilty of murder.¹⁴ Where the accused murdered the deceased knowing full well the nature of his act, but under the belief that by so doing he was helping in the recovery of his wife and children, whose illness he attributed to the deceased, whom he believed to be a witch, it was held that the accused was guilty of murder.¹⁵ Where the accused possessed by a superstitious belief made an offering of his child to a crocodile in a certain tank, with a pure heart, believing that the crocodile, though it would doubtless take the child away, would return it unharmed and the child would thereafter lead a charmed life and attain to a good old age, it was held that, as the accused had no intention of causing death to the child, he was guilty of an offence punishable under the last clause of s. 304, as what he did, he did with knowledge that his act would result in the death of the child.¹⁶ The accused whose right hand was atrophied, deformed and weak, and unfit to handle a knife with it, in the superstitious belief that the deceased, an old lady of about sixty years, was a 'witch' who had been 'shadowing' a child of the family of the accused and was the cause of the illness, knocked her down, and throwing the whole weight of his body on her plunged a knife with his left hand (which was quite normal) in the temple of the deceased with deadly effect. It was held that the accused was guilty of murder. The fact that he plunged the knife in such a vital part of the deceased as the temple indicated that he could have had no other intention than to cause death.¹⁷

Unskilful medical treatment.—Where a man of full age submitted himself to emasculation, performed neither by a skilful hand nor in the least dangerous way, and

⁸ *Nga Po Chit*, (1928) 1 Ran. 199; *Abor Ahmed*, [1937] Ran. 393.

⁹ *Gabbar Pande*, (1927) 7 Pat. 638.

¹⁰ *Parmehsri Das*, (1933) 35 Cr. L. J. 1319, [1934] AIR (L) 332.

¹¹ *Jamaludin*, (1892) Unrep. Cr. C. 603; *Haku*, (1928) 10 Lah. 555. In a similar case the accused were held guilty of an offence under s. 304A because the girl had consented to the beating: *Nga Po Kyaw*, (1902) 1 U. B. R. (P. C.) 1.

¹² *Nga Po Tha*, (1917) 3 U. B. R. 54, 19 Cr. L. J. 375, [1918] AIR (UB) 24.

¹³ *Dhondi*, (1895) Unrep. Cr. C. 785.

¹⁴ *Seat Ali*, (1917) 18 Cr. L. J. 766, [1917] AIR (P) 503; *Sukni Chamain*, [1936] P. W. N. 389, 37 Cr. L. J. 543, [1936] AIR (P) 245.

¹⁵ *Mato Ho*, (1920) 1 P. L. T. 282, 21 Cr. L. J. 603, [1921] AIR (P) 63.

¹⁶ *Bharat*, (1920) 33 C. L. J. 179, 25 C. W. N. 676, 22 Cr. L. J. 526, [1921] AIR (C) 501.

¹⁷ *Des Raj*, [1939] Lah. 345.

died from the injury, the persons concerned in the fact were held guilty of culpable homicide not amounting to murder.¹⁸

Any person, whether licensed or unlicensed, who deals with the life or health of another person is bound to use competent skill and sufficient attention; if the patient dies for want of either, the person is guilty of manslaughter.¹⁹

Causing a person to be bitten by snake.—A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted, and to show his own skill and dexterity, but without any intention to cause harm to anyone, placed the snake on the head of one of the spectators. The spectator in trying to push off the snake was bitten, and died in consequence. It was held that the snake-charmer was guilty of culpable homicide not amounting to murder.²⁰ The accused who professed by tattooing to render persons immune from the effect of snake-bite, caused a poisonous snake to bite the deceased whom he had tattooed but who died. It was held that the burden of proving that the accused was justified in believing and did believe that he could give immunity lay on the accused and that as he failed to discharge the burden, he was guilty of culpable homicide not amounting to murder.²¹

Squeezing of testicles.—Where a woman, by gripping and squeezing the testicles of her husband, reduced them to a pulpy condition, thereby causing an injury which resulted in death due to the shock so inflicted on the nervous system, it was held that she was guilty of culpable homicide.²² Here the violence of the attack on the husband's delicate parts was sufficient to justify an inference that the wife had knowledge of the likely effect of her attack. But where death was caused not by the squeezing of the testicles but owing to the unsound bodily condition of the deceased and the medical evidence showed that the injury inflicted upon the deceased would not in normal conditions have endangered his life, it was held that the accused was guilty of hurt only.²³

Strangulation.—The deceased was grazing his sheep. The accused came along with a dog. The deceased hit the dog with a stick for having molested his sheep, whereupon the accused seized hold of him in a sudden temper, took the turban of the deceased from his head and strangled him to death. There had been no enmity between the two and it was a sudden and unpremeditated attack. It was held that the accused was guilty of culpable homicide and not murder, inasmuch as the injury which the accused intended to inflict was not sufficient in the ordinary course of nature to cause death, but the act of the accused was done with the knowledge that he was likely to cause death.²⁴

Injury causing death.—Where the deceased had beaten the accused with a shoe and being overpowered by others, the accused lost self-control and picked up a sort of wooden substance which was lying nearby and introduced it into the rectum of the deceased who died in consequence, it was held that the offence was one under s. 304, part II, and one not under s. 325.²⁵

English cases.—Where a person in *loco parentis* inflicted corporal punishment on a child, and compelled it to work for an unreasonable number of hours, and beyond its strength, and the child died, the death being from consumption, he was held guilty of manslaughter.¹ A schoolmaster, on the second day after a boy's return to school, wrote to the parent saying the boy was extremely obstinate, and ought to be severely and frequently beaten. The father replied, "I do not wish to interfere with your plan". Accordingly the schoolmaster beat the boy for two hours and a half secretly in the night with a thick stick until he died. It was held that, such punishment being excessive and unreasonable, the schoolmaster was guilty of manslaughter.² Where a father who, for some childish fault, gave an infant of two years and a half about a dozen

¹⁸ *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.

¹⁹ *Burdee*, (1916) 25 Cox 598.

²⁰ *Gonesh Dooley*, (1879) 5 Cal. 351. See *Poonai Fattamah*, (1869) 12 W. R. (Cr.) 7, 3 Beng. L. R. (A. Cr. J.) 25.

²¹ *Nga Ba Tu*, (1921) 11 L. B. R. 50, 23 Cr. L. J. 59, [1921] AIR (LB) 26.

²² *Kaliyani*, (1898) 19 Mad. 350.

²³ *Bai Jiba*, (1917) 19 Bom. L. R. 823, 18 Cr. L. J. 1010, [1917] AIR (B) 259.

²⁴ *Nanak*, (1931) 32 Cr. L. J. 1205, [1931] AIR (L) 189.

²⁵ *Bhola Nath*, (1931) 33 Cr. L. J. 365, 33 P. L. R. 49, [1932] AIR (L) 199.

¹ *Cheeseman*, (1886) 7 C. & P. 455.

² *Hopley*, (1860) 2 F. & F. 202.

strokes with a strap an inch wide and eighteen inches long, from the effects of which the child died, it was held that he was guilty of manslaughter.³

Death caused without intention or knowledge is not culpable homicide.—The offence of culpable homicide supposes an intention, or knowledge of likelihood, of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to a person who either is alive or who is believed by the accused to be alive.⁴ In the absence of such intention or knowledge, the offence committed may be the offence of causing grievous hurt,⁵ or simple hurt.⁶ When injuries have been followed by death and the question is what offence has been committed, it is not concluded by any backward reasoning as to presumable intention from the mere fact that injuries caused did not in fact result in death. What has to be seen is what degree of injury the accused actually intended and what he knew as to the consequences of such injury.⁷

The rule that where a single blow is inflicted and it is not shown that it was the intention of the accused to cause death, the offence committed by him, if his blow results in the death of his victim, would be culpable homicide not amounting to murder or grievous hurt, applies only to cases where the assault is committed on a sudden quarrel and without premeditation and not to cases where the assault is premeditated.⁸ The following observations are pertinent:—"It appears that there is a growing tendency among Sessions Judges to convict of the offence of grievous hurt in cases of offences against the person which have resulted fatally. The description of grievous hurt contemplated is practically never stated. In the great majority of cases, it could only be that mentioned in the 8th clause of s. 320, viz., 'any hurt which endangers life'. . . A person who voluntarily inflicts injury such as to endanger life must always, except in the most extraordinary and exceptional circumstances, be taken to know that he is likely to cause death. If the victim is actually killed, the conviction in such cases ought ordinarily to be of the offence of culpable homicide."⁹

Even in the case of gross negligence a man is liable for the natural consequence of his act. But where death results not as a direct consequence of the act of the accused, but from some other cause of which he was unaware, then the accused cannot be charged with culpable homicide. Where death is caused owing to the rupture of a diseased spleen and not violence, it is on this principle that the accused is convicted of hurt or grievous hurt.

Cases.—Where the accused by a single blow with a deadly weapon killed another who was entering at dead of night into a dark room, where the accused and his wife were sleeping, for the purpose of having criminal intercourse with her, it was held that he was guilty of causing grievous hurt only.¹⁰ Where, in the course of a trivial dispute, the accused gave the deceased a severe push on the back which caused him to fall on the road below to a distance of two cubits and a half, and in falling the deceased sustained an injury from which tetanus resulted which caused his death on the fifth day after, it was held that this was simply a case of using criminal force.¹¹ According to the English law this would have been treated as manslaughter.

A dispute arose between L and his half-brother B, which resulted in a scuffle between them. L was empty-handed but B had a stick. Seeing that G, brother of

³ *Griffin*, (1869) 11 Cox 402.

⁴ *Palani Goundan*, (1919) 42 Mad. 547, F.B.

⁵ *Megha Meeah*, (1865) 4 W. R. (Cr.) 39; *Chulundee Poramanick*, (1865) 3 W. R. (Cr.) 55; *Bhadeo Poramanick*, (1865) 4 W. R. (Cr.) 28; *Sheikh Solim*, (1866) 5 W. R. (Cr.) 41; *Madur Jolaha*, (1867) 8 W. R. (Cr.) 28; *O'Brien*, (1880) 2 All. 766; *Idu Beg*, (1881) 3 All. 776; *Iqbal Husain*, (1930) 7 O. W. N. 449, 31 Cr. L. J. 835, [1930] AIR (O) 252; *Palani Goundan*, [1934] M. W. N. 729. See, for further cases in which the act of the accused was held to be grievous hurt, Comment on s. 320.

⁶ *Punchanun Tantee*, (1866) 5 W. R. (Cr.) 97; *Bysagoo Noshyo*, (1867) 8 W. R. (Cr.) 29;

Safatulla, (1879) 4 Cal. 815; *Fox*, (1879) 2 All. 522; *Randhir Singh*, (1881) 3 All. 597; (1881) 1 Weir 288. See for further cases in which the act of the accused was held to be simple hurt, Comment on s. 319.

⁷ *Damullya Molla*, (1930) 34 C. W. N. 1127, 32 Cr. L. J. 187, [1931] AIR (C) 261.

⁸ *Nawab*, (1932) 33 P. L. R. 546, 33 Cr. L. J. 446.

⁹ Per Broomfield, J., in *Mana*, (1930) 32 Bom. L. R. 1143, 1144, 32 Cr. L. J. 289, [1930] AIR (B) 483.

¹⁰ *Chulundee Poramanick*, (1865) 3 W. R. (Cr.) 55.

¹¹ *Acharjys*, (1877) 1 Mad. 224.

B, was coming to help B, L entered into his house and came out with a chopper and attacked B inflicting more than one injury. L allowed himself to be disarmed by G who got some slight injuries. B was sent to the hospital from which he went away twice of his own accord. After his return the second time he died of septic pneumonia. It was held that as it might fairly be inferred that there was no intention of causing death, or even of causing such bodily injury as was likely to cause death, L could only be convicted of having caused grievous hurt.¹³ Where the deceased and his son made an attack on the accused who attacked the deceased though his life was not in danger and it appeared that the accused had no knowledge that the wounds he inflicted were likely to cause death, it was held that although he was not justified in attacking the deceased and his son with such ferocity as he did, the accused was guilty of grievous hurt.¹³

A youth of about eighteen had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock. It was held that, as death was not the natural consequence to be expected from a simple sexual offence, the accused was not guilty of culpable homicide.¹⁴ Where an old man as a result of being knocked over had some of his ribs broken and died, it was held that the act of knocking over though it resulted in his death was one that the accused could not reasonably have known to be likely to cause death and he was guilty of causing hurt with a lethal weapon under s. 325.¹⁵

Death due to diseased spleen or heart.—(1) **Grievous hurt.**—Where the accused gave a blow with a light bamboo stick, not more than an inch in diameter, to the deceased, who was suffering from a diseased spleen, on the region of that organ, he was held guilty of causing grievous hurt.¹⁶ The accused went to a place where a cart was standing, and presuming that it belonged to a man who was sleeping on a cot close by, roused him and told him to let him have the cart. The man explained that the cart did not belong to him and remarked at the same time that he was ill. The accused, thereupon, got irritated and pulled the cot about, causing the man to fall out of it, kicked him and struck him on the side or on the ribs with a stick. Owing to the injuries he had received, the man died very soon after. It was held that as the deceased was suffering from a diseased spleen the accused was guilty of causing grievous hurt.¹⁷ The accused, while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomited and bled from the nose, and within little more than an hour died. The death was caused by the rupture of the spleen. It was held that he was guilty of grievous hurt only.¹⁸ Where the main object of the accused was to rescue the cattle which the deceased had impounded and to give him a beating for refusal to surrender them, and no injury was inflicted on any vital part of the accused's body, and there was no evidence to show that the accused had any knowledge that the deceased had a badly enlarged heart on account of which he died, it was held that under the circumstances the accused could not be presumed to have had an intention to cause such bodily injury as was likely to cause death, and was guilty of an offence under s. 325 and not under s. 304.¹⁹ The accused sat on the chest of the deceased and began to strangle him and would not desist despite entreaties of relations. Suddenly the deceased died. According to medical evidence, death was caused by shock and internal bleeding due to rupture of the spleen, which was considerably enlarged, and not to strangulation. The other injuries were not sufficient to cause death if the spleen had not been ruptured. The fact of the spleen being enlarged was not known to the accused or the relations. It was held that the accused was guilty of culpable homicide under s. 304, second part, and that when death had occurred it was obviously unsatisfactory to find a man guilty of grievous hurt and the Legislature had taken into consideration that the intention to cause grievous hurt might be a more serious moral offence than the knowledge that death was likely

¹³ *Lal Singh*, (1918) 17 A. L. J. R. 56, 20 Cr. L. J. 137; *Bhure Khan*, (1927) 2 Luck. 433. See *Mussammatt Siryan*, (1915) 17 P. L. R. 185, 17 Cr. L. J. 270, [1916] AIR (L) 419.
¹⁴ *Teja Singh*, (1938) 35 Cr. L. J. 90, 34 P. L. R. 961, [1938] AIR (L) 733.

¹⁵ *Shambhu Khatri*, (1924) 3 Pat. 410.

¹⁶ *Raju*, (1938) 40 P. L. R. 562.

¹⁷ *Megha Meeah*, (1865) 2 W. R. (Cr.) 39.

¹⁸ *O'Brien*, (1880) 2 All. 766.

¹⁹ *Idu Beg*, (1881) 3 All. 776.

²⁰ *Bharat Singh*, (1932) 34 Cr. L. J. 99, 9 O. W. N. 665, [1932] AIR (O) 279.

to occur, by making imprisonment obligatory under s. 325 and not under s. 304, second part.²⁰

(2) **Hurt.**—Where the accused, having received great provocation from his wife, pushed her with both arms so as to throw her with violence to the ground, and after she was down slapped her with his open hand, and the woman died on account of rupture of her spleen which was diseased, it was held that the accused was guilty of causing hurt.²¹ Similarly, where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by her, the husband not knowing that the spleen was diseased, he was held guilty of causing hurt.²² The accused, dissatisfied and irritated by the lazy and inefficient manner in which a punkha cooly was managing a punkha, went up to him and struck him one or more blows. The cooly was suffering from a diseased spleen and died from the injuries he had received. It was held that the accused was guilty of causing hurt.²³ Where the accused threw a piece of a brick at the deceased which struck him in the region of the spleen and ruptured it, the spleen being diseased, it was held that he was guilty of causing hurt.²⁴ The accused was charged with having caused the death of one N by kicking him over the region of the spleen, being enraged at the latter having allowed his goats to stray into his fields. The medical evidence showed that the spleen of the deceased was enormously large, and slight injuries over the region of the spleen would be sufficient to cause its rupture which generally ended fatally. It was held that in the absence of satisfactory evidence to prove knowledge of the state of health of the deceased on the part of the accused, the conviction should be for hurt only.²⁵

6. Explanation 1.—A person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerating the death of that other, is deemed to have ‘caused his death’. But one of the elements of the offence of culpable homicide must be present.¹ The Explanation assumes that the bodily injury was inflicted with the intention of causing death, or the knowledge that it would be likely to cause death. Where there is no such intention or knowledge the offence is not culpable homicide under the first two parts of this section.²

“An offence affecting the life of a person who must soon die either from a mortal disease or in course of nature from old age and decay, is not a less offence than one which affects the life of a person in strong health. The offender causes death in the one case by accelerating that event by a few months, or days, or hours; in the other case, possibly, he hastens the event by many years. The real difference between the two cases is not in point of law, but in respect of the degree of proof, requisite to show the cause of death. For where the death of a person who receives some bodily injury while labouring under a disease is the subject of enquiry, the Court in estimating the evidence must consider whether it is sufficiently proved which of the two causes, the disease or the bodily injury to the deceased person, is the cause of his dying on the day when his death occurs. It is not necessary (if it were possible) that the evidence should enable the Court to apportion the two causes and the degree in which each of them contributes to the result. But the Court must be satisfied (1) that the death at the time when it occurs is not caused solely by the disease; and (2) that it is caused by the bodily injury to this extent, that it is accelerated by such injury. Suppose A is ill of small-pox, and Z gives him pills in such doses that the disease is aggravated and death is accelerated; Z has *caused death*, notwithstanding that it may be proved that A must have eventually died of the small-pox.”³

The English law is to the same effect.⁴ The accused one night came home before his wife, and he was in a condition of violent excitement, and was overheard to express a determination of “giving his wife something” when she came in. When the woman did come home there were at once sounds of an altercation, and shortly afterwards the woman was seen by several witnesses to rush from the house into the road closely pursued by the accused, who was at the same time using violent threats towards her. She was then seen to fall into the roadway, and lying there she was kicked

²⁰ *Munnialal*, [1948] All. 853.

²¹ *Punchanun Tantee*, (1866) 5 W. R. (Cr.) 97.

²² *Bysagoo Noshyo*, (1867) 8 W. R. (Cr.) 29.

²³ *Fox*, (1879) 2 All. 522.

²⁴ *Randhir Singh*, (1881) 3 All. 597; (1881) 1 Weir 288.

²⁵ *Aiman*, (1904) 1 A. L. J. R. (Notes) 162.

¹ *Fox*, (1879) 2 All. 522.

² *Ismail*, (1917) 11 S. L. R. 79, 19 Cr. L. J. 319, [1918] AIR (S) 60.

³ *M. & M.* 257.

⁴ *Murton*, (1862) 3 F. & F. 492; *Martin*, (1832) 5 C. & P. 128.

on the left forearm by the accused. When picked up she was found to be dead. The *post mortem* examination showed that the deceased was suffering from a persistent thymus gland, and the medical evidence was to the effect that any combination of physical exertion and fright or strong emotion might occasion the death of the person having such gland. It was held that the evidence that the death of the deceased was due to combination of physical exertion and fright, or strong emotion caused by an illegal act of the accused, was sufficient to support a conviction for manslaughter without proof of actual violence on his part occasioning the death.⁵

The Calcutta High Court has held that if a person was suffering from an injury which would render injuries (which would not have a fatal effect to an ordinary man) fatal to that person, it does not necessarily follow, as it would in the case of a healthy man, that the person inflicting those injuries knew it to be likely that death would be caused thereby.⁶

Where a number of persons armed with *lathis* make a concerted attack upon another man and practically kill him on the spot inflicting severe injuries on the head, it must be supposed that they had the intention, if not to kill him, at any rate, to cause such hurt as they must have known to be imminently dangerous and likely to cause his death and each of the party contributing to the result must be found guilty of murder. Where the attack was of such a reckless character and the injuries of such a nature that the assailants must have known that they were likely to endanger that man's life the fact that the deceased suffered from some abnormality, such as a fatty heart, cannot affect the intention and knowledge of the accused. Even if the existence of the fatty heart contributed to the death Explanation 1 to this section makes the offence murder.⁷

7. Explanation 2.—‘By resorting to proper remedies death... might have been prevented’.—The Explanation reproduces the English law. The authors of the Code say: “We see no reason for excepting such cases [the cases of persons who die of a slight wound, which, from neglect or from the application of improper remedies, has proved mortal] from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death; yet both these points might be fully established. Suppose such a case as the following:—It is proved that A inflicted a slight wound on Z, a child who stood between him and a large property; it is proved that the ignorant and superstitious servants about Z applied the most absurd remedies to the wound; it is proved that under their treatment the wound mortified, and the child died. Letters from A to a confidant are produced; in those letters, A congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates, with exultation, the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. It appears to us, that if such evidence were produced, A ought to be punished as a murderer.

“Again, suppose that A makes a deliberate attempt to commit assassination; in the presence of numbers he aims a knife at the heart of Z, but the knife glances aside, and inflicts only a slight wound... In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that, in consequence, he is attacked with tetanus and dies. Here again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A as a murderer.”⁸

“Although proof be given that the wound or other bodily injury if skilfully treated might not have resulted in death, yet if in fact death is the result, the wound ‘causes’ death. And it does not avail the offender to prove that the first might have been removed or rendered inoperative by the application of proper remedies and that death might thus have been prevented. ‘Proper remedies and skilful treatment’ may not be within the reach of the wounded man; or, if they are at hand, he may be unable

⁵ *Hayward*, (1908) 21 Cox 692.

⁶ *Ainuddi Chowkidar*, (1921) 34 C. L. J.

515, 23 Cr. L. J. 344.

⁷ *Kamaya*, [1935] M. W. N. 51.

⁸ Note M, p. 148.

or unwilling to resort to them. But this is immaterial so far as relates to the due interpretation of the words 'cause of death'. The primary cause which sets in motion some other cause,—as the severe wound which induces gangrene or fever,—and the ultimate effect, death, are sufficiently connected as cause and effect, notwithstanding that the supervening sickness or disease might have been cured by medical skill. All that it is essential to establish is, that the death has been caused by the bodily injury, and, if there be any intervening cause, that it is connected with a sufficient degree of probability with the primary one.

"Cases not reached by either of the above Explanations may occur, in which there will be some perplexity in determining the *cause of death*. Suppose a person who has received some slight wound or hurt resorts not to 'proper remedies and skilful treatment,' but to some ignorant and unskilled adviser; and that, in consequence, the bodily injury is aggravated by the application of unwholesome salves and death ensues—or suppose he drinks spirit immoderately in a hot climate or suppose he is carried to a hospital where erysipelas happens at the time to be prevalent, and catches the disorder and dies of it—or again suppose the bodily injury renders the amputation of a limb necessary, and that the patient is soon afterwards attacked by some complaint innocuous to a person in sound health, but which proves fatal to him in his weakly condition. In all these cases, if no bodily injury had been received, the man would not have died; and it may therefore be said that the injury is in some sense the cause of death. But it seems indispensable that the death should be connected with the act of violence or other primary cause not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.

"In each of the instances we have last supposed, the bodily injury caused death under extraordinary circumstances. Its direct influence in producing that result was small, and the intervening circumstances which more immediately caused death could scarcely have been foreseen. Nevertheless the use of the words 'to cause death' without qualification or exception, brings such cases within this term of the definition of the offence of culpable homicide. The difference between these cases and others of less complexity is a matter to be considered by the Court in estimating the effect of the evidence. But it is difficult to conceive any evidence sufficient to establish an intention to cause death on the part of a person who inflicts a bodily injury which ends so unexpectedly in death".⁹

Where an injury is intentionally inflicted the defence that no proper medical treatment was forthcoming does not exonerate the person who caused the injury from guilt of murder if he intended that the injury should be sufficient in the ordinary course of nature to cause death, or knew that it was likely to cause death to that person. It does not exonerate him from guilt of culpable homicide if death ensues as a natural or likely consequence. Such a person is deemed to have caused the death and his degree of criminal responsibility must depend on the knowledge or intention to be gathered from the proved facts.¹⁰

If death results from an injury voluntarily caused, the person who causes that injury is deemed to have caused death, although the life of the victim might have been saved if proper medical attention had been given, and even if medical treatment was given but was not the proper treatment, provided that it was administered in good faith by a competent physician or surgeon.¹¹

When the disease which actually causes death is meningitis, peritonitis, tetanus, pneumonia, etc., and it is the natural and probable result of the injury which the person inflicting the injury has caused, the person who inflicts the injury must be held responsible for the disease arising from the injury.¹²

In order that a person should be guilty of culpable homicide, the injury inflicted must be a proximate cause of death, and not a remote cause connected with the death by a chain of intervening events. The death of a person must be at least a likely consequence of the injury received.¹³

⁹ M. & M. 228.

¹⁰ *Abor Ahmed*, [1937] Ran. 384, F.B.; *Mahanti Sreeramulu*, [1939] M. W. N. 1129, 50 L. W. 787.

¹¹ *San Pai*, (1936) 14 Ran. 643, corrected

in *Abor Ahmed*, [1937] Ran. 384, F.B.

¹² *Nga Ba U*, (1936) 39 Cr. L. J. 217, [1937] AIR (R) 429.

¹³ *Nga Moe*, [1941] Ran. 138.

Cases.—Where a wound is inflicted under circumstances that immediate death would make the person inflicting it guilty of murder, he will be liable for murder even if the death ensues from an operation thought necessary and performed by competent medical advisers, who considered that the wound was dangerous;¹⁴ nor will the liability be less even though life may have been preserved but for the refusal of the deceased to submit to a surgical operation.¹⁵ Where the accused was indicted for the murder of his wife by kicking her, and a surgeon administered brandy to her as a restorative, some of which went the wrong way, and entered her lungs, and might have caused death, it was held that he was guilty of manslaughter.¹⁶ Where a person inflicted grievous injuries on another, and as a result of these injuries pneumonia supervened and the latter died, it was held that the offence committed was that of murder.¹⁷ Similarly, where an injury was inflicted on a person by a blow which in the judgment of competent medical men rendered an operation advisable, and, as a preliminary to the operation, chloroform was administered to the patient, who died during its administration, and it was agreed that the patient would not have died but for its administration, it was held that the person causing the injury was liable to be indicted for manslaughter.¹⁸ But where a person causes simple injury to another and the latter dies of septic meningitis owing to neglect of treatment and application of wrong remedies, the person causing the injury is not guilty of culpable homicide not amounting to murder.¹⁹ If the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill-applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter according to circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of gangrene or fever, is the immediate cause of the death, *causa causati*. Thus, it was resolved, that if one gives wounds to another who neglects the cure of them or is disorderly, and does not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter according to the circumstances; because if the wounds had not been, the man had not died; and, therefore, neglect or disorder in the person who receives the wounds shall not excuse the person who gave them.²⁰ But where a person is seriously injured by the accused, and as a result of the injuries a gangrene sets in and becomes the immediate cause of death of the victim, the accused is guilty of murder.²¹

8. Explanation 3.—This Explanation gets over the difficulty of proving the 'birth' of a child as required by English law. Under the English law the child should have completely emerged to constitute it a human being.

The causing of the death of a child in the mother's womb is not homicide; such an offence is punishable under s. 315. "The life of a child, while it remains wholly within womb, is a part of the mother's life, and not a separate and distinct existence. But as soon as any part of the child has been brought forth from the womb, the child is accounted a living human being, to cause whose death may be culpable homicide. It is further explained that this may be so though the child may not have breathed. The mere fact of having breathed is a very uncertain indication of life in such cases, for it is well known that many children are wholly brought forth and eventually live, and yet do not breathe for some time after their birth.

"It may be said that a child is not completely born until after the umbilical cord has been severed, notwithstanding that the mother has been completely delivered, and that the child is in existence. But it is obvious that to cause the death of such a child ought to be deemed an offence of the same nature, as the causing of the death of a child one month, one year, or ten years old. The Explanation expressly states that

¹⁴ *Pym*, (1846) 1 Cox 330.

¹⁵ *Holland*, (1841) 2 Mood. & R. 351.

¹⁶ *McIntyre*, (1847) 2 Cox 370.

¹⁷ *Nur Muhammad*, (1929) 31 Cr. L. J. 198.

¹⁸ *Davis*, (1883) 15 Cox 174. See, to the same effect, *Kalu Kaan*, (1911) 5 Cr. L. Rep. 35.

¹⁹ *Sobha*, (1935) 11 Luck. 401; *Nga Ba Min*, (1935) 37 Cr. L. J. 205, [1935] AIR (R)

418.

²⁰ 1 Hale P. C. 428; *Flynn*, (1868) 16 W. R. (Eng.) 319. See, to the same effect, *Mammi*, (1927) 29 Cr. L. J. 345; *Nga Paq*, (1936) 38 Cr. L. J. 103, [1936] AIR (R) 526.

²¹ *Lal Singh*, (1927) 39 Cr. L. J. 205, [1928] AIR (L) 81.

complete birth is not requisite. Instead of an uncertain period which it would be difficult to define satisfactorily and which would, in many cases of infanticide, greatly add to the difficulty to prove a definite and readily ascertained point of time (that is, the time when any part of the child is brought forth) is fixed, to denote when the child may become a subject of culpable homicide."²² Under this Explanation it must be proved not only that the child breathed and was therefore a living child (for that might have been done while it was still entirely in the womb), but that it breathed after it had wholly or partially emerged from its mother's womb.²³

The use of the word 'child' seems to assume that the foetus must have assumed the human shape.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death,¹ or—

*2ndly*².—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

*3rdly*³.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

*4thly*⁴.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

ILLUSTRATIONS.

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1⁵.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above Exception is subject to the following provisos :—

First⁶.—That the provocation is not sought or voluntarily pro-

²² M. & M. 231.

²³ *Mussammatt Budho*, (1915) P. R. No. 29 of 1915, 17 Cr. L. J. 20, [1916] AIR (L) 184.

voked by the offender as an excuse for killing or doing harm to any person.

*Secondly*⁷.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

*Thirdly*⁸.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

*Explanation*⁹.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

ILLUSTRATIONS.

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

*Exception 2*¹⁰.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of the defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION.

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

*Exception 3*¹¹.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.¹²—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.¹³—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

ILLUSTRATION.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

COMMENT.

Section 299 defines the offence of culpable homicide. This section says when culpable homicide amounts to murder. In the Penal Code 'culpable homicide' is used as a generic term, and is exhaustively sub-divided into two species, namely, culpable homicide amounting to murder (s. 300, cls. 1, 2, 3, 4) and culpable homicide not amounting to murder (s. 299 and Exceptions to s. 300). According to Sir Fitz-James Stephen the definitions of 'culpable homicide' and 'murder' are the weakest part of the Code as they are defined in terms closely resembling each other.

Culpable homicide is murder where the party inflicting the injury does it either with the intention that it should cause death or with the knowledge that it may do so. It will not be murder if the case falls within any of the Exceptions. Where there is neither intention, knowledge, nor likelihood that the injury will or can result in death, the offence would be neither murder, nor culpable homicide not amounting to murder, but would be voluntarily causing grievous hurt or hurt and the conviction in such a case would be either under s. 325 or s. 326 according to the nature of the weapon used²⁴ or under s. 323.

The Code nowhere makes premeditation a necessary concomitant to murder. Whatever the motive may be, or whether nor not any motive whatsoever be discoverable, the sole point for inquiry is, whether the person inflicting the injury did so with the intention or knowledge as specified in the section.²⁵

Scope.—An offence cannot amount to murder, unless it falls within the definition of culpable homicide; for this section merely points out the cases in which culpable homicide amounts to murder. But an offence may amount to 'culpable homicide and yet may not amount to murder.

In deciding the question whether culpable homicide amounts to murder, it will be erroneous to convict the accused of murder, simply because there is nothing to bring him under any of the exceptions reducing the offence to one not amounting to murder, and it is the duty of the Court to consider, in the first place, whether the element or elements which constitute the offence of murder, as defined in this section, exist.¹ In *Queen v. Sheikh Bazu*,² Peacock, C.J., observed: "It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in s. 300. To render culpable homicide murder, the case must come within the provisions of clauses 1, 2, 3, or 4 of s. 300".

English law.—Murder is unlawfully causing the death of another with malice aforethought express or implied. Malice aforethought, in murder, practically means—

(1) An intent to kill or do grievous bodily harm to the person who is killed.

(2) An intent to kill or do grievous bodily harm to anyone else.

²⁴ See *Ghulam Muhay-ud-din*, (1921) 22 Cr. L. J. 658.

²⁵ *Mahomed Elim Abdool Kurreem*, (1865) 3 W. R. (Cr.) 40.

¹ *Pasput Gope v. Ram Bhajan Ojha*, (1897) 1

C. W. N. 545; *Attria*, (1891) P. R. No. 9 of 1891; *Sheikh Pyao*, (1883) & P. R. No. 27 of 1883.

² (1867) 8 W. R. (Cr.) 47, 51, Beng. L. R. (Sup. Vol.) 750, F.B.

(3) An intent to do any criminal act which will probably cause death or grievous bodily harm to some one.

(4) An intent to oppose by force any officer of justice who is lawfully arresting or keeping in custody some one whom he is entitled to arrest or keep in custody, provided the accused knows that he is such officer of justice.

Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. In every charge of murder, if the prosecution have proved homicide, namely, the killing by the accused, the prosecution must prove further that the killing was malicious and murder, as there is no presumption that the act was malicious, and at no point of time in a criminal trial can a situation arise in which it is incumbent upon the accused to prove his innocence, subject to the defence of insanity and subject also to any statutory exception. Where intent is an ingredient of a crime there is no onus on the accused to prove that the act alleged was accidental.³

Culpable homicide and murder distinguished.—The distinction between these two offences is very ably set forth by Melvill, J., in *Reg. v. Govinda*,⁴ in which the accused knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain and she died in consequence. The Court held that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed was not murder but culpable homicide. The learned Judge said :

"For convenience of comparison, the provisions of Sections 299 and 300 . . . may be stated thus :—

SECTION 299.

A person commits culpable homicide, if the act by which the death is caused is done

- (a) With the intention of causing death ;
- (b) With the intention of causing such bodily injury as is *likely* to cause death ;
- (c) With the knowledge that . . . the act is *likely* to cause death.

SECTION 300.

Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done

- (1) With the intention of causing death ;
- (2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the *person to whom the harm is caused* ;
- (3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death ;
- (4) With the knowledge that the act is *so imminently dangerous that it must in all probability* cause death, or such bodily injury as is likely to cause death.

"I have underlined the words which appear to be to mark the differences between the two offences.

(a) and (1) show that where there is an intention to kill, the offence is always murder.

"(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide ; if it is the most probable result, it is murder.

"The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death. The illustration given in the section is the following :—

'A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in

³ *Woolmington v. The Director of Public Prosecutions*, [1935] A. C. 462; *Parbhoo*, [1941] All. 843.

⁴ (1876) 1 Bom. 342, 344-346. See *Inder*

L. C.—45

Singh, (1928) 10 Lah. 477, where also the elements of ss. 299 and 300 are compared and discussed. See *Ratan*, (1932) 7 Luck. 684; *Rahman*, [1939] Lah. 77.

consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health'.

"There remain to be considered (b) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases . . . must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death ; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4), already noticed. It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death ; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death".

The offence of culpable homicide by doing an act by which the death is caused "with the intention of causing such bodily injury as is likely to cause death" can exist independently of s. 300, though none of the Exceptions set out in s. 300 apply to the case. The first offence is punishable under the first part of s. 304 ; the latter under s. 302. Section 300 can only apply when it is established that the offender intended the injury to be sufficient in the ordinary course of nature to cause death or knew that in the special circumstances of the case not death merely, but the death of the particular person to whom the harm was caused, was likely.⁵

As regards (c) Peacock, C. J., observes in *Gora Chand Gopee's case*⁶ : "There are many cases falling within the words of s. 299 'or with the knowledge that he is likely by such act to cause death' that do not fall within the 2nd, 3rd, or 4th clause, of s. 300, such for instance as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But, although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in clause 2 or 3 of s. 300.

"As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as to bring the case within the 4th clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. . . If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as in clause 4, s. 300.

"From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption ; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

"Suppose a gentleman should cause death by furiously driving up to a Railway Station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus ; that he was intending to go by a particular train ; and that he could not arrive at his destination in time for his business by any other train ; that at the time of the furious driving it wanted only two minutes to the time of the train's starting ; that the road was so crowded that he must have known that he was likely to run over some one, and to cause death. Would any one under the circumstances presume that his intention was to cause death ? Would it not be more reasonable to presume that his intention was to save the train ? If the

⁵ *Aung Nyun*, [1940] Ran. 441, F.B.

⁶ (1866) 5 W. R. (Cr.) 45, 46, Beng. L. R.

(Sup. Vol.) 443, 451-452, F.B.

Judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing of death was such that he must have known, and did know, that his act must in all probability cause death, &c., within the meaning of clause 4, s. 300.

"If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment".

Plowden, J., in *Barkatulla's* case said: "It may be useful here to point out that the Indian Penal Code contemplates that when an act is culpable homicide, whether amounting to murder, or not amounting to murder, by reason of the act being done with the knowledge described in clause 3 of s. 299 (or with the knowledge described in clause 4 of s. 300, which knowledge satisfies the definition of clause 3 of s. 299), an intention to cause death or to cause such bodily injury as is likely to cause death must be absent. When intention of either kind co-exists with the knowledge described, the knowledge merges in the intention, and a higher degree of guilt is imputable. That the degree of guilt is higher when a murderous intention exists (which intention seems to be deemed to import the specified knowledge), and is lower when the knowledge is unaccompanied by such intention, seems a necessary inference from the language of s. 304 as to punishment."⁷

"Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the most probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder."⁸

Where, therefore, the act of the accused does not fall within the first clause of s. 300, that is, where the act was done not *with the intention of causing death*, the difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue. It is culpable homicide where death must have been known to be a *probable* result. It is murder, where it must have been known to be the *most probable* result.

Culpable homicide may, therefore, not be murder (1) where notwithstanding that the mental state is sufficient to constitute murder, one of the Exceptions to s. 300 applies, or (2) where the mental state, though within the description of s. 299, is not of the special degree of criminality required by s. 300.

In cases where it is difficult to determine whether the offence committed by the accused is culpable homicide or culpable homicide amounting to murder, the accused should be convicted of the lesser offence.⁹

1. Clause 1.—‘Act by which the death is caused is done with the intention of causing death’.—The word ‘act’ includes omissions as well (s. 33). See Comment on s. 299. Any omission by which death is caused will be punishable as if the death is caused directly by an act. Thus, if a person neglects to provide his child with proper sustenance, although repeatedly warned of the consequences, and the child dies, it will be murder.¹⁰

‘Death’ means the death of a human being (s. 46). It will be murder whether death is caused of a grown-up person or a newly-born child.¹¹

As to ‘intention’ see Comment on s. 299, *supra*. Where the intention to kill is present, the act amounts to murder; where such an intention is absent, the act amounts to culpable homicide not amounting to murder. To determine what the intention of the offender is, each case must be decided on its own merits. Where it is proved that the accused fired a gun shot at such a close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that after firing at one person he reloaded the gun and fired another shot at another person there is a clear indication of his intention to commit murder.¹² Where a person fires

⁷ (1887) P. R. No. 32 of 1887, p. 65. See also the judgment of the same learned Judge in *Sheikh Pyao*, (1883) P. R. No. 27 of 1883.

⁸ Per Straight, J., in *Idu Beg*, (1881) 3 All. 776, 778; *Girdharee Singh*, (1878) 6 N. W. P. 26; *Inder Singh*, (1928) 10 Lah. 477; *Ratan*, (1932) 7 Luck. 634.

⁹ *Nga Po Aung*, (1889) S. J. L. B. 459.

¹⁰ *Gunga Singh*, (1878) 5 N. W. P. 44; *Ram Prasad*, (1883) 3 A. W. N. 281.

¹¹ *Irowa*, (1888) Unrep. Cr. C. 401.

¹² *Rajendra Prasad Singh*, (1931) 34 Cr. L. J. 1071, [1933] AIR (P) 147.

two shots successively at another person his murderous intent is clearly evident.¹³ The law looks as regards intention to the natural result of a man's act and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend. Where a man strikes *lathi* blows on the head of the deceased mercilessly and practically kills him on the spot, he is guilty of murder.¹⁴ Where a man stabs another in a vital part he must be held to have intended to cause death, and if death ensues either directly from the wound or in consequence of the wound creating conditions, which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder.¹⁵ Absence of premeditation will not reduce the crime of murder to culpable homicide not amounting to murder.¹⁶ But where there is nothing more than a fatal result to indicate an intention to cause death and no weapon is used, it is unsafe to convict of murder.¹⁷

To be at a person after he has fallen down does not necessarily prove the intention of causing his death. Certain factors will have to be considered, such as for instance the number of blows, the nature of those blows and the parts of the body on which those blows have been inflicted. It may also be of importance to know what the condition of the injured person was when he fell down. If there could be no doubt about his serious condition, for instance if blood was flowing from his head or body and he was apparently unconscious, the striking of further blows, even on his body, though such blows might not ordinarily be dangerous, would indicate an intention on the part of his assailants to cause him more injury than would be caused by an ordinary beating, for the intention to give a beating would already have been more than given effect to, and a man in that condition would be less likely to survive if further blows were given, the shock to his system being aggravated by the additional blows.¹⁸

If there was a joint attack with dangerous weapons by four or five persons on one man and the latter died almost on the spot as a result of the injuries inflicted on him, at least the offence of culpable homicide must be said to have been made out, and the mere fact that it is not possible to say who inflicted the fatal injury would not be sufficient to support a finding that even the offence of culpable homicide has not been committed.¹⁹

If a person intends to cause the death of another and does an act in furtherance of that intention, which act does not in fact cause the death intended, and in the belief that the said act has caused death, he does another act, for the purpose of hiding the traces of the crime, and such act results in death, the offender can be convicted of murder. Where it appeared that the accused deliberately intended to kill the wife of one of them, that they decoyed her to a certain place and after an attempt to strangle her, dragged her immediately either in an unconscious or semi-conscious condition on to the railway line and placed her in front of the train and she was decapitated by the train, it was held that the accused were guilty of murder. The two acts were intimately connected with each other and the latter act followed immediately upon the former, that both the acts of the accused must be treated as being only one transaction, the transaction being to kill the deceased.²⁰ The Madras High Court has thus agreed with the dissenting view of Parsons, J., in *Khandu's* case,²¹ distinguishing an earlier full bench case in which the accused struck his wife a blow on her head with a plough-share which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, he hanged her on a beam by a rope and thereby caused her death by strangulation, and it was held that he was not guilty of either murder or culpable homicide not amounting to murder but was guilty of grievous hurt.²² This case was distinguished in a subsequent case on the ground that it was not shown that the blow on the deceased's head with a

¹³ *Ahmad Yar Khan*, (1909) P. W. R. No. 1 of 1910, 11 Cr. L. J. 171.

¹⁴ *Patan*, (1932) 9 O. W. N. 350, 33 Cr. L. J. 537; *Bishna*, (1932) 33 P. L. R. 130, 33 Cr. L. J. 378, [1932] AIR (L) 244; *Koramutla Narasigadu*, [1937] M. W. N. 1124, 39 Cr. L. J. 130, [1937] AIR (M) 792.

¹⁵ *Nga Dwe*, (1904) 1 Cr. L. J. 909; *Aziz Ahmad*, (1938) 40 P. L. R. 119, 39 Cr. L. J. 695, [1938] AIR (L) 355; *Rambira Missir*, (1948) 22 Pat. 388.

¹⁶ *Mahomed Elim Abdool Kurreem*, (1865) 3 W. R. (Cr.) 40.

¹⁷ *Daude Gangadu*, (1881) 1 Weir 209.

¹⁸ *Ram Lal*, [1944] O. W. N. 342.

¹⁹ *Mohideen Pichai Rowther*, (1938) 50 L. W. 557.

²⁰ *Kaliappa Goundan*, (1933) 57 Mad. 158.

²¹ (1890) 15 Bom. 194. The difference of opinion between the Judges in this case was a difference of fact and not of law. Per Walsh, J., in *Khubi*, (1923) 25 Cr. L. J. 703, [1923] AIR (A) 545. See *Gajjan Singh*, (1930) 32 Cr. L. J. 483, [1931] AIR (L) 27.

²² *Palani Goundan*, (1919) 42 Mad. 547, F.B.

ploughshare was likely to cause death. The main point of distinction between the two cases is this, that in the full bench case there was never at any time an intention to cause death. The original intention was only to cause injury. The second intention was only to dispose of a supposedly dead body to shield himself. In *Kaliappa's* case there was at the beginning an intention to cause death. The accused attacked the deceased and caused three punctured wounds on her head and threw her body into a well. The medical evidence showed that the wounds by themselves were not sufficient to cause death. It was held that since the intention to cause death was evident even from the beginning, and such intention was apparently completely carried out into effect though not in fact at the first stage, and since the act was closely connected in time and space with the next act of throwing the body into a well and the result of the actions taken as a whole was clearly to carry out the intention to kill with which intention they began to act, the conviction for murder was therefore right.²³ Similarly the Patna High Court, following this case, held in a case in which the accused strangled a woman and on her becoming unconscious put her on a railway line and she was cut into two by a passing train that the accused was guilty of murder as from the very beginning there was a clear intention to cause death and the mere fact that the earlier assault did not result in death and that the accused was killed by a passing train where she had been placed by the accused would make no difference.²⁴

In *Khandu's* case a man struck another on the head with a stick, and believing him to be dead set fire to the hut with a view to remove all evidence of the crime and it was found that the blow only stunned the deceased and the death was really caused by the injuries from the burning when the accused set fire to the hut. It was held that the offence committed was that of attempt to murder. Parsons, J., who gave a dissenting judgment, was of opinion that the offence of murder was committed. The Patna High Court has also followed the opinion of Parsons, J. Where the accused assaulted a woman with the intention of causing death, and thereafter placed her body on a railway line where she was run over by a train, and the medical opinion favoured the view that the actual cause of death had been decapitation but there was no evidence that the accused, when he carried the body to the railway line, was under the belief that the woman was dead and that he was handling a dead body, it was held that the accused was guilty of murder.²⁵ It has laid down that where an accused person commits two (or more) acts closely following upon and intimately connected with each other, they cannot be separated and assigned the one to the one intention and the other to another, but both must be ascribed to the original intention which prompted the commission of those acts and without which neither could have been done.¹

The Calcutta High Court has followed the majority view in *Khandu's* case. The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the naval. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body, and hung it by a rope. The *post mortem* examination showed that death was due to hanging. It was held that the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder; and that the offence committed was one under s. 325 for having given her kicks, blows and slaps before she fell down.²

The question of finding out the intention of a particular person who together with others had admittedly committed a crime of violence, is always a difficult one. In the absence of direct evidence of the common intention, which is available only in rare cases, such an intention can only be ascertained by a consideration of the established facts and the surrounding circumstances.³

Cases.—Intention.—Where a man armed with a deadly weapon (a *sela*) thrust that weapon into the chest of his victim and caused instantaneous death;⁴ where eight persons deliberately attacked the deceased, who was alone and unarmed, and even

²³ *Thavamani*, [1943] 2 M. L. J. 13, [1943] M. W. N. 342, (1943) 56 L. W. 340, 44 Cr. L. J. 790, [1943] AIR (M) 571.

²⁴ *Lingraj Das*, (1944) 24 Pat. 131.

²⁵ *Nehal Mahto*, (1939) 18 Pat. 485.

¹ *Ibid.*

² *Dalu Sardar*, (1914) 18 C. W. N. 1279,

15 Cr. L. J. 709, [1915] AIR (C) 221.

³ *Tara Singh*, (1931) 33 P. L. R. 1, 33 Cr. L. J. 457, [1932] AIR (L) 189.

⁴ *Chand Singh*, (1934) 35 P. L. R. 715, 36 Cr. L. J. 696, [1934] AIR (L) 741; *Abdul Aziz*, (1933) 14 P. L. T. 464, 35 Cr. L. J. 725, [1933] AIR (P) 508.

after they knocked him down continued to beat him with *lathis* causing his death;⁵ where the accused struck the deceased with such determination that when the stick broke he armed himself with another weapon and chased the deceased into another man's compound and assaulted him with the second weapon;⁶ and where a man struck the deceased on the head with a formidable *lathi* and fractured his skull,⁷ it was held that murder was committed.

The accused sent a box to the deceased, with whom he was at enmity, with a letter asking him to open the box, examine its contents and send it on to a person whose name and address was pasted on the box. When the deceased opened the box, the mechanism of the box ignited the explosives in the box, and the deceased, his wife, and two daughters died as the result of the explosion. The accused was on these facts convicted of culpable homicide amounting to murder.⁸

A man was shot in the abdomen with a gun in the course of a dacoity and died from acute peritonitis caused by the perforation of the gut. He died on the third day, having been first operated on at a railway hospital where he was sent by train and having been operated on a second time at Calcutta to reach where he underwent a further railway journey of about ten hours. The only evidence as to the manner of shooting was that a companion of the man who fired the gun flashed a torch-light on the victim and then he was fired at. Every gunner had similarly attached to him a lightman and other men were also shot as a torch-light was flashed on them, but all in lower parts of the body. The medical evidence was that peritonitis is not invariably caused by the perforation of the gut and that death had been due to exhaustion caused by the injuries, by which was meant continued external irritation, depressing the normal function of respiration and circulation. It was held that, in the circumstances, the act of firing was not murder.⁹

Neglect to provide medical aid or food.—Infants.—Where M was convicted of the manslaughter of his son of tender years, who died of confluent small-pox, and M, though able to do so, did not, owing to certain religious views he held, employ any medical practitioner, nor afford to the child during its illness any medical aid or attendance, and it was proved that proper medical aid and attendance might have saved or prolonged the child's life, it was held that the conviction could not be sustained. Lord Coleridge, C. J., said: "It is not enough to shew neglect of reasonable means for preserving or prolonging the child's life, but to convict of manslaughter it must be shewn that the neglect had the effect of shortening life. . . In order to sustain the conviction affirmative proof is required".¹⁰ In an earlier case it was distinctly shown, and found by the jury, that the child's death was caused by the neglect to provide medical aid, and therefore the conviction for manslaughter was upheld.¹¹ Where the death of a child was caused by neglect to supply him with proper nourishment, it was said that mere negligence would not do, there must be wicked negligence.¹² These cases are decided under the Prevention of Cruelty to Children Act, which is in force in England. To warrant the conviction of a woman for manslaughter of her new-born child, whose death is caused by want of proper care at birth, it is not enough to show that such woman was guilty of criminal negligence by purposely arranging to be unattended at her confinement. She must also be proved to have been further guilty of negligence towards the child after it was completely born.¹³

Adults.—A girl of eighteen was taken in labour in the house of her step-father. The mother did not procure the aid of a midwife, in consequence of which the daughter died. The evidence did not show that she had means to pay the midwife. It was held that she was not legally bound to procure the aid of a midwife and that she could not be convicted of manslaughter.¹⁴ Where a mistress omitted to supply her servant

⁵ *Raj Bahadur*, (1934) 11 O. W. N. 1309, 35 Cr. L. J. 1496, [1934] AIR (O) 499; *Sheo Prasad*, (1941) 17 Luck. 376.

⁶ *Nga Kyin Baw*, (1938) 34 Cr. L. J. 1245, [1938] AIR (R) 278.

⁷ *Langar Jhena*, (1933) 35 Cr. L. J. 101, [1933] AIR (L) 980; *Raja Ram*, (1938) 14 Luck. 328; *Kandasami Solagar*, [1941] M. W. N. 1028, (1941) 43 Cr. L. J. 516, [1942] AIR (M) 213.

⁸ *Shivaputrappa Maharudrappa*, (1936)

Confirmation Case No. 16 of 1936, decided by Beaumont, C. J., and Wassoodew, J., on August 27, 1936 (Unrep. Bom.).

⁹ *Pran Krishna Chakravarty*, (1934) 39 C. W. N. 188, 36 Cr. L. J. 1322, [1935] AIR (C) 580. S. B.

¹⁰ *Morby*, (1882) 8 Q. B. D. 571, 574.

¹¹ *Downes*, (1875) 1 Q. B. D. 25.

¹² *Nicholls*, (1875) 13 Cox 75.

¹³ *Izod*, (1904) 20 Cox 690.

¹⁴ *Sarah Shepard*, (1862) 31 L. J. (M. C.) 102.

with proper food and lodging and so caused her death, it was remarked : "The law clearly is that, if a person has the custody and charge of another and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody ; but it is also equally clear that, when a person, having the free control of her actions and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue".¹⁵ The accused, a woman of full age and without any means of her own, lived with, and was maintained by, the deceased, her old aunt. No one lived with them. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the accused lived in the house and took in the food supplied by the tradesman, but, apparently gave none of it to the deceased, nor did she procure for her any medical or nursing attendance, or inform any one of the condition of the deceased. The death of the deceased was substantially accelerated by want of food, nursing, and medical attendance. It was held that a duty was imposed upon the accused under the circumstances to supply the deceased with sufficient food to maintain life, and that, the death of the deceased having been accelerated by the neglect of such duty, the accused was guilty of manslaughter.¹⁶

Mere presence not sufficient for conviction of murder : common intention necessary.—Mere presence as a member of a gang which has committed murder is insufficient to support a conviction for murder. It must be shown that murder was the common object of the gang and that the accused did some act in furtherance of the common object.¹⁷ Where the accused are present at the time of a murder and thereby give moral support to it, they are as much guilty of murder as the murderer himself.¹⁸ Where the accused, a menial servant, accompanied his master with the intention of rendering such assistance as might be required when the latter had announced his intention of committing murder, it was held that the accused was guilty of murder.¹⁹ Where a blow was struck by A in the presence of, and by the order of, B, both were held to be principals in the transaction ; and where two persons joined in beating a man, and he died, it was held not necessary to ascertain exactly what the effect of each blow was.²⁰

2. Clause 2.—‘With the intention of causing such bodily injury as the offender knows to be likely to cause the death.’—See Comment on s. 299. In order to convict a person of the offence of murder under this clause it has to be found that he had the intention of causing the injury and also that he had the knowledge that the injury which he intended to inflict was likely to cause death. The word ‘knowledge’ imports a certainty and not merely a probability.²¹ If a man strikes another on the head with a stick when he is asleep, and fractures his skull, knowledge of likelihood of causing death must be presumed; and the offence committed is murder.²² As to the intention to be presumed in cases of blows on the head with a stick, instinct at least, if not knowledge and experience, tells every man that to hit another human being any violent blow on the head may possibly result or is likely to result or will probably result in serious injury to the person struck, but knowledge, belief or expectation of the amount of injury that may be caused must depend upon what is used in inflicting the blow and the force with which the blow is delivered. Repeated blows or even a single blow forcibly delivered with a heavy weapon would make the offence a murder, but where a sudden blow is struck with a stick that is not heavy, the offence would be culpable homicide not amounting to murder.²³ Even a most illiterate and ignorant person will realise that a savage blow with an axe in the region of the abdomen and spine is bound to cause death or injury which will result in death.²⁴

¹⁵ Per Erle, C. J., in *Smith's Case*, (1865) L. & C. 607, 624.

¹⁶ *Instan*, [1893] 1 Q. B. 450.

¹⁷ *Wansarapu Baladu*, (1881) 1 Weir 296; *Kammari Kannappa*, (1881) 1 Weir 297.

¹⁸ *Tulli*, (1924) 47 All. 276.

¹⁹ *Golla Sanyasi*, (1881) 1 Weir 296.

²⁰ *Mahomed Asger*, (1874) 23 W. R. (Cr.) 11; *Gour Chunder Das*, (1875) 24 W. R. (Cr.) 5.

²¹ *Gahbar Pande*, (1927) 7 Pat. 638.

²² *Sheikh Choollye*, (1865) 4 W. R. (Cr.) 35; *Sheo Prasad*, (1941) 17 Luck. 376.

²³ *Baba Naya*, (1927) 5 Ran. 817; *Dildar Khan*, [1938] O. W. N. 184, 39 Cr. L. J. 330, [1938] AIR (O) 88; *Chinna Pichai Vadu*, [1938] M. W. N. 871, 48 L. W. 415, 39 Cr. L. J. 979.

²⁴ *Girdhari Teli*, (1940) 41 Cr. L. J. 587, [1940] AIR (P) 605; *Andi Thevan*, [1940] M. W. N. 811, (1940) 42 Cr. L. J. 668, [1941] AIR (M) 251.

This clause also applies in special cases where the person injured is in such a condition or state of health that his death would be likely to be caused by an injury which would not ordinarily cause the death of a person in sound health, and where the person inflicting the injury knows that owing to such condition or state of health it is likely to cause the death of the person injured.²⁵

Cases—Where A several times kicked B, who, after having been severely beaten, fell down senseless, it was held that A was guilty of murder as he must have known that such kicks were likely to cause death in B's state at that time.¹ Where two persons set upon an unarmed man and beat him with sticks so severely that he died within a few minutes they were held guilty of murder.² Where two men pursued an old man and each of them gave him a blow on the head with such force that his skull was cracked, it was held that both of them were guilty of murder.³ Where four men beat another so severely that death ensued from the injuries received, it was held that they must be presumed to have known that by such acts they were likely to cause death, and that the offence of murder was not reduced to culpable homicide not amounting to murder by the absence of intention to cause death.⁴ A cut Z on the head, with a heavy chopper, slicing off a bit of the frontal bone and cutting the brain. Z died from the effect of the injury, but the medical evidence showed that the wound was not certain, although likely, to cause death. It was held that A's intention must be inferred not merely from the actual consequences of his act, but from the act itself, and as the natural consequence of an act of the kind in question would be death, A must be presumed to have intended to cause death.⁵ Where a person struck the deceased with a highly lethal weapon with the knowledge that the act was such as was likely to cause death, he was held guilty of murder.⁶ It was held likewise where a blow was given with a bottle full of liquid.⁷ A body of six persons attacked another with cattle goads in a violent and determined manner, inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen, and so caused his death. The person attacked was a strongly-built man of thirty-five years of age, and his spleen was in a healthy state. It was held that such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death; and that the offence amounted to murder.⁸

The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both lungs and of the spleen. It was held that the crime fell under the first or second clause of s. 300 as the intention was clear whether to kill or to cause a dangerous injury and thus the case was taken out of the purview of clause 4 which applied to cases in which there was no wish to kill or to hurt.⁹ Where in continuation of an altercation which had taken place earlier in the day between the mother of the accused and the wife of the deceased the two men were struggling in front of their houses when the accused suddenly struck the deceased with a weapon which was variously described as a spear-head or a sickle and the medical evidence showed that the person of the deceased bore two wounds of penetrating nature one of which completely perforated the heart; the other penetrating the abdomen on the left side had divided intestines, it was held that having regard to the nature

²⁵ See *Nga Maung*, (1907) 4 L. B. R. 132, 6 Cr. L. J. 389; *Ram Asre*, (1922) 20 O. C. 18, 24 Cr. L. J. 513, [1923] AIR (O) 97.

¹ *Nilmadhub Sircar*, (1865) 3 W. R. (Cr.) 22.

² *Sardula Singh*, (1943) 45 P. L. R. 121.

³ *Ranjha*, (1947) 49 P. L. R. 305.

⁴ *Pooshoo*, (1865) 4 W. R. (Cr.) 33; *Garib*, (1919) 17 A. L. J. R. 985, 20 Cr. L. J. 767, [1919] AIR (A) 445; *Parshadi*, (1928) 30 Cr. L. J. 559, [1929] A. L. J. R. 244, [1929] AIR (A) 160; *Patil*, (1932) 9 O. W. N. 350, 33 Cr. L. J. 537.

⁵ *Po Tu*, (1908) 4 L. B. R. 306, 9 Cr. L. J. 5.

⁶ *Sobeel Mahee*, (1866) 5 W. R. (Cr.) 32; *Bishna*, (1932) 33 P. L. R. 130, 33 Cr. L. J. 378, [1932] AIR (L) 254; *Jhiktu Bhogte*, (1941) 23 P. L. T. 763, 43 Cr. L. J. 544, [1942] AIR (P) 427.

⁷ *Shwe Hla U*, (1903) 2 L. B. R. 125, 1 Cr. L. J. 184.

⁸ *Elem Molla*, (1907) 37 Cal. 315. See *Naba*, (1911) 12 P. L. R. 737, 12 Cr. L. J. 393, to the same effect.

⁹ *Nawab*, (1914) P. R. No. 31 of 1914, 15 Cr. L. J. 610, [1914] AIR (L) 98; *Sardula Singh*, (1943) 45 P. L. R. 121.

of the wounds inflicted it must be deemed that his intention was, if not to cause death, at least to cause such bodily injury as was likely to cause death.¹⁰

In the course of a murderous attack on his wife by the accused, the former ran to the deceased woman for protection and clasped her arms round her waist. The accused thereupon gave a fatal stab to the deceased with the sole object of making her let go his wife, so that he might wreak his vengeance on her. The accused had no quarrel with the deceased and had no intention of killing her. It was held that the accused was only guilty of culpable homicide not amounting to murder, as he did not intend to inflict such injury on the deceased as was likely to cause her death or was sufficient in the ordinary course of nature to cause her death.¹¹ A attacked his mother-in-law, Y, a woman of fifty-five, with an edged instrument but by mistake cut another woman, Z, on the arm. Z, who was sixty-one years of age, died from the effects of the wound, although the Civil Surgeon considered that the injury was not sufficient in the ordinary course of nature to cause death to a woman of her age. The Sessions Judge considered that this clause was applicable on account of Y's age. It was held that this clause was not applicable because (1) as the injury was actually caused to Z, although intended for Y, Y's age did not affect the question at all, and (2) in view of the medical evidence and of the fact that the injury was not on a vital part of the body, A could not be held to have intended such bodily injury as he knew to be likely to cause the death of either Y or Z, or such bodily injury as was likely to cause death.¹²

Four coolies of a tea estate, thinking that another person had by sorcery made one of them dumb, set upon him while he was sitting in a courtyard. One of them finding a knife in the pocket of the victim took it out and stabbed him fatally. All the four dragged him and buried him in a well. It was held that all the accused having taken part in the affray from the beginning with the intention to kill the deceased, all the four were guilty of murder.¹³

Dhatūra poisoning.—Where a woman of twenty years of age was found to have administered *dhatūra* (a poisonous herb) to three members of her family, who ultimately recovered, it was held that she was guilty of attempt to commit murder as she must be presumed to have known that the administration of *dhatūra* was likely to cause death, although she might not have administered it with that intention.¹⁴ It is not clear from the judgment in this case how the Court came to that finding, as it was held that although the accused knew that she might cause death she had no intention to do so, but intended only to incapacitate temporarily the persons to whom she administered the *dhatūra* in order that she might run away with her lover. The same High Court in a subsequent case said: "Dhatūra is not exactly a deadly poison, and may often be given for the purpose of merely stupefying a victim" (p. 571). On this ground it held, where, for the purpose of facilitating robbery, *dhatūra* was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, that, in respect of the traveller who died, the offence committed was that of grievous hurt (s. 325), and, in respect of the travellers who did not die, the offence committed was that under s. 328.¹⁵ This case is of doubtful authority. The same High Court has now laid down that a person who recklessly administers *dhatūra* to another is guilty, if death ensue, of the offence of murder, and not merely of culpable homicide not amounting to murder or of grievous hurt.¹⁶ Where *dhatūra* was administered with the object of facilitating robbery but in such quantity that the person to whom it was given died in the course of a few hours, it was held that the person so administering *dhatūra* was guilty of murder.¹⁷ The former Chief Court of the Punjab followed this decision in a case in which the accused administered *dhatūra* to A and B, both of whom died from the effects thereof and on the following day he administered the same poison to C and D, the former got ill and recovered, but the latter died. It held that the accused was guilty of murder, for, when he administered *dhatūra* poison he committed an act which, even

¹⁰ *Lachhman Singh*, (1926) 7 Lah. 564.

¹¹ *Perumal Naiken*, [1912] M. W. N. 193, 13 Cr. L. J. 129, per Abdur Rahim and Sundara Aiyar, JJ., (Spencer J., dissenting).

¹² *Ban U*, (1908) 4 L. B. R. 367, 9 Cr. L. J. 364.

¹³ *Lakhan Sawra*, (1932) 33 Cr. L. J. 663, [1932] AIR (C) 815, F.B.

¹⁴ *Tulsha*, (1897) 20 All. 143.

¹⁵ *Bhagwan Din*, (1908) 80 All. 568.

¹⁶ *Nanhu*, (1923) 45 All. 557.

¹⁷ *Gutali*, (1908) 31 All. 148.

if not committed with the intention of causing death or causing bodily injury likely, to the knowledge of the offender, or in the ordinary course of nature sufficient, to cause death, was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death; and that the accused was guilty of an offence under s. 307 as regards the poison administered to C. The Court observed : "It would be putting a premium on murder to hold that the giving of *dhatura* in this reckless fashion is comparatively a minor offence. We cannot agree with the *dicta* in the judgment of the Allahabad High Court in the case of *Emperor v. Bhagwan Din*¹⁸ and we prefer, in the interests of public safety, to follow the ruling of the same High Court in the case of *Emperor v. Gutali*.¹⁹ As remarked by the learned Judges in the latter case, 'Although death does not always follow from *dhatura* poisoning, yet it does follow in a considerable proportion of cases' ".²⁰ In this case it was found by the Court that the accused was an expert in *dhatura* poisoning and knew well that the poison worked in a most effective and dangerous manner upon his victims. But where the accused caused the death of two persons by administering to them *dhatura* in order to facilitate the commission of robbery, the same Court, in another case, held that they were guilty of an offence under s. 326 and not under s. 302. It said that "no hard and fast rule can be laid down as to the section of the Indian Penal Code applicable, and that the circumstances of the particular case must be taken into consideration." It further observed that it had not been shown that the accused administered *dhatura* with such intention or knowledge as would make them guilty of murder.²¹ In case of murder by *dhatura* poisoning it is to be determined with what object it is administered. Its use may be merely in order to facilitate the commission of robbery and it does not *per se* and necessarily import contemplation of the victim's death as a means towards, or as incidental to, the main end of that offence. The point is to be decided with regard to the circumstances of each case and the best indication of the intention of the offender can be gathered from the amount of *dhatura* which he administers. Where a large quantity of *dhatura* is administered the offender shall be presumed to intend to cause the death of the victim for the successful termination of his crime.²²

The Bombay High Court has followed the rulings in *Q.-E. v. Tulsha, Emp. v. Gutali, Emp. v. Gauri Shankar*²³ and *Emp. v. Nanhui*, and has dissented from *Emp. v. Bhagwan Din*. The accused administered *dhatura* to five men for the purpose of facilitating the commission of robbery. Three of them died and the remaining two were taken seriously ill and regained consciousness after four days. The Sessions Judge convicted them under s. 325, for causing the death of three men; and under s. 328 for administering the poisonous substance to the other two. He acquitted them of the charge under s. 302 for causing the death of the three men as he held that there were no sufficient grounds for holding that the accused knew that they were likely to cause death by the administration of *dhatura*. It was held, setting aside the acquittal, that the accused were guilty of murder under cl. (4) of s. 300, as they had sufficient knowledge of the fact that administering *dhatura* often resulted in death and was likely to cause death.²⁴ The Court observed : "Having regard to the extent to which *dhatura* poisoning does take place in India, both in the case of men and cattle, there is very adequate ground for attributing, at any rate, to ordinary Indian villagers a knowledge of the dangerous results that may occur from administering *dhatura*."²⁵ "In the cases of adult persons...deliberately administering *dhatura* or some such poison or deleterious substance, and in quantities such as to kill three persons within a few hours on the spot, the burden is heavily on the accused to show why the ordinary presumption from an act so imminently dangerous and so probably fatal should not be drawn...Persons making use of poisons which, besides being intoxicants, may likewise prove fatal if administered in sufficient quantity, cannot escape the fatal consequences of this reckless administration, without showing that they were

¹⁸ (1908) 30 All. 568, 571.

¹⁹ (1908) 31 All. 148, 150.

²⁰ *Lala*, (1910) 12 P. L. R. 165, 171, 12 Cr. L. J. 125, 129.

²¹ *Sadhu*, (1918) P. R. No. 19 of 1919, 20 Cr. L. J. 510, [1919] AIR (L) 420.

²² *Kesar Din*, (1919) 21 P. L. R. 6, 21 Cr.

L. J. 319, [1920] AIR (L) 375; *Rana*, (1929) 31 Cr. L. J. 140, [1930] AIR (L) 90.

²³ (1918) 40 All. 360.

²⁴ *Shetya*, (1926) 28 Bom. L. R. 1003, 27 Cr. L. J. 1184, [1926] AIR (B) 518.

²⁵ Per Fawcett, J., in *ibid.*, p. 1008.

not possessed of the ordinary knowledge of adults, which even villagers are presumed to possess."¹ The Nagpur High Court has adopted the same view.²

In the case of *dhatura* poisoning, the contention, that in the absence of proof that the deceased was subject to a fatal dose of the poison, death as a result of that poison cannot be presumed, is without force.³

The accused gave some food with which *dhatura* was mixed to three persons in order to rob them. The three men were found next morning lying out in the open in a state of coma, or unconsciousness and they were taken to the hospital. Two of them recovered but the third developed pneumonia and died. It was held that the accused were not guilty of murder since it was not shown that pneumonia was a likely consequence of the administration of *dhatura*, nor was it established that the pneumonia was caused by the exposure or was a probable consequence of sleeping out. The accused were held to be guilty under s. 328.⁴

Aconite.—The accused gave a large quantity of aconite to a young married girl, and the girl, under the impression that her husband would begin to love her and consent to send her to her parents if he could be made to take the said substance with his food, mixed the same with the mid-day meal of the whole family. On eating the food, the husband's father and an elder brother died. It was held that the accused was guilty under this section and s. 115.⁵ Where a wife, not knowing the dangerous properties of aconite powder, administered it to her husband by mixing it with his food and in consequence the husband died, the Madras High Court held that she could not be found guilty of murder, but inasmuch as her intention was to cause bodily infirmity to her husband by depriving him of his will power and so bringing him completely under her domination, she committed an offence under s. 328.⁶

Arsenic.—A person who administers a well-known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and, if death ensues, he is guilty of murder, notwithstanding that his intention may not have been to cause death. Where the accused administered arsenic to a boy nine years of age with the object of preventing the father of the boy from appearing as a witness against himself in a criminal case, but in such quantity that the boy died in the course of three days, it was held that he was guilty of murder, though his intention might not have been to cause death.⁷ Where a woman of middle age administered to her husband arsenic disguised in sugar and placed in his food and thereby caused his death, it was held that she must be taken to know that her act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death, and she was guilty of murder and not under s. 304A, notwithstanding that her intention might not have been to cause death.⁸ The accused sent sweetmeat poisoned with arsenic to A, with the intention of causing her death, and A, as well as D and C to whom she gave a part of the sweetmeat, all became seriously ill as a consequence of partaking of it but they all recovered from the effect of the poison. It was held that the accused was guilty of attempting to murder B and C as well.⁹

3. Clause 3.—'With the intention of causing bodily injury to any person... sufficient in the ordinary course of nature to cause death.'—Where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause.¹⁰ The distinction between this clause and clause (2) of s. 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury *sufficient* in the ordinary course of nature to cause death and the conviction should be of murder; if there was probability in a less degree of death ensuing from the act committed, the finding

¹ Per Madgavkar, J., in *Shetya*, (1926) 28 Bom. L. R. 1008, 1011, 1012, 27 Cr. L. J. 1134, 1138, [1926] AIR (B) 518.

² *Mst. Minai*, [1940] Nag. 125.

³ *Sarabai*, (1932) 34 Cr. L. J. 398, 16 N. L. J. 35, [1933] AIR (N) 303.

⁴ *Venkatachalam Chetty*, [1941] 2 M. L. J. 661, [1941] M. W. N. 1088, (1941) 43 Cr. L. J. 320, [1942] AIR (M) 100.

⁵ *Amode Ali Sikdar*, (1931) 58 Cal. 1228.

⁶ *Hanumakka*, [1943] Mad. 679.

⁷ *Gauri Shankar*, (1918) 40 All. 360.

⁸ *Chhattarpal Singh*, (1930) 7 O. W. N. 980, 32 Cr. L. J. 126, [1930] AIR (O) 502.

⁹ *Ladha Singh*, (1920) 22 Cr. L. J. 194, [1921] AIR (L) 108.

¹⁰ *Babulal Beharilal*, [1945] Nag. 981.

should be that the accused intended to cause injury *likely* to cause death and the conviction should be of culpable homicide not amounting to murder.¹¹ It is not correct to say that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability of death is very great, the requirements of this clause are satisfied, and the fact that a particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution have survived an injury which would prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient "in the ordinary course of nature" to cause death.¹² If a person knowingly causes injuries which are more likely to cause death than not in the ordinary way, his offence falls under either the second or third clause.¹³ In the case of some classes of injuries, it is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which we must know will be dangerous to life. But in the case of wounds with blunt instruments, the intention is not so clear. The effect of a severe blow upon one man will be very different from what it will be upon another, and it does not follow, when the victim dies, that it was intended to inflict such injury as is sufficient to cause death. A Judge must always find whether the bodily injury inflicted was that which was intended by the accused.¹⁴

The words of s. 299 "or with the intention of causing such bodily injury as is likely to cause death" amount to murder only when it can be held that the likelihood of death is so great that the bodily injury intended to be inflicted must be held to be an injury sufficient in the ordinary course of nature to cause death so as to bring the case within the third clause of s. 300. Where the likelihood is not sufficiently high, the offence is that of culpable homicide not amounting to murder.¹⁵ In cases of death caused by reckless violence the nature of the weapon used is a test for deciding whether the crime falls under s. 299 or this clause.¹⁶ The nature of the material object used and the force used are useful guides in arriving at a decision as to whether the intention and knowledge required by this section can be attributed to the accused.¹⁷ The accused savagely attacked and wounded with a hatchet their cousin, who was laid up with fever in consequence of the wounds for about forty days and ultimately died of blood poisoning. It was held that the accused were guilty of murder, the wounds inflicted by them being the cause of death.¹⁸ Where a person received grievous injuries and was detained in hospital and as a result of these injuries pneumonia supervened and the victim died, it was held that those who caused the injuries were guilty of murder.¹⁹ Where in a trial for murder, the medical evidence was that the injuries inflicted on the deceased were not necessarily sufficient in the ordinary course of nature to cause death, and that death was due to meningitis and compression of the brain but this had no direct connection with the injuries, it was held that the offence fell under s. 326 and not under s. 302.²⁰

It cannot always be assumed that, when a man strikes a blow on the head, he intends to cause death or injury sufficient to cause death or even injury likely to cause death.²¹ Owing to a quarrel which the deceased had with the accused, the latter armed himself with an iron-shod stick and struck one blow with it on the head of the deceased which caused his death. He was convicted of murder. It was held that, inasmuch as it was possible that the blow struck by the accused exceeded in violence the injury he had in view at the moment of striking it, the conviction should

¹¹ *Po Sin*, (1909) 5 L. B. R. 80, 10 Cr. L. J. 359; *Apalu*, (1923) 1 Ran. 285; *Daljit Singh*, (1936) 39 Cr. L. J. 92, [1937] AIR (N) 274.

¹² *Singaram Padayachee*, [1944] 1 M. L. J. 25, (1943) 57 L. W. 13, 45 Cr. L. J. 729, [1944] AIR (M) 223.

¹³ *Arjan Singh*, [1942] Lah. 145, F.B.

¹⁴ *Muvalla Kondaiya*, (1882) 1 Weir 300.

¹⁵ *Apalu*, (1923) 1 Ran. 285.

¹⁶ *Hashim*, (1913) 7 S. L. R. 29, 14 Cr. L. J. 459; *Saindino*, (1915) 9 S. L. R. 99, 16 Cr. L. J. 710.

¹⁷ *Venkata Nari*, [1937] Mad. 684; *Chinna*

Pitchai Vadu, [1938] M. W. N. 871, 48 L. W. 415, 39 Cr. L. J. 970.

¹⁸ *Nuro*, (1913) 7 S. L. R. 83, 15 Cr. L. J. 376, [1914] AIR (S) 105; *Kala*, (1943) 46 P. L. R. 69.

¹⁹ *Fazla*, (1928) 29 Cr. L. J. 678, [1928] AIR (L) 851.

²⁰ *Chanan Das*, (1934) 35 Cr. L. J. 1283, [1934] AIR (L) 368.

²¹ *Nga Tun Baw*, (1907) 1 U. B. R. (1907-09) (P. C.) 5, 7 Cr. L. J. 205; *Ramza*, (1922) 6 L. L. J. 533.

be altered from murder to culpable homicide not amounting to murder.²² The reasoning in this case has been criticised on the ground that the ordinary rule in criminal cases is that intention must be inferred from a person's acts. The Madras High Court has not followed this decision in a case in which during an exchange of abuse, the accused hit the deceased with a deadly weapon—a rice-pounder—which caused her death, but there was nothing in the evidence to show that he had a motive in killing the deceased and equally there was no doubt that he intended to inflict the injury and that he must have known that such an injury was sufficient to cause death in the ordinary course of nature.²³ Where the accused in the course of an altercation dealt a blow with a *dharia* (scythe) on the head of the deceased with the result that it penetrated the skull, it was held that the accused was guilty of murder.²⁴ Where a person struck a blow on the head with a deadly weapon and with such violence as to cut through the skull, it was held that he did so with the intention of causing death or such bodily injury as was likely to cause death and was guilty of murder.²⁵

Cases.—Stabbing in vital part.—The accused stabbed the deceased with a dagger in the back. The wound, though not severe, was in such a part of the body, that it was considered dangerous; but the dagger did not penetrate to any great length. The wound healed in about seven days, at the end of which time symptoms indicative of tetanus were observed and the deceased died from that cause on the following day. According to the medical evidence in the case, tetanus was caused by a bacillus, which entered the body through the breach of surface, caused by a wound. It was held that there was no reasonable doubt that tetanus, which was the cause of the death of the deceased, was due to the wound inflicted by the accused; that when there was a natural explanation of the appearance of tetanus, it was unreasonable to conjecture that tetanus might have resulted independently of the normal cause, and had been the effect of some rare and unexplained conditions.¹ The accused inflicted a stab with a sharp-pointed weapon which entered the upper part of the deceased's stomach, causing rupture of it and of the peritoneum, it was held that his act came within this clause.² If a person stabs another in the abdomen with sufficient force to penetrate the abdominal walls and the internal viscera, he must undoubtedly be held, whatever his station in life, to have intended to cause injury sufficient in the ordinary course of nature to cause death.³

An ordinary person is not presumed to know the precise location of the arteries in the human limbs. If, therefore, a stab with a knife or dagger, aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be quite reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt or grievous hurt with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or heck at a limb. The person who uses a sword or *arwal* chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence in that case is clearly murder.⁴ Where the accused stabbed the deceased on a vital part of the body and the deceased died as a result of that injury and the injury was one which in the ordinary course would have caused death, it was held that the accused was guilty of murder. The mere fact that the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime.⁵

²² *Sardarkhan*, (1916) 18 Bom. L. R. 793, 41 Bom. 27, followed in *Ghulam Jilani*, (1925) 26 P. L. R. 430, 26 Cr. L. J. 1118, [1925] AIR (L) 559, and *Ram Jalaha*, (1927) 8 P. L. T. 594, 28 Cr. L. J. 541, [1927] AIR (P) 406.

²³ *Muniandi Servai*, [1944] 1 M. L. J. 14, (1943) 57 L. W. 11, [1944] M. W. N. 180, 45 Cr. L. J. 733, [1944] AIR (M) 251.

²⁴ *Samat Kala*, (1938) 36 Bom. L.R. 210, 35 Cr. L. J. 829, [1934] AIR (B) 156; *Hariram Mahathia*, (1941) 23 P. L. T. 438, 43 Cr. L. J. 41, [1942] AIR (P) 96.

²⁵ *Tek Singh*, (1925) 26 P. L. R. 221, 26 Cr. L. J. 1251, [1925] AIR (L) 873; *Kandasami Solagar*, [1941] M. W. N. 1028, (1941) 43 Cr. L. J. 516, [1942] AIR (M) 213.

¹ *Nga Dwe*, (1904) 1 Cr. L. J. 909.

² *Hamid*, (1903) 2 L. B. R. 63; *Mohammad*, (1932) 33 P. L. R. 145, 33 Cr. L. J. 375, [1932] AIR (L) 254; *Bhola Bind*, (1943) 22 Pat. 608.

³ *On Shwe*, (1923) 1 Ran. 436; *Nathu*, (1927) 29 Cr. L. J. 369; *Gul Khan*, (1927) 32 C. W. N. 345, 47 Cr. L. J. 240, 29 Cr. L. J. 546, [1928] AIR (C) 430; *Abor Ahmed*, [1927] Ran. 384, F.B.; *Dil Mohammad*, (1941) 21 Pat. 250.

⁴ *Public Prosecutor v. Ramaswami Nadur*, [1940] 2 M. L. J. 92, (1940) 52 L. W. 224, [1940] M. W. N. 479, (1940) 41 Cr. L. J. 900, [1940] AIR (M) 745.

⁵ *Mahanti Sreeramulu*, [1939] M. W. N. 1129, (1939) 50 L. W. 787, 41 Cr. L. J. 491, [1940] AIR (M) 298.

Murderous assault.—A man who has either hacked a fellow-creature about in a most merciless fashion or has practically pounded him to death, cannot escape conviction of murder merely by urging that he was careful to avoid injuring a vital part.⁶ Where the accused caused the death of another person by giving him unmerciful thrashing with sticks, smashing both bones of each forearm, the right elbow and right knee-cap, and the occipital area on the right temporal area of the skull, it was held that he was guilty of murder.⁷ The accused killed a person by striking him one blow on the head with a long and heavy bamboo. The nature of the injury indicated that very great force was used. It was held that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the accused intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was guilty of murder.⁸ There can be no doubt that a person delivering a violent blow with a lethal weapon like a *dang* (club) on a vulnerable part of the body such as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused.⁹ The accused was bathing in the street in front of his house causing "slush" in the road. The person living in a house opposite protested and in the course of the quarrel the waterpot of the accused was broken. The accused then went into his house shouting abuse and brought a rice-pounder, which was a heavy piece of wood, two yards long and about three inches in diameter. He struck that person with it on the head causing a contused wound rendering him unconscious. Then the aunt of that person intervened. The accused struck her also on the head with the rice-pounder. She fell down unconscious and bleeding and died seven days later owing to fracture of the skull. It was held that the case came within ill. (c) to this section and that the accused was guilty of murder.¹⁰ Where the accused committed an unprovoked and cowardly assault upon the deceased rushing out at him by surprise and striking him one blow upon the head with a *lathi* (club) and the blow fractured his skull from temple to temple, it was held that the accused was guilty of murder.¹¹ In the course of a riot the accused attacked and killed a man with dangerous weapons. It was held that the acts of the accused having caused the death of the man, and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result, in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions, they must be taken to have intended to kill the man.¹² Where two men together repeatedly struck another on his head with *lathis* with sufficient force to break his skull in several places, it was held that they were guilty of murder for their intention could not be other than to inflict such injury as was sufficient in the ordinary course of nature to cause death.¹³ The accused inflicted wounds with an *vettaruwal* (an instrument of cutting) on the deceased and the wounds were such as cumulatively would have caused death in a normal man. But because the deceased was well-built it appeared that they need not have proved fatal and that he might have escaped death but for the supervening septicaemia and pyæmia (blood poisoning). It was held that the accused was guilty of murder as his intention to cause death was evident and the cause of death was directly associated with the act.¹⁴

Intoxication.—Two men met each other in a drunken state, and commenced a quarrel, during which they abused each other. This lasted for about half an hour, when one of them ran to his own house, and came back with a heavy pestle with which he struck the other a violent blow on the left temple causing instant death. It was

⁶ *Kutab Ali*, (1911) P. R. No. 14 of 1911, 12 Cr. L. J. 597; *Arjan Singh*, [1942] Lah. 145; *Rathu*, (1946) 48 P. L. R. 176; *Gurudev Singh*, (1947) 49 P. L. R. 137, 49 Cr. L. J. 26.

⁷ *Samand Singh*, (1918) P. R. No. 3 of 1919, 20 Cr. L. J. 157, (1919) AIR (L) 382.

⁸ *Nga Khan*, (1921) 11 L. B. R. 115, 23 Cr. L. J. 111, [1921] AIR (LB) 4; *Karuppayya Thevar*, [1941] 2 M. L. J. 999, [1941] M. W. N. 1025, (1941) 43 Cr. L. J. 521, [1942] AIR (M) 227.

⁹ *Preman*, (1925) 26 P. L. R. 363, 28 Cr. L. J. 966, [1928] AIR (L) 93; *Bahawal*, (1931) 32 P. L. R. 810, 33 Cr. L. J. 184, [1932] AIR (L) 5; *Bhana Mah*, (1929) 31 Cr. L. J. 731, [1930]

AIR (L) 154; *Seva Singh*, (1930) 31 Cr. L. J. 1069, [1930] AIR (L) 490.

¹⁰ *Venkata Nari*, [1937] Mad. 684; *Muniandi Servai*, [1944] 1 M. L. J. 14, (1943) 57 L. W. 11, [1944] M. W. N. 130, (1943) 45 Cr. L. J. 733, [1944] AIR (M) 251.

¹¹ *Suraj Prasad*, (1926) 3 O. W. N. 451, 27 Cr. L. J. 766; *Sheo Prasad*, (1927) 4 O. W. N. 445, 28 Cr. L. J. 452, [1927] AIR (O) 174.

¹² *Bali Reddi*, (1913) 37 Mad. 119.

¹³ *Ilam Din*, (1931) 32 P. L. R. 401, 32 Cr. L. J. 1127; *Nga Kyin Baw*, (1933) 34 Cr. L. J. 1245, [1933] AIR (R) 278.

¹⁴ *Dorasami Servai*, [1944] Mad. 437.

held that the offence fell within clauses (2) and (3).¹⁵ Intoxication is no excuse for a man throttling to death another and a weaker man who is intoxicated also.¹⁶ Voluntary drunkenness, though it does not palliate any offence, may be taken into account as throwing light on the question of intention.¹⁷ It may also be considered in estimating the probable effect on the mind of the accused of the words or actions of others, and in determining whether the provocation given was grave and sudden.¹⁸ Where death was caused by an act done while in a state of intoxication, voluntarily induced, and the accused was convicted of causing grievous hurt, it was held that the accused should have been charged with culpable homicide not amounting to murder.¹⁹

Injury sufficient to cause death.—The accused after an altercation smote the deceased with great force on the leg above the ankle with his *dah* with such force that he cut through the bones and the arteries. As a result the man died four days later in a hospital. It was held that the accused did in fact inflict injury sufficient in the ordinary course of nature to cause death, but the intention to cause such injury or the knowledge that he must inflict such injury could not be imputed to him. A man who directs a blow on the leg, especially near the ankle, does not, as a general rule, intend to cause injury sufficient in the ordinary course of nature to cause death. But as the accused struck a very violent blow with a formidable weapon it was held that he must have known that the injury he would inflict was likely to cause death, and he was, therefore, guilty under s. 304, part one.²⁰

4. Clause 4.—‘Person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, . . . without any excuse for incurring the risk of causing death’.—This clause cannot be applied until it is clear that clauses 1, 2 and 3 of the section each and all of them fail to suit the circumstances.²¹ It does not apply to a case in which death has been caused by an act done with the intention of causing bodily injury to a particular person. In such a case the question whether the offence is murder or not must be decided by reference to the first three clauses of the section and the exceptions.²² In some of the decided cases this distinction has not been observed and where the weapon used is of a dangerous nature this clause has been applied. The cases in which this clause has any application are extremely rare, and though it is not easy to attempt to define with any strictness the kind of cases in which that clause comes in, there is one broad distinction between it and the first three clauses—in the first three clauses the important thing is an intention to kill or to hurt, while the fourth clause says nothing about intention.²³

‘To cause death merely by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death, does not constitute murder as defined in cl. 4 of s. 300, but is mere culpable homicide not amounting to murder. In order that an act done with such knowledge should constitute murder, it is also necessary that it should be committed ‘without any excuse for incurring the risk of causing death or such bodily injury.’ An act done with such knowledge alone is not *prima facie* an act of murder, subject to proof that there is some excuse. It becomes an act of murder, only, if it can be positively affirmed that there was no excuse. The requirements of this clause are not satisfied by the act of homicide being an act of extreme recklessness: it must be a wholly inexcusable act of extreme recklessness. It follows that when in view of all the circumstances found to exist in a particular case, it cannot be affirmed of an act falling in other respects within cl. 4 of s. 300, that it was committed without any excuse for incurring the risk mentioned, then such act, notwithstanding that it was done with the knowledge that it was so imminently dangerous that it must in all probability cause death, is merely culpable homicide not amounting to murder under s. 299, cl. (3).

¹⁵ *Dasser Bhooyan*, (1867) 8 W. R. (Cr.) 71; *Jhiktu Bhogta*, (1941) 23 P. L. T. 763, 43 Cr. L. J. 544, [1942] AIR (P) 427.

¹⁶ *Akulputtee Gossain*, (1866) 5 W. R. (Cr.) 58; *Nga Thet Hnin*, (1899) P. J. L. B. 550.

¹⁷ *Ram Sahoy Bhur*, (1864) W. R. (Gap No.) (Cr.) 24.

¹⁸ *Nga Sun*, (1904) 2 L. B. R. 204, 1 Cr. L. J. 473.

¹⁹ *Thiyagarayan*, (1882) 1 Weir 301.

²⁰ *Abor Ahmed*, [1937] Ran. 393; *Nga Aung Nyun*, (1937) 39 Cr. L. J. 561, [1938] AIR (R)

156.

²¹ *Ghufar*, (1887) P. R. No. 62 of 1887; *Hasta*, (1937) 39 P. L. R. 327, 38 Cr. L. J. 1073, [1937] AIR (L) 593.

²² *Shwe Ein*, (1905) 3 L. B. R. 122, 3 Cr. L. J. 355, followed in *Nga Nu Ban*, (1906) (1904-06) U. B. R. (P.C.) 33, 5 Cr. L. J. 306.

²³ *Abdul Karim*, (1914) P. R. No. 32 of 1914, 16 Cr. L. J. 74; *Manindra Lal*, (1937) 41 C. W. N. 1187, 38 Cr. L. J. 868, [1937] AIR (C) 432.

It is culpable homicide because the act causing death is done with the knowledge that the actor is thereby likely to cause death; it is not murder because it does not satisfy both parts of the definition of murder in cl. 4 of s. 300. Being culpable homicide and not being murder, the act is necessarily culpable homicide not amounting to murder.²⁴

This clause also appears to be designed to provide for that class of cases where the acts resulting in death are calculated to put the lives of many persons in jeopardy without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequence. As, for example, where death is caused by firing a loaded gun into a crowd (*vide ill. (d)*), by poisoning a well from which people are accustomed to draw water, by opening the draw of a bridge just as a railway passenger train is about to pass over it. In such and the like cases, the imminently dangerous act, the extreme depravity of mind and the regardlessness of human life, properly place the crime upon the same level as the taking of life by deliberate intention.²⁵ Any person of average intelligence knows that the explosion of a bomb in a crowded room, however carefully it may be thrown, is an imminently dangerous act such as he must be deemed to know would in all probability cause death or at least such bodily injury as is likely to cause death. Accused, described by their counsel as persons of exceptional intelligence, must, therefore, be presumed to know that their act was dangerous and likely to cause death. The fact that accused had no deliberate intention of killing any particular individual does not take their case outside cl. (4) of this section when they had no excuse for running the risk.¹

'Imminently dangerous.'—Where it is clear that the act by which the death is caused is so imminently dangerous that the accused must be presumed to have known that it would, in all probability, cause death or such bodily injury as is likely to cause death, then unless he can meet this presumption, his offence will be culpable homicide, and it would be murder unless he can bring it under one of the exceptions.² Thus, a man who strikes at the back of another a violent blow with a formidable weapon must be taken to know that he is doing an act imminently dangerous to the life of the person at whom he strikes and that a probable result of his act will be to cause that person's death.³ Similarly, if a man strikes another in the throat with a knife he must have known that the blow is so imminently dangerous that it must in all probability cause death and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.⁴ But if the extent of knowledge required under this clause is wanting, the offence will be culpable homicide not amounting to murder. Thus, causing death by branding a thief without the knowledge requisite under this clause is held to be culpable homicide not amounting to murder.⁵ Similarly, where a snake-charmer exhibited in public a venomous snake whose fangs he knew had not been extracted, and to show his own skill placed it on the head of a spectator who in trying to push it off was bitten and died, it was held that he was guilty under cl. (3) of s. 299.⁶ Where death was caused by a blow with a club and there was reason to think that the accused knew no more than that the blow was possibly dangerous to life, it was held that the conviction should be of culpable homicide not amounting to murder.⁷ But where the accused, four in number, all armed with heavy sticks, felled the deceased, who was defenceless and armless, gave him a prolonged beating and inflicted several blows completely smashing the skull, it was held that they were all guilty of murder under this clause although the evidence did not disclose which of the injuries were inflicted by each of the accused respectively.⁸ The accused during an altercation between

²⁴ Per Plowden, J., in *Barkatulla*, (1887) P. R. No. 32 of 1887, p. 64.

²⁵ M. & M. 240; *Manindra Lal*, (1937) 41 C. W. N. 1187, 38 Cr. L. J. 868, [1937] AIR (C) 482.

¹ *Bhagat Singh*, (1930) 31 Cr. L. J. 290, 31 P. L. R. 73, [1930] AIR (L) 266.

² *Lakshman*, (1888) Unrep. Cr. C. 411.

³ *Nga Maung*, (1907) 6 Cr. L. J. 389.

⁴ *Judagi Mallah*, (1929) 8 Pat. 911.

⁵ *Khedun Misser*, (1867) 7 W. R. (Cr.) 54.

⁶ *Gonesh Dooley*, (1879) 5 Cal. 351.

⁷ *Midde Venkappa*, (1881) 1 Weir 299. See *Umrao*, (1923) 21 A. L. J. R. 316, 24 Cr. L. J. 753, [1923] AIR (A) 355.

⁸ *Kanhai*, (1912) 35 All. 329; *Ram Newaz*, (1913) 35 All. 506; *Hanuman*, (1918) 35 All.

560; *Sipahi Singh*, (1922) 45 All. 130; *Lali*, [1937] Nag. 388. See *Kedar*, (1923) 26 Cr. L. J. 76, [1925] AIR (O) 284. In *Gulab*, (1918) 40 All. 686, overruling *Chandan Singh*, (1917) 40 All. 103, the dispute sprang up suddenly and the injuries were inflicted in the heat of passion and so the Court held that the case fell within Excep. 4 to s. 300. In a similar case the former Chief Court of the Punjab held that the offence amounted to grievous hurt: *Ramzan*, (1919) 21 P. L. R. 8, 21 Cr. L. J. 3, [1920] AIR (L) 91. This is not sound law. In *Saundino*, (1915) 9 S. L. R. 99, 16 Cr. L. J. 710, the case of *Hanuman*, (1913) 35 All. 560, is not followed. In *Mahadeo Singh*, (1934) 35 Cr. L. J. 1302, [1934] AIR (A) 739, *Gulab's* case is approved of and followed.

him and the deceased deliberately went outside and fetched a yoke pin and returned after more than five minutes had elapsed and struck the deceased on the head with it with great force, causing injury resulting in the death of the deceased shortly afterwards. It was held that the accused must be taken to have known that his act was so imminently dangerous that it must, in all probability, cause death, or such bodily injury as was likely to cause death and was guilty of murder.⁹

Where the accused under the influence of liquor assaulted the deceased and literally beat him to death with *lathis* without any direct motive, it was held that they were guilty of murder as they must have known that their act was "so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death".¹⁰ Where the injury inflicted by the accused person in a case of intoxication was of such a nature as any sober man must surely have known that the injury was likely to cause death, and where the injury was sufficient in the ordinary course of nature to cause death, it was held that although the act was intended to cause death the offence was one of murder.¹¹

'Without any excuse for incurring the risk of causing death'.—These words mean without any excuse which a criminal Court administering the criminal law as embodied in this Code could reasonably regard as an excuse. The term 'excuse' also occurs in the explanation to s. 81, and it is there used as synonymous with the expression 'to justify which seems to indicate that the grammatical meaning of 'exculpating' or 'absolving' was intended to be retained. In this sense the words would mean in the absence of any exculpatory circumstances other than any of those circumstances mentioned in the five exceptions to this section.¹² It is well settled that it is not murder merely to cause death by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death. In order that an act done with such knowledge should constitute murder it is necessary that it should be committed without any excuse for incurring the risk of causing the death or bodily injury. An act done with the knowledge of its consequence is not *prima facie* murder. It becomes murder only if it can be positively affirmed that there was no excuse. The requirements of the section are not satisfied by the act of homicide being one of extreme recklessness. It must in addition be wholly inexcusable when a risk is incurred—even a risk of the gravest possible character which must normally result in death—the taking of that risk is not murder unless it was inexcusable to take it.¹³ In this case a village woman of twenty was ill-treated by her husband. There was a quarrel between the two and the husband had threatened that he would beat her. At night time the woman, taking her six months' old baby in her arms, slipped away from the house. After she had gone some distance she heard somebody coming up behind her, and when she turned round and saw her husband was pursuing her, she got into a panic and jumped down a well nearby with the baby in her arms. The result was that the baby died and the woman recovered. She was charged with murder of the child. It was held that an intention to cause the death of the child could not be attributed to the accused, though she must be attributed with the knowledge—however primitive or frightened she might have been—that such an imminently dangerous act as jumping down the well was likely to cause the child's death; but the culpable homicide did not amount to murder because, considering the state of panic she was in, there was "excuse for incurring the risk of causing death" within the purview of this clause.¹⁴ Where a father sacrificed his son, because wealth had not accompanied his birth, and afterwards partially cut his own throat as a protest against the deity's injustice, he was held guilty of murder.¹⁵ A threat caused by incantations,¹⁶ or a belief in witchcraft,¹⁷ does not justify the causing of death.

Exceptions.—Unless the act done constitutes, at least, *prima facie* murder by reason of the intention with which it is found to be done, the Court need not consider the exceptions. Where a person causes the death of another person it is for him to show

⁹ *Nga Chit Tin*, (1939) 40 Cr. L. J. 725, [1939] AIR (R) 225.

¹⁰ *Pal Singh*, (1917) P. R. No. 28 of 1917, 18 Cr. L. J. 808, [1917] AIR (L) 226.

¹¹ *Dil Mohanmad*, (1941) 21 Pat. 250.

¹² *Suba*, (1888) P. R. No. 40 of 1888.

¹³ *Dhirajia*, [1940] All. 647, 654.

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¹⁴ *Ibid.*, 647.

¹⁵ *Bishendhara Kahar*, (1867) 7 W. R. (Cr.) 64 [100].

¹⁶ *Gobadur Bhooyan*, (1870) 18 W. R. (Cr.), 55, 4 Beng. L. R. (Appx.) 101.

¹⁷ *Ganduwa Nayako*, (1882) 1 Weir 305.

that his act was removed from the category of murder by one of the exceptions to the section.¹⁸

"The operation of the five exceptions to s. 300 is practically somewhat different in respect to an act which falls within one of the first three clauses of s. 300, and in respect to an act which falls within the 4th clause. These four clauses, it should be remarked, describe exhaustively all the classes of acts to which the five exceptions apply. The exceptions operate in this way. The existence of all the circumstances described in an exception excuses an act which would otherwise be murder within one of the first three clauses, to the extent that the act constitutes only culpable homicide not amounting to murder and not murder. Here the act is *prima facie* murder unless and until an exception is established. There is no inconsistency involved in finding that an act falls within one of these clauses and also falls within an exception, for all the circumstances of any exception may co-exist with the murderous intention. When however an act falls within the 4th clause of s. 300, as regards the knowledge with which it is done, and the circumstances constituting an exception exist, there is this difference, it cannot consistently be affirmed (at the end of a trial and upon all the evidence) of an act causing death done with the knowledge described, in one breath that it was done without any excuse for running the risk of causing death, and in the next breath that it was done under circumstances which the law declares to be an excuse for the act of causing death to the extent of preventing the culpable homicide amounting to murder... It is a matter of fact and not of law whether a particular act of homicide committed with the knowledge described in cl. 4 of s. 300 is committed without any excuse. As the 4th clause is framed, it need never be determined as a matter of law what circumstances, other than or falling short of the five exceptions, constitute an excuse, it being in each case a question of fact whether from the concomitant circumstances which are proved, the just inference is that the act was done 'without any excuse'. As this 4th clause is expressed like the three preceding clauses to be subject to the five exceptions which are legal excuses for murder (as contradistinguished from culpable homicide) it is evident that the words 'without any excuse' in clause 4 do not mean merely 'in the absence of the circumstances described in the exceptions'. A Jury or a Court as a Judge of fact is left at liberty to affirm upon proof of circumstances other than or falling short of an exception, not that these circumstances form an excuse for murder, but that in view of them the Jury or Court is unable to affirm that the particular act of homicide was committed without any excuse, and is therefore unable to pronounce the act to be culpable homicide amounting to murder, as defined in cl. (4) of s. 300".¹⁹

An offence may amount to culpable homicide but not murder even though none of the exceptions in this section are applicable to the case. Thus, where the accused strangles the deceased with the intention of causing such bodily injury as is likely to cause death, but not with the intention of causing such bodily injury as he knew to be likely to cause death, or as is sufficient in the ordinary course of nature to cause death, neither cl. (2) nor cl. (3) of this section applies, and the offence is culpable homicide not amounting to murder, even though none of the exceptions in this section apply to the case.²⁰

5. Exception 1.—'Grave and sudden provocation'.—Under this Exception the provocation (1) must be grave and sudden, and (2) must have by its gravity and suddenness deprived the accused of the power of self-control. In other words, it ought to be distinctly shown not only that the act was done under the influence of some feeling which took away from the person doing it all control over his action but that that feeling had an adequate cause. In the absence of such proof, the atrocity of the offence will not be mitigated and the offender will not be able to escape the legal consequences of his act.²¹ The test to see whether the accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to lose control of himself to the extent of inflicting the injury or injuries that he did inflict.²² In *Mancini v. Director of Public*

¹⁸ *Piire*, (1919) 17 A. L. J. R. 866, 20 Cr. L. J. 608, [1919] AIR (A) 389; *Ratan*, (1932) 8 Luck. 301; *Rameshwar*, [1935] O. W. N. 311, 36 Cr. L. J. 534, [1935] AIR (O) 281.

¹⁹ Per Plowden, J., in *Barkatulla*, (1887) P. R. No. 32 of 1887, pp. 65, 66.

²⁰ *Raja Ram*, [1935] O. W. N. 140, 36 Cr. L. J. 454, [1935] AIR (O) 239.

²¹ *Lal Singh*, (1921) 22 Cr. L. J. 674; *Rajavelu Mudali*, [1931] M. W. N. 134.

²² *Saraj Din*, (1934) 36 Cr. L. J. 306, 35 P. L. R. 588, [1934] AIR (L) 600.

*Prosecution*²³ Viscount Simon laid down—"It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death... The test to be applied is that of the effect of the provocation on a reasonable man, ... so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." In another case Lord Simon said: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised viz., the actual finding of a spouse, in the act of adultery."²⁴

Deceased was having an intrigue with the accused's wife for a long time and used to sing provocative songs tantamount to declaration of his intrigue with the wife of the accused and of a most provocative nature. The accused had managed to control himself on previous occasions when provoked by such songs, but on this occasion he lost self-control and shot the deceased. It was held that he was entitled to the benefit of this exception.²⁵

Anger is a passion to which good and bad men are both subject, and mere human frailty and infirmity ought not to be punished equally with ferocity or other evil feelings. The authors of the Code observe:—

"We agree with the great mass of mankind, and with the majority of jurists, ancient and modern, in thinking that homicide committed in the sudden heat of passion, on great provocation, ought to be punished; but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming themselves to govern their passions; and in some few cases for which we have made provision, we conceived that it ought to be punished with the utmost rigour.

"In general, however, we would not visit homicide committed in violent passion, which had been suddenly provoked, with the highest penalties of the law. We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course,—a course which would shock the universal feeling of mankind, and would engage the public sympathy on the side of the delinquent against the law"¹

Provocation caused by words or gestures.—According to English law mere words, or gestures, not accompanied with anything of such a serious character as a blow will not, in point of law, be sufficient to reduce the crime to manslaughter.² A sudden confession of adultery by either spouse without more can never constitute provocation of a sort which might reduce murder to manslaughter.³ Mere suspicion of a wife's adultery is not sufficient to reduce a husband's homicide of the suspected person to manslaughter.⁴ A statement by the wife that she was going to live with another man or was about to commit adultery, does not amount to provocation so as to reduce the crime of killing from murder to manslaughter.⁵ But the law as to provocation sufficient

²³ [1942] A. C. 1, 9; *Holmes v. Director of Public Prosecutions*, [1926] 2 A. E. R. 124.

²⁴ *Holmes v. Director of Public Prosecutions*, [1946] 2 A. E. R. 124.

²⁵ *Bahadur*, (1935) 36 Cr. L. J. 939, [1935] AIR (Pesh.) 78.

¹ Note M, p. 144.

² *Welsh*, (1869) 11 Cox 386; *James Ellor*, (1920) 15 Cr. App. R. 41, 26 Cox 680.

³ *Holmes v. Director of Public Prosecutions*

[1946] 2 A. E. R. 124, overruling *Rothwell*, (1871) 12 Cox 145; *James*, (1908) 72 J. P. 215; *Palmer*, [1913] 2 K. B. 29; *Frank Greening*, (1913) 9 Cr. App. R. 105, 107.

⁴ *William Harrison Birchall*, (1913) 9 Cr. App. R. 91. In this case the Court has observed that the doctrine of *Rothwell's* case (sup.) is not to be extended.

⁵ *James Ellor*, (1920) 15 Cr. App. R. 41, 26 Cox 680.

to reduce homicide to manslaughter is not the same in the case of unmarried as of married persons. "It is a grave offence against the husband for the wife to commit adultery, but there is no such offence when a man is living with another woman. He has no right to object to her going to a house of ill-fame; the case is entirely different".⁶

The authors of the Code remark: "We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact, that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honour more acutely than an outrage which fractured one of his limbs. If so, why should we treat an offence produced by the blamable excess of a feeling which all wise legislators desire to encourage, more severely than we treat the blamable excess of feelings certainly not more respectable?..."

"A person who should offer a gross insult to the Mahomedan religion in the presence of a zealous professor of that religion; who should deprive some high-born Rajpoot of his caste; who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt".⁷

The Law Commissioners in their First Report⁸ say: "The discretion...is purposely left to the Court to judge whether the provocation be such as would be likely to move a person of ordinary temper to violent passion, not *any person* it is to be understood, but a person of the same habits, manners, and feelings. A discreet Judge... would properly reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shewn to belong to a class sensitive to insult of this kind, or otherwise. The framers of the Code deemed it inadvisable to lay it down as a *rule* that insults by words or gestures should be considered an adequate cause of provocation, while, for the reason assigned, they thought it proper to *allow* the plea of provocation, where it may be evident that such insults have as great a tendency as bodily injuries to excite violent passion."

Abusive words.—Use of merely abusive or vulgar language is not a grave provocation.⁹

Where the accused struck the deceased a hasty though fatal blow with a stick for abusing his mother;¹⁰ where the accused killed the deceased for grossly abusing him in filthy language;¹¹ where the accused quarrelled with his wife who was dilatory in the performance of her household duties and exchanged abuse with her, and gave her a blow on the side of the head with a heavy hammer which he picked up on the spur of the moment, from the effects of which she died,¹² and where the accused, a weak-looking youth of about seventeen years of age (his wife being about thirty-five), on his unexpected return to his house, found the paramour of his wife coming out of his house and on remonstrating with his wife was further annoyed by her reception of his remonstrances and killed her with a hoe,¹³ it was held that the offence of culpable homicide not amounting to murder was committed. Where the accused, a lad of nineteen years, was abused by the deceased and he killed him in anger, it was held that the provocation could not be said to be grave and sudden such as would reduce the offence of murder to that of culpable homicide not amounting to murder.¹⁴

⁶ *Frank Greening*, (1913) 9 Cr. App. R. 105.

⁷ Note M, pp. 144, 145.

⁸ Section 271.

⁹ *Mohammad Ali*, (1945) 47 Cr. L. J. 747, 48 P. L. R. 26, [1945] AIR (L) 278; *Partapa*, (1923) 25 Cr. L. J. 298, [1923] AIR (L) 408; *Abdullah*, (1932) 33 P. L. R. 382, 33 Cr. L. J. 338, [1932] AIR (L) 369.

¹⁰ *Suleem Sheikh*, (1864) 1 W. R. (Cr.) 23; *Ameera*, (1866) P. R. No. 12 of 1866; *Thirupathuran*, (1934) 67 M. L. J. 674, 40 L. W. 777, [1934] M. W. N. 1358, 36 Cr. L. J. 790, [1934]

AIR (M) 722.

¹¹ *Nga Paw Yin*, (1935) 37 Cr. L. J. 410, [1936] AIR (R) 40; *Girdhari Lal*, (1939) 42 P. L. R. 45.

¹² *Rahmat*, (1902) P. R. No. 30 of 1902.

¹³ *Ralia*, (1912) P. R. No. 3 of 1913, 14 Cr. L. J. 208.

¹⁴ *Mangal Singh*, (1925) 27 P. L. R. 15, 28 Cr. L. J. 217; *Rahman*, (1930) 32 Cr. L. J. 61, 31 P. L. R. 891, [1930] AIR (L) 344; *Abdullah*, (1932) 33 P. L. R. 382, 33 Cr. L. J. 338, [1932] AIR (L) 369.

'Whilst deprived of the power of self-control.'—The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation, is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (e.g. a person afflicted with defective control and want of mental balance) of his self-control.¹⁵ The provocation must be such as will upset, not merely a hot-tempered or hyper-sensitive person, but one of ordinary sense and calmness.¹⁶ The act must be done whilst the person doing it is deprived of self-control by grave and sudden provocation. That is, it must be done under the immediate impulse of provocation.¹⁷ The deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation.¹⁸ The fatal blow should be clearly traced to the passion arising from that provocation. Therefore, if, from the circumstances, it appears that the party, before any provocation given, intended to use a deadly weapon towards anyone who might assault him, this would show that a fatal blow given afterwards was not to be attributed to the provocation, and the crime would therefore be murder.¹⁹ Again, if the act was done after the first excitement had passed away, and there was time to cool, it is murder.²⁰

As to the question how long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its having cooled, it is laid down in East,²¹ that "In every case of homicide, how great soever the provocation may have been, if there be a sufficient time for the passion to subside and for reason to interpose, such homicide will be murder... With respect to what interval of time shall be allowed for passion to subside... the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given: for if from any circumstances whatever it appear that the party reflected, deliberated, or cooled, any time before the fatal stroke given; or if in legal presumption there was time or opportunity for cooling; the killing will amount to murder; as being attributable to malice and revenge rather than to human frailty... such malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature... [The killing will amount to murder] if between the provocation received and the stroke given [the party giving the stroke] fall into other discourse, or diversions, and continue so engaged a reasonable time for cooling; or if he take up and pursue any other business or design, not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of the provocation. Again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it; for that shews *deliberation*, which is inconsistent with the excuse of *sudden passion*, and is the strongest evidence of malice. It may be further observed in respect to time, that in proportion to the lapse thereof [time] between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument, or the manner of it... The mere length of time intervening between the injury and the retaliation... is... evidence in itself of deliberation."

The question to be determined in every case will be: "Was there time for the blood to cool and for reason to resume its seat?"²² If there was, the offence will be murder; if there was not, the offence will be culpable homicide not amounting to murder.

'Grave and sudden provocation.'—The provocation must be grave and sudden and of such a nature as to deprive the accused of the power of self-control. In determining whether the provocation was so, it is admissible to take into account the

¹⁵ *Lesbini*, [1914] 3 K. B. 1116; *Dinabandhu Ooriya*, (1929) 31 Cr. L. J. 637, [1930] AIR (C) 199.

¹⁶ *Des Raj*, [1939] Lah. 345.

¹⁷ *Nokul Nushyo*, (1867) 7 W. R. (Cr.) 27; *Ghausar Singh*, (1884) P. R. No. 33 of 1884; *Shangara Singh*, (1939) 42 P. L. R. 88.

¹⁸ *Bechoo Saout*, (1873) 19 W. R. (Cr.) 35.

¹⁹ *Thomas*, (1837) 7 C. & P. 817.

²⁰ *Yasin Sheikh*, (1869) 12 W. R. (Cr.) 68, 4 Beng. L. R. (A. Cr. J.) 6; *Lochan*, (1886) 8 All. 635.

²¹ *Pleas of the Crown*, Vol. I, pp. 251, 252, 253.

²² *Dhira*, (1877) Unrep. Cr. C. 122; *Hayward*, (1833) 6 C. & P. 157.

condition of the mind in which the offender was at the time of the provocation.²³ But it is not a necessary consequence of anger, or other emotion, that the power of self-control should be lost.²⁴ It must be shown distinctly not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause.²⁵ It has, therefore, been held in a series of cases that the commission of adultery by a wife within the sight of her husband is a sufficient grave provocation to bring the husband within this exception if he kills her. In such cases very mild punishment is usually inflicted.

Information received from a reliable person and believed to be credible as to the existence of a provoking act, which is being done in the immediate neighbourhood and the existence of which is instantaneously verified, can be said to be provocation given by the person committing that act just as much as if the person provoked had seen it in the first place with his own eyes.¹

"It must not however be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter... For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation."²

When the derangement of the mind reaches that degree that the judgment and reason ceases to hold dominion over it—their authority being suspended and yielding place to violent and ungovernable passion—the man who was before a rational being is no longer the master of his own understanding, becomes incapable of cool reflection, and ceases to have control over his passions. It is to such a state of mind that the law in judging of acts which cause death, gives indulgent considerations. And no mental perturbation or agitation which falls short of this, and leaves sway to reason and the power of self-control, can reduce a murder to an offence within the range of this mitigating exception.³

The provocation must be such as will upset not merely a hasty and hot-tempered or hypersensitive person, but one of ordinary sense and calmness.⁴ The mere sight of a person going to Court who had filed a criminal complaint should not give rise to grave and sudden provocation in the mind of the accused and if he kills the complainant after some altercation the offence will be murder.⁵

'Sudden.'—Grave provocation, arising from injuries extending over a long series of years, has been held to be insufficient, in the absence of evidence of recent and sudden provocation, to reduce the offence to culpable homicide not amounting to murder. The accused killed the deceased because, according to his allegations, the deceased had seduced his cousin, had encroached on his ancestral tope and had cut down trees, had persuaded the woman, whose land he cultivated, to turn him away, had usurped his share in the village, and had struck him and constantly behaved towards him in an insolent manner, it was held that there was nothing in the circumstances mentioned by him which could be taken as provocation so grave and sudden as to reduce the offence to culpable homicide not amounting to murder.⁶ Where the accused's concubine refused to abandon another connection and the accused, after remonstrating with the woman and leaving her, followed and killed her with a dagger which he stated he had purchased with the intention of killing her, it was held that though the provocation may have been grave, it was not of so sudden a character as to reduce the offence to culpable homicide not amounting to murder.⁷ Where the

²³ *Khogayi*, (1879) 2 Mad. 122; *A We*, (1900) 1 U. B. R. (1897-1901) 291.

²⁴ *Devji Govindji*, (1895) 20 Bom. 215; *Sakharam valad Ramji*, (1890) 14 Bom. 564; *Bechoo Saout*, (1873) 19 W. R. (Cr.) 35; *Kesar Singh*, (1877) P. R. No. 10 of 1878; *Ghausar Singh*, (1884) P. R. No. 33 of 1884.

²⁵ *Huri Giree*, (1868) 10 W. R. (Cr.) 26, 1 Beng. L. R. (A. Cr. J.) 11; *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33, F.B.

¹ *Chanan Khan*, [1944] Lah. 72.

² 1 East P. C. 234.

³ M. & M. 242.

⁴ *Khadim Hussain*, (1926) 7 Lah. 488; *Sohrab*, (1924) 5 Lah. 67.

⁵ *Prem Singh*, (1942) 44 P. L. R. 457, 44 Cr. L. J. 117, [1942] AIR (L) 301.

⁶ *Moni Prodhano*, (1882) 1 Weir 306.

⁷ *Ghuntappa*, (1882) 1 Weir 306.

accused found seated on the same cot with his wife her paramour whom he had expelled from his house only a day previously, and he gave a blow with an adze which fractured the skull of his wife and killed her, it was held that the accused must be considered to have received a grave and sudden provocation.⁸ The refusal of a wife to have connection with her husband is held not to constitute a grave and sudden provocation.⁹

The deceased abused a woman of the house of the accused when the accused was not there. The accused on being informed of it proceeded to the house of the deceased and challenged him to fight for having abused the woman. The deceased came out of the house to meet the accused when some persons intervened and pushed the accused to his house. The deceased again came out of his house and challenged the accused to fight and abused him. The accused accepted the challenge. The deceased caught hold of the accused by the tuft of his hair and gave him blows with his fist. The accused then gave a fatal blow with a dagger. It was held that though the original provocation by the deceased was not grave and sudden, it was aggressive, and the second provocation, viz., seizing by the tuft, was grave and sudden and the accused came within this exception.¹⁰

A provocation however grave which is not sudden but is a chronic one will not satisfy the requirements of the exception.¹¹ An attack on the head of a religious community may be a provocation, but it cannot be said to be sudden where he had knowledge of it a couple of days ago.¹²

'Causes the death of the person who gave the provocation.'—The first exception only applies when the death of the person giving provocation has been caused. Cases like those which are not unfrequent of a person under excitement running amok and killing all whom he meets, are not mitigated by this exception.

'Mistake.'—See s. 76, *supra*. This exception treats the case of a person killed by mistake or accident as culpable homicide not amounting to murder.

'Accident.'—See ills. (a) and (b) and s. 80, *supra*.

6. Proviso 1.—**'Provocation is not sought or voluntarily provoked.'**—Where the provocation is sought by the accused, it cannot furnish any defence against the charge of murder. A and B were at some difference. A bade B take a pin out of the sleeve of A, intending thereby to take an occasion to strike or wound B, and B did so accordingly, and then A struck B whereof he died. This was held to be murder because there was no provocation, since the act was done with the consent of A, and because it appeared to be a malicious and deliberate artifice to take occasion to kill B.¹³ Where A and B having fallen out, A said he would not strike but would give B a pot of ale to strike him, whereupon B struck and A killed him, it was held that A had committed murder as the provocation given was courted by him.¹⁴

This proviso includes the case of premeditated murder in which part of the plan of the murderer is to incite the victim to provoke him, so that he may prepare the way for his own defence if he should be prosecuted.¹⁵ If the accused goes deliberately in search of the provocation sought to be made the mitigation of his offence, the first exception will not apply.¹⁶

As to the definition of the word 'voluntarily', see s. 39, *supra*.

7. Proviso 2.—The wording of this proviso does not limit its provisions to public servants only, but includes all persons acting according to the commands of law.¹⁷ The Law Commissioners in their First Report¹⁸ say: "We apprehend that grave provocation given by any thing done under cover of obedience to the law, or under cover of its authority, or by a public servant, or in defence, in excess of what

⁸ *Des Raj*, (1928) 29 Cr. L. J. 454.

⁹ *The Government Pleader v. Nattekallappa*, (1886) 1 Weir 308; *Dadubhai*, (1895) Unrep. Cr. C. 766, Cr. R. No. 30 of 1895; *Ghazi*, (1921) 28 Cr. L. J. 140. Sentence of transportation for life was considered sufficient in such a case.

¹⁰ *Guturi Nagalu*, [1927] M. W. N. 796, 29 Cr. L. J. 7, [1928] AIR (M) 136.

¹¹ *Junma*, (1932) 33 P. L. R. 511, 34 Cr. L. J. 94, [1932] AIR (L) 438.

¹² *Aziz Ahmad*, (1938) 40 P. L. R. 119, 39 Cr. L. J. 695, [1938] AIR (L) 355.

¹³ 1 Hale P. C. 457; 1 East P. C. 289.

¹⁴ 1 Hawk. P. C., e. 13, s. 24, p. 96, 1 East P. C. 239.

¹⁵ *Annamalai*, [1935] M. W. N. 1161.

¹⁶ *Mohan*, (1886) 8 All. 622; *Lochan*, (1886) 8 All. 635; *Mahamdu*, [1944] Kar. 444.

¹⁷ *Vide* s. 79, *supra*.

¹⁸ Section 277

it strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them, and the like, would be admissible in extenuation of homicide under this clause." As to 'public servant', see s. 21, *supra*.

8. Proviso 3.—A person lawfully exercising the right of private defence may give provocation to the aggressor, but the aggressor is thereby not entitled to take shelter under the first exception. "For example, take the case of Wat Tyler...He was a public officer, a tax gatherer, who came to 'exercise his lawful powers' in that capacity, but doing so in a manner unwarranted and highly offensive, Tyler was excited to violent passion, and in his rage killed him on the spot. The Commissioners upon this say, 'so far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a Judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter' ".¹⁹ See ill. (e) to Exception 1. As to the right of private defence, see ss. 96-106, *supra*.

9. Explanation.—The Calcutta High Court has laid down that provocation is a question of fact, and where the Judge and assessors have found on the evidence that the accused is not guilty of murder, the High Court cannot interfere, as no question of law is involved.²⁰ But in a similar case the Allahabad High Court has treated this question as one of law.²¹ The Allahabad view is not in accordance with the present state of law in England and is contrary to the principle of this Explanation.

Cases.—Provocation caused by adulterous intercourse.—Where woman is wife.—Where the accused found a man committing adultery with his wife and killed him;²² where the accused under similar circumstances killed both his own wife and the adulterer;²³ where the accused killed a person who had come to his house with the intention of having sexual intercourse with his wife²⁴ and thereafter killed his wife also;²⁵ where the accused saw another man in the act of sleeping with his wife with the intention of committing adultery;¹ where the accused saw a man in criminal conversation with his wife on the first day, and on the second, seeing them eating together, he took up a bill-hook which was lying near and killed him;² where the accused, finding that his wife was forcibly taken to the house of a native physician, who alleged that her presence was necessary for the performance of some incantations, took a sword and watched the proceedings from the roof of a house, and on seeing his wife being violated by the physician, jumped down from the roof, and killed him with the sword;³ where the accused saw his wife in company with her paramour and killed her;⁴ where the accused seeing a man going out of a place at night time where his wife was, pursued him but he escaped and on asking his wife she abused him and he killed her,⁵ it was held that the offence of culpable homicide not amounting to murder was committed. Accused's wife led a grossly immoral life. After a recent act of unchastity the accused remonstrated with her and instead of showing repentance she replied that she would continue in the course to which he objected. The accused became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. Accused then lost control of himself, took out a knife and stabbed her

¹⁹ Section 277.

²⁰ *Huri Giree*, (1868) 10 W. R. (Cr.) 26, 1 Beng. L. R. (A. Cr. J.) 11.

²¹ *Lochan*, (1886) 8 All. 635.

²² *Asha Gopal*, (1897) Unrep. Cr. C. 932, Cr. R. No. 42 of 1897; *Gour Chunder Polie*, (1864) 1 W. R. (Cr.) 17; *Bhekye*, (1864) 1 W. R. (Cr.) 46; *Maithya Gazeer*, (1866) 6 W. R. (Cr.) 42; *Said Ali*, (1890) P. R. No. 8 of 1890; *Fazal*, (1899) P. R. No. 8 of 1899; *Sahib*, (1900) P. R. No. 27 of 1900; *Kadir Baksh*, (1920) 23 Cr. L. J. 563, [1920] AIR (L) 501; *Muhammad Zaman*, (1932) 34 P. L. R. 899, 34 Cr. L. J. 1161, [1933] AIR (L) 165; *Maddy's Case*, (1872) 1 Vent. 158, 86 Eng. Rep. 108; *Kelly*, (1848) 2 C. & K. 814.

²³ *Sheik Boodhoo*, (1867) 8 W. R. (Cr.) 38; *Mangal Ganda*, (1924) 25 Cr. L. J. 1077, [1925] AIR (N) 37.

²⁴ *Teprah Fukeer*, (1866) 5 W. R. (Cr.) 78; *The Government of Bengal v. Haneef Fakeer*, (1875) 23 W. R. (Cr.) 50; *Hussain*, [1939] Lah.

278; *Chanan Khan*, [1944] Lah. 72.

²⁵ *Raham Shah*, (1924) 26 P. L. R. 260, 26 Cr. L. J. 534, [1925] AIR (L) 114. In *Hira Lal*, (1921) 22 Cr. L. J. 341, the father-in-law killed his daughter-in-law under similar circumstances.

¹ *Hussain*, [1939] Lah. 278; *Ajudhi* (accused saw his wife lying on a cot with a man and killed her), (1915) 16 Cr. L. J. 625; *Jate Uraon*, [1940] P. W. N. 446, (1940) 41 Cr. L. J. 472, [1940] AIR (P) 541.

² *Boya Munigadu*, (1881) 3 Mad. 33; *Hussun*, (1872) P. R. No. 30 of 1872; *Venkatesan*, (1882) 1 Weir 307.

³ *Ramtahal Kahar*, (1869) 3 Beng. L. R. (A. Cr. J.) 33.

⁴ *Fatta*, (1928) 30 Cr. L. J. 481 *Narainjan Singh*, (1929) 31 Cr. L. J. 735, [1930] AIR (L) 172.

⁵ *Abdul Khanan Watamir*, (1939) 42 P. L. R. 42, 40 Cr. L. J. 868, [1939] AIR (L) 436.

repeatedly with it with the result that she died from the injuries. It was held that the immediate provocation offered to the accused at the time of his remonstrance coming on the top of all that had gone before was sufficient to reduce the offence of the accused from murder to one of culpable homicide.⁶ The accused and his wife's sister's husband B were sleeping on the same cot in a verandah, and the accused's wife was sleeping in the adjoining room. Some time in the night B got up and went into the room and bolted the door behind him. The accused also got up and peeping through a chink in the door saw B and the accused's wife having sexual intercourse. The accused returned and lay down on the cot. After some time B came out of the room and lay down on the cot by the side of the accused. After a short time, when B began dozing, the accused stabbed him several times with a knife and killed him. There was no evidence that the accused had to go anywhere to search for the knife, which, apparently, was with him. It was held that the case came within this exception notwithstanding the interval of time between the seeing of the act of adultery and the killing of B, and the accused having acted under grave and sudden provocation the offence committed was one under s. 304 and not under s. 302.⁷

Where woman is not wife.—The Calcutta and the Patna High Courts have held that where the relationship between the parties is not that of husband and wife the offence would be murder.⁸ But the Madras High Court has taken a contrary view. It has held that the question of provocation is a purely psychological question and one cannot apply considerations of social morality to such a purely psychological question. Consequently where a man sees a woman in the arms of another, and loses control over himself, the circumstance that she was his mistress and not wife does not make any real difference for the purpose of s. 304.⁹ The High Courts of Allahabad, Bombay and Lahore have held likewise. Where the accused found his sister having illicit connection with a man and in a fit of passion killed them both on the spot, it was held that the plea of grave and sudden provocation reduced the offence to one of culpable homicide not amounting to murder.¹⁰ The deceased who was the younger sister of the accused had left her husband and was living under his care. She was suspected to be of an immoral character. On the night of her murder at about 3 a.m. she had gone out to meet a stranger in the compound at the back of the house for a clandestine purpose. When the accused asked the deceased why she did not give up evil ways she refused to listen to him and gave an insolent reply. It was held that the provocation received by the accused was in the circumstances almost as "grave and sudden" as it would have been had the accused seen the deceased in the act of sexual intercourse with a stranger and the provocation was further aggravated by the insolent reply given by the deceased and he was guilty under the first clause of s. 304.¹¹ Where the accused saw his sister and her paramour coming from the precincts of a mosque, and, receiving an insulting answer from the latter, there and then killed him;¹² and where the accused on seeing a person misbehaving with his brother's wife ran after him and killed him,¹³ it was held that the offence of culpable homicide not amounting to murder was committed.

Confession by woman of immoral conduct.—Although a confession of adultery by a wife to her husband who, in consequence, kills her, may be such provocation as will entitle the jury in their discretion to find a verdict of manslaughter instead of murder, a similar confession of illicit intercourse by a woman who was not the accused's wife but only engaged to be married to him, cannot, if he kills her in consequence, justify such a verdict.¹⁴

⁶ *Sikhai*, (1925) 26 Cr. L. J. 1228, [1925] AIR (A) 676; *Jan Muhammad*, (1929) 30 Cr. L. J. 1044, [1929] AIR (L) 861.

⁷ *Balku*, [1938] All. 789.

⁸ *Dinabandhu Ooriya*, (1920) 31 Cr. L. J. 737, [1930] AIR (C) 199; *Murgi Munda*, (1938) 18 Pat. 101; *Sheo Ram*, [1937] O. W. N. 917, 38 Cr. L. J. 938, [1937] AIR (O) 457. But see *Kasseemoddeen*, (1865) 4 W. R. (Cr.) 38, where the accused killed the deceased lying in bed with their sister.

⁹ *Kota Potharaju*, [1931] M. W. N. 1137, (1931) 35 L. W. 141, 33 Cr. L. J. 273, [1932] AIR (M) 25.

¹⁰ *Chunni*, (1896) 18 All. 497; *Mohammad Yar*, (1922) 25 Cr. L. J. 685, [1925] AIR (L) 62; *Nagya Kany Kathodi*, (1930) Cr. App. No. 308 of 1930, decided by Madgavkar and Baker, JJ., on July 23, 1930 (Unrep. Bom.).

¹¹ *Inayat*, (1933) 34 P. L. R. 935, 35 Cr. L. J. 74, [1933] AIR (L) 869.

¹² *Jafar*, (1905) 6 P. L. R. 492, 2 Cr. L. J. 705.

¹³ *Dinni*, (1926) 27 Cr. L. J. 572 (2), [1926] AIR (L) 485.

¹⁴ *Palmer*, [1913] 2 K. B. 29; *Frank Greening*, (1913) 9 Cr. App. R. 105; *Dinabandhu Ooriya*, (1929) 31 Cr. L. J. 737, [1930] AIR (C) 199.

The principle that, if a wife suddenly confessed to her husband that she has committed adultery, it may be treated as equivalent to the discovery of the act itself and if the husband forthwith kills her, the offence is only one of culpable homicide not amounting to murder, cannot be extended to a case of murder by the husband of the paramour with whom his wife has confessed to have committed adultery. The accused strongly suspected that his wife had gone wrong with the deceased. Acting with considerable deliberation the accused sent for the deceased and when he arrived he asked his wife as to whether she was amusing herself with the deceased and she confessed her misconduct with the deceased. Then he asked him if it were true, and without waiting for a reply, drew a knife from his waist and stabbed him in his chest which proved fatal. It was held that the accused was guilty of murder and not culpable homicide not amounting to murder, that it was not a matter of any sudden confession on the wife's part that surprised him and took him off his balance, but only a confirmation of that which he had already suspected, if he had not really believed it.¹⁵

The accused, a soldier, returned home on leave and found his home and children in a very neglected condition. His wife admitted that she had been unfaithful to him. Their infant son, aged two years, was suffering from a painful malady. On the day of the crime the wife left the house, and, although repeatedly sent for, refused to return to the child, who was visibly in intense pain. The accused, provoked by the continued neglect of his wife, killed the child. It was held that the provocation owing to the neglect of the wife, which was set up as a defence, was insufficient to reduce the crime to manslaughter.¹⁶

Provocation caused by adultery, but death caused not in a fit of passion.—Where the accused finding a man intriguing with his wife, beat him, and after taking him to the bank of a river, cut off his head;¹⁷ where the accused finding the deceased lying with his wife, took him to another house, where his father brought a bamboo with which the accused and his father suffocated the deceased by placing the bamboo on his neck;¹⁸ where the accused's concubine refused to abandon another connection and the accused after remonstrating with the woman and leaving her, followed and killed her with a dagger which he had purchased with the intention of killing her;¹⁹ where the accused suspecting infidelity in his wife followed her with a hatchet one night, when she stealthily left his house, and finding her talking with her paramour, there and then killed her;²⁰ where the accused, suspecting the widow of his cousin, followed her one night with a sword in hand to a considerable distance, and finding her actually having connection with her lover, killed her there and then;²¹ and where the accused suspected his sister of unchastity and killed her and the man with whom she had come to his house after some conversation,²² it was held that the offence of murder was committed. It was held similarly where the accused suspected his wife and made preparations to catch her with her paramour. A person whom he had asked to be on the watch called him outside his house and pointed out the spot where she and her paramour were together. Thereupon the accused returned to his house, took a heavy wooden pole and going to the place caught the couple in the act, and dealt the paramour a blow on the head which killed him on the spot.²³ The mere singing by the deceased girl of love songs, which reminded the accused (her cousin) of her immoral relations with a stranger, was held not to constitute such grave provocation as would reduce the offence of murder to one of homicide not amounting to murder.²⁴ No doubt in all these cases there was provocation, but the acts were not committed while the accused were deprived of the power of self-control, they were not the offspring of the moment, but they were the result of cool and mature consideration after the first excitement had passed away.

Where the accused stated that he had seen the deceased arrange a clandestine meeting between his wife and a young man, whom he actually saw enter his wife's

¹⁵ *Imbichi Koya*, (1933) 66 M. L. J. 213, [1933] M. W. N. 543, 39 L. W. 190, 35 Cr. L. J. 694, [1934] AIR (M) 176.

¹⁶ *Simpson*, (1915) 25 Cox 269.

¹⁷ *Yasin Sheik*, (1869) 12 W. R. (Cr.) 68, 4 Beng. L. R. (A. Cr. J.) 6.

¹⁸ *Bechoo Saout*, (1873) 19 W. R. (Cr.) 35; but see *Abalu Das*, (1901) 28 Cal. 571.

¹⁹ *Ghuntappa*, (1882) 1 Weir 306.

²⁰ *Mohan*, (1886) 8 All. 622; *Gohra*, (1890)

P. R. No. 7 of 1890.

²¹ *Lochan*, (1886) 8 All. 635; *Gohra*, (1890) P. R. No. 7 of 1890.

²² *Rahim Khan*, (1913) 7 S. L. R. 118, 15 Cr. L. J. 501.

²³ *Goshain*, (1920) 18 A. L. J. R. 851, 21 Cr. L. J. 607, [1920] AIR (A) 119; *Jagar*, (1937) 39 P. L. R. 479, 38 Cr. L. J. 1057, [1937] AIR (L) 692.

²⁴ *Khadim Hussain*, (1926) 7 Lah. 488.

room some time before midnight and again leave it after a considerable interval, and that in consequence of what he saw he had not a wink of sleep that night and was devoid of his senses at the time he killed the deceased, it was held that there was no doubt the accused did actually believe he had ocular proof of his wife's infidelity, and that if he had acted under the immediate influence of such a delusion, the estimate of his guilt must be made upon the basis of the actual existence of the fact in regard to which the delusion existed, and had the accused acted under the immediate influence of such provocation his guilt would have been greatly reduced, but as he did not do so, his offence was murder.²⁵

The mother of the accused had been behaving in a shameless manner in running away with her paramour (the deceased) on several occasions. On the last occasion she took her young daughter aged sixteen or seventeen years with her. The accused suspected the deceased and killed him. It was held that the provocation to the accused was not "grave and sudden."¹ The accused knew that his sister had gone to see the deceased with whom she had illicit connection and deliberately went there to kill the deceased if he found him with his sister. It was held that the provocation was no doubt grave but not sudden. The accused expected to find at the spot before he left his house what he afterwards found there. There was, therefore, no suddenness about the discovery of his sister in the company of the deceased and the accused could not be said to have been deprived of the power of self-control. On the other hand, he sought the provocation by deliberately going to the scene of the meeting.² Where the deceased fell in love with the same woman the accused was in love with and he was not prepared to give up his illicit connection with that woman at the bidding of the accused and the accused killed him, it was held that it could hardly be said that his conduct gave grave provocation to the accused, and would not mitigate his crime of brutal murder committed after premeditation.³

Where the accused were lying in wait armed with spears, expecting the deceased to come that side to prosecute his intrigue with the girl who was betrothed to one of them, and intended to murder him, if he did come, it was held that it could not be said that the provocation was sudden in that it deprived the accused of their power of self-control and thus impelled them to commit the offence and that they were guilty under s. 302.⁴ Where the wife of the accused was living with the deceased for sometime and the accused sought out the deceased and stabbed him, it was held that the accused was guilty of murder.⁵

In England it is held that mere suspicion of adultery by a wife is not enough to reduce killing by the husband from murder to manslaughter.⁶

Grave provocation.—Where death was caused by an act presumably committed partly under the influence of apprehension from a severe beating from which the accused had just escaped and partly under the influence of provocation caused by the beating, it was held that the conviction should have been of culpable homicide not amounting to murder.⁷ Where a husband and wife were not on good terms and on one occasion when the husband asked for *pan* (betel) the wife threw dirty rice-water in his face and the husband being enraged took up a stone and struck her on the head and the wife died, it was held that the act of the wife was grave and sudden provocation and the husband was guilty of culpable homicide not amounting to murder.⁸ The accused found three youths stealing pineapples from his garden. He chased them and overtaking one of them cut him down with a *da*. It was night and dark, there was nothing to show that the deceased attempted to cause hurt to the accused. It was held that the law should be construed liberally in favour of the accused in such a case if he has acted in good faith for the protection of his person and property, though he had acted in excess of his legal rights; and that he was entitled to the benefit of s. 300, Excep. 1, having acted under the excitement of grave and sudden provocation.⁹

²⁵ *Ghatu Pramanik*, (1901) 28 Cal. 613.

¹ *Jumma*, (1932) 34 Cr. L. J. 94, 33 P. L. R. 511, [1932] AIR (L) 438; *Allah Din*, (1929) 31 Cr. L. J. 229, [1930] AIR (L) 415.

² *Mehra Mistak*, (1933) 35 Cr. L. J. 1378, [1934] AIR (L) 103; *Imam Bakhsh*, (1936) 18 Lah. 206.

³ *Shankar*, (1934) 35 Cr. L. J. 894, 11 O. W. N. 636, [1934] AIR (O) 222.

⁴ *Nur Ilahi*, (1933) 35 Cr. L. J. 1476, [1934] AIR (L) 239.

⁵ *Palaniappa Chetty*, [1937] M. W. N. 94.

⁶ *Fredrick Thomas Milkward*, (1931) 23 Cr. App. R. 119.

⁷ *Taturi Jamaliya*, (1881) Weir (3rd Edn.) 168..

⁸ *Krishna Chandra*, (1929) 30 Cr. L. J. 729, [1929] AIR (P) 201.

⁹ *A We*, (1897-1901) 1 U. B. R. Cr. 291.

No grave provocation.—A belief in having been the victim of witchcraft during a period extending over three or four months was held not to constitute provocation sufficient in its nature and suddenness to reduce the offence to culpable homicide not amounting to murder.¹⁰ Where the accused stabbed his wife with a penknife in the region of her breast and caused a wound two and a half inches deep because she refused to go with him to another place immediately but merely asked him to wait for a night, it was held that there was no provocation of a grave and sudden character and that the accused must have intended to cause her death.¹¹ A, B and C had been drinking together and were all more or less intoxicated. A pressed C to drink more and on his refusing A got angry and drew a clasp knife on C. B, the deceased, interfered and, after vainly remonstrating with A, hit him with a branch of a tree on the head. Getting incensed at this A inflicted on B a fatal blow. It was held that as the deceased hit the accused with the sole object of preventing him from stabbing C in the exercise of the right of private defence as laid down in s. 97, this provocation would not bring the accused's act under the first Exception to this section.¹² Throwing of a clod of earth by a child of three or four was held not to be sufficient provocation for a man causing its death by swinging it round his head and dashing it against the ground.¹³ Where the accused left his wife for eight months exposed to temptation during which period she misbehaved and became pregnant and on returning home he killed her lover when he was asleep, it was held that the accused was not entitled to a lenient treatment and must receive a capital sentence, inasmuch as the murder could not be said to have been committed on grave and sudden provocation.¹⁴ The accused asked his wife to sever her connection with her paramour but she declined to do so. Thereupon there was a quarrel between the accused and his wife in the course of which he lost his temper and in a fit of anger killed his wife. It was held that there was no grave and sudden provocation within the meaning of this Exception, but there was provocation entitling him to the lesser penalty of transportation for life.¹⁵

10. Exception 2.—Exceeding the right of private defence.—This Exception provides for the case of a person who exceeds the right of private defence. The authors of the Code say: "Wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, we are inclined to think that it will always be expedient to make a separation between murder and what we have designated as voluntary culpable homicide in defence.

"The chief reason for making this separation is that the law itself invites men to the very verge of the crime which we have designated as voluntary culpable homicide in defence. It prohibits such homicide indeed; but it authorizes acts which lie very near to such homicide; and this circumstance, we think, greatly mitigates the guilt of such homicide.

"That a man who deliberately kills another in order to prevent that other from pulling his nose should be allowed to go absolutely unpunished, would be most dangerous. The law punishes and ought to punish such killing; but we cannot think that the law ought to punish such killing as murder; for the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage; to give the assailant a cut with a knife across the fingers which may render his right hand useless to him for life, or to hurl him downstairs with such force as to break his leg; and it seems difficult to conceive that circumstances which would be a full justification of any violence short of homicide should not be a mitigation of the guilt of homicide. That a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the Code if he kills the same assailant; that there should be only a single step between perfect innocence and murder, between perfect impunity and liability to capital punishment, seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death.

¹⁰ *Gandwa Nayako*, (1882) 1 Weir 305. See *Ooram Sungra*, (1886) 6 W. R. (Cr.) 82.

¹¹ *Syed Barcha Sahib*, [1913] M. W. N. 556, 14 Cr. L. J. 115.

¹² *Nyo H'a Aung*, (1910) 12 Cr. L. J. 477.

¹³ *Bihari*, (1892) 1 O. D. 480.

¹⁴ *Pateshwari Prasad*, (1928) 29 Cr. L. J. 465, 5 O. W. N. 160, [1928] AIR (O) 241.

¹⁵ *Ibrahim*, (1927) 29 Cr. L. J. 347, [1928] AIR (L) 544; *Khanun*, (1929) 31 Cr. L. J. 759, [1930] AIR (L) 171; *Rahman*, (1931) 33 P. L. R. 8, 32 Cr. L. J. 1118, [1932] AIR (L) 14.

"It is to be considered also that the line between those aggressions which it is lawful to repel by killing, and those which it is not lawful so to repel, is in our Code, and must be in every Code, to a great extent an arbitrary line, and that many individual cases will fall on one side of that line which, if we had framed the law with a view to those cases alone, we should place on the other. Thus we allow a man to kill if he has no other means of preventing an incendiary from burning a house; and we do not allow him to kill for the purpose of preventing the commission of a simple theft. But a house may be a wretched heap of mats and thatch, propped by a few bamboos, and not worth altogether twenty rupees. A simple theft may deprive a man of a pocket-book, which contains bills to a great amount, the savings of a long and laborious life, the sole dependence of a large family. That in these cases the man who kills the incendiary should be pronounced guiltless of any offence, and that the man who kills the thief should be sentenced to the gallows, or, if he is treated with the utmost lenity which the Courts can show, to perpetual transportation or imprisonment, would be generally condemned as a shocking injustice. We are, therefore, clearly of opinion that the offence which we have designated as voluntary culpable homicide in defence ought to be distinguished from murder in such a manner that the Courts may have it in their power to inflict a slight or merely nominal punishment on acts which, though not within the letter of the law which authorizes killing in self-defence, are yet within the reason of that law."¹⁶

For the application of this exception it is essential that the person causing hurt in the bona fide exercise of the right of private defence should act without any intention of doing more harm than is necessary for the purpose of such defence.¹⁷

The onus of proving private defence is on the accused.¹⁸ Where the accused sets up a plea of self-defence, the question to consider is whether the accused had any reasonable apprehension that he would be hurt; and particularly in a case where he has caused death whether he was under any reasonable apprehension of grievous hurt or death to himself. It is his apprehension that is the important point and not the injuries suffered by him.¹⁹ An accused who is aggressor cannot claim the right of private defence against the rescuer of his victim.²⁰ Where peaceful citizens were attacked by a body of men armed with deadly weapons, it was held that it could not be said that the right of private defence was exceeded if those attacked, in their turn, used similar weapons; nor could it be said if in using those weapons one of the aggressors was killed, that that would necessarily be exceeding the right of private defence.²¹

Where the party opposing the accused actually started the fight but was overwhelmed by the party of the accused by reason of their superior number, it was held that the accused were guilty of culpable homicide and not of murder, notwithstanding the fact that the accused were prepared for a fight and the disparity in the numbers of the two opposing parties was such that their act was more like a massacre than a fight.²² Where the accused reasonably apprehends injury or insult to his person or trespass to his property, and is overawed by the strength of the other party and loses all control of himself and causes death he must be deemed to have acted in self-defence though in excess of it.²³

If a person in exercising the right of defending the body of another person against any offence affecting his body, in fact does no more than exercise such right he commits no offence; but if he exceeds that right and kills the offender when in fact it was unnecessary to kill, then under the second Exception to this section it is still a lesser offence than murder if the intention of the accused was to do no more harm than he believed necessary in the exercise of his right. Even though there was a reckless criminality in the act the case would fall within the Exception if the right of private defence was the only impulse operating in the mind of the accused, and he did not kill with a vengeful motive in the purported exercise of his right.²⁴

¹⁶ Note M, pp. 147, 148; *Ram Lal*, (1927) 3 Luck. 244.

¹⁷ *Lal*, (1946) 48 Cr. L. J. 809.

¹⁸ *Asiruddin Ahmed*, (1904) 8 C. W. N. 714, 1 Cr. L. J. 708.

¹⁹ *Kesavulu Naidu*, [1930] M. W. N. 502; *Ammu Pujary*, [1942] M. W. N. 172, [1942] 1 M. L. J. 200, (1941) 55 L. W. 125, 48 Cr. L. J. 753, [1942] AIR (M) 295.

²⁰ *Indar Singh*, (1943) 45 P. L. R. 155, 44 Cr. L. J. 657, [1943] AIR (L) 163.

²¹ *Man Singh*, [1933] A. L. J. R. 581, 34 Cr. L. J. 765, [1933] AIR (A) 401.

²² *Ajodhia*, (1932) 9 O. W. N. 997, 34 Cr. L. J. 387, [1933] AIR (O) 41.

²³ *Muzaffar Hussain*, (1943) 45 P. L. R. 93, 45 Cr. L. J. 634, [1944] AIR (L) 97.

²⁴ *Po Mye*, [1940] Ran. 109.

Cases.—No right of private defence.—Where a person wilfully killed another whilst endeavouring to escape, after having been detected in the act of housebreaking by night for the purpose of theft,²⁵ where a person pursued a thief and killed him after a house-trespass had ceased,¹ and where after an altercation between the accused and the deceased, who was armed with a hatchet, the accused first wrested the hatchet from his hands and then stabbed him to death,² it was held that they had committed murder and they did not come under this Exception. A head constable, in order to extort money from certain gipsies unlawfully ordered one of them to be bound and taken away. There was a great disturbance caused thereby and the gipsies advanced in a threatening manner towards the constable, upon which he fired a gun at the crowd and killed one of them. Any apprehension that death or grievous hurt would be the consequence of the acts of such crowd would have ceased, had he released the gipsy he had unlawfully arrested and withdrawn himself, or had he effected his escape. It was held that the head constable had no right of private defence against the acts of the gipsies and that he was guilty of murder.³ Where the accused finding a feeble old woman stealing his crop, beat her so violently that she died from the effect of the attack, it was held that he was guilty of murder.⁴ Similarly, where the accused went on a moonlight night armed with heavy clubs and assaulted two persons who were cutting their rice crop, one of whom received six distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot, it was held that they were guilty of murder.⁵ The accused who was watching his field (some of the grain of which had on previous occasions been stolen) saw the deceased cutting his corn. On being pursued (the night being dark) the deceased ran his head against a tree and fell. The accused then hit him recklessly with a stick (which was not proved to be a very formidable weapon) while on the ground, and fractured his skull in two places, causing death. It was held that he was guilty of culpable homicide.⁶ Where the accused was the aggressor and the deceased attacked him with a knife and the accused stabbed him in self-defence, it was held that the accused was not entitled to claim the right of self-defence but was guilty of culpable homicide not amounting to murder.⁷

Threats of incantations give no right of defence.—The accused and the deceased met one day at a liquor shop, and there drank together. They afterwards walked in company, and on their way an altercation took place in respect of the deceased having caused the death of the accused's four children by incantations. The deceased admitted that he had so caused their death, and added that he would also bring about the death of the accused by causing the accused to be taken by a tiger. The accused, thereupon, killed the deceased with several blows of a heavy club. It was held that the accused had no reasonable apprehension of danger to himself from the threats of the deceased and that his case was not taken out of the category of murder by reason of this Exception.⁸

Right of private defence exceeded.—Where a thief was seen with half his body and head through the wall of a house occupied by women except the accused and his young idiot son, and the accused suddenly caught up a sort of pole-axe, and with it struck the thief five times on his neck and nearly cut off his head, it was held that the accused inflicted more hurt than was necessary for defence and was guilty of culpable homicide not amounting to murder.⁹ The accused was appointed a watchman to watch certain crops. He saw a person coming there and beginning to steal them. He remonstrated with the thief and the two quarrelled and proceeded to fight. The accused being stronger of the two got him down and strangled him with his hands and then went off to the landholder and informed him that he had a fight with the thief and that he was dead or about to die. It was held that the accused was guilty

²⁵ *Durwan Geer*, (1866) 5 W. R. (Cr.) 73.

¹ *Balakee Jolahed*, (1868) 10 W. R. (Cr.) 9.

² *Ashraf-ud-din*, (1940) 42 Cr. L. J. 450, [1941] AIR (L) 45.

³ *Abdul Hakim*, (1880) 3 All. 253.

⁴ *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33, F.B.

⁵ *Mammun*, (1916) P. R. No. 35 of 1916, 18 Cr. L. J. 367, [1917] AIR (L) 347.

⁶ *Bag alias Bagi*, (1902) P. R. No. 29 of

1902, 4 P. L. R. 4.

⁷ *Kesavulu Naidu*, [1930] M. W. N. 502.

⁸ *Gobadur Bhooyan*, (1870) 13 W. R. (Cr.) 55, 4 Beng. L. R. (Appx.) 101.

⁹ *Fukeera Chamar*, (1806) 6 W. R. (Cr.) 50; *Mahabir*, (1930) 7 O. W. N. 797, 32 Cr. L. J. 44, [1930] AIR (O) 408; *Bachchu Lal*, [1935] O. W. N. 934, 36 Cr. L. J. 1209, [1935] AIR (O) 442.

of culpable homicide not amounting to murder.¹⁰ A cry of thief being unjustly raised against the accused, he turned and shot dead one of his pursuers. The accused was held to have committed culpable homicide and not murder.¹¹ The accused, who was appointed to protect the crops in a field, went round one night and saw in the darkness a man cutting the crop. The thief on seeing the accused arose. Upon this the accused, who was armed with a club, at once struck him a blow on the head felling him to the ground, with the result that he died that very night. It was held that the accused had exceeded the right of private defence of property, and that he was guilty of culpable homicide not amounting to murder.¹² Where the deceased who was of a stronger physique than the accused picked up a clod of earth to strike the accused who under the circumstances struck the deceased with hatchet blows it was held that the accused had a reasonable apprehension of hurt being caused to him but he must be taken to have exceeded his right of private defence.¹³ Where the deceased was either causing mischief or committing trespass on the property of the accused and in the act the accused struck the deceased a blow which caused his death, it was held that the accused had the right to defend his property, had the injury caused to the deceased amounted only to grievous hurt, but as he had given the blow with a rafter with such violence as to fracture the skull he was guilty of murder.¹⁴ Where a creditor's peons armed with *lathis* and *kirpans* seized the accused, the debtor, and began dragging him from his house and the accused struck them suddenly with a knife as a result of which one of the peons died, it was held that he was guilty of culpable homicide not amounting to murder, he having exceeded the right of private defence.¹⁵ The accused seeing his brother struck on the head by the deceased with a bamboo and felled to the ground, stabbed the deceased which resulted in his death. It was held that the accused was so provoked as to be deprived of the power of self-control and there was no reason to suppose that the accused was actuated by any impulse but that of exercising the right of private defence of the body and that as he had exceeded the right he was guilty of culpable homicide not amounting to murder.¹⁶

Where the accused had been carrying on a liaison with the wife of the deceased and the deceased came into the court-yard in a state of great excitement brandishing a *lathi* obviously determined to use violence against his erring wife upon which the accused snatched the *lathi* from the deceased and struck him twice on his head which caused his death, it was held that this Exception was applicable and the accused was guilty under the first part of s. 304.¹⁷ Where of two persons A and B, A was armed with a *dang* (club) and B with a knife, A tried to strike B and missed the stroke and the two then grappled with each other, in the course of which A was unarmed but threw down B who then struck A with his knife and A collapsed and died under the shock, it was held that B exceeded the right of private defence which he had and that he was guilty under the first part of s. 304.¹⁸

11. Exception 3.—Public servant or person aiding him exceeding the powers given by law.—This Exception protects a public servant, or a person aiding a public servant acting for the advancement of public justice, if either of them exceed the powers given to them by law and cause death. It gives protection so long as the public servant acts in good faith; but if his act is illegal and unauthorized by law, or if he glaringly exceed the powers given to him by law, the Exception will not protect him.

As to 'good faith', see s. 52, *supra*; and as to 'public servant,' see s. 21, *supra*.

Cases.—Public servant exceeding power given by law.—Where the accused, fearful of being punished if they allowed an outlaw to escape, and thinking that they were acting lawfully, in furtherance of a plan arranged for them by a police constable, and the *lumberdar* of a village, for the capture of the outlaw, for whose arrest a reward

¹⁰ *Sundar Singh*, (1911) P. L. R. No. 68 of 1912, 13 Cr. L. J. 478.

¹¹ *Sher Baz*, (1879) P. R. No. 1 of 1880.

¹² *Kallu*, (1921) 22 Cr. L. J. 741; *Ram Lal*, (1927) 3 Luck. 244.

¹³ *Ghulam Rasul*, (1926) 27 P. L. R. 430, 27 Cr. L. J. 756.

¹⁴ *Natha Singh*, (1927) 28 P. L. R. 279, 28

Cr. L. J. 487, [1927] AIR (L) 730.

¹⁵ *Daroga Lohar*, (1929) 11 P. L. T. 381, 32 Cr. L. J. 84, [1930] AIR (P) 347.

¹⁶ *Po Mye*, [1940] Ran. 109.

¹⁷ *Indar Singh*, (1932) 34 P. L. R. 886, 34 Cr. L. J. 1100, [1933] AIR (L) 144.

¹⁸ *Wazir Muhammad*, (1933) 35 Cr. L. J. 639, [1933] AIR (L) 1048.

had been offered, and, in pursuance thereof, killed him while he was endeavouring to escape, it was held that the offence committed came under this Exception and amounted to culpable homicide not amounting to murder.¹⁹

Public servant doing unlawful act.—Where death was caused by a constable under the orders of a superior officer, it being found that neither he nor his superior officer believed that it was necessary for the public security to disperse certain reapers by firing on them, it was held that he was guilty of murder, since he was “not protected in that he obeyed the orders of his superior officer.”²⁰

12. Exception 4.—Death caused without premeditation in a sudden fight in the heat of passion without taking undue advantage or acting in a cruel manner.—The Exception directs the attention to the distinction between the present and some of the preceding Exceptions. In many cases of mutual contest, homicide caused by the person who received the first blow or the provocation, would, under those Exceptions, have been extenuated. But if that person's death had been caused by his opponent, the offence would not have been within the reach of any mitigating provision. The present Exception is meant to apply to cases in which, notwithstanding that a blow may have been struck or some provocation given in the origin of the dispute,—or in whatsoever way the quarrel may have originated,—yet the subsequent conduct of both parties puts them, in respect of guilt, upon an equal footing. For, there is a mutual combat, and blows on each side. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood already heated warms at every subsequent stroke, and the voice of reason is heard on neither side in the heat of passion. Under such circumstances there cannot be much room for discriminating between the respective degrees of blame with reference to the state of things at the commencement of the fray.²¹

This Exception requires three things :—

- (1) Sudden fight ;
- (2) absence of premeditation ; and
- (3) no undue advantage.

It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first; provided the occasion be sudden, and not urged as a cloak for pre-existing malice.²² An unpremeditated assault (ending in an affray in which death is caused) committed in the heat of passion upon a sudden quarrel (it being immaterial which party offers the provocation, or commits the first assault) comes within this Exception.²³ If, on a sudden quarrel, blows pass without any intention to kill or seriously injure one another, and if one of those fighting, while in hot blood, in the course of the struggle, kills the other with a deadly weapon, this is not murder, but culpable homicide.²⁴

To bring a case within this Exception all the facts mentioned in it must be found.²⁵ If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage and is not entitled to the benefit of this Exception.¹ This Exception applies to cases in which there is no wish to kill or to hurt.²

The number of wounds is not the criterion, but the position of the combatants with regard to their arms and the use of those arms are considerations to be kept in mind when applying this Exception. Hence where the deceased was not armed but the accused was and he caused grievous hurt to the deceased with fatal results by causing only one wound, it was held that he was not protected by this Exception and the offence committed was that of murder.³

Sudden fight.—The word ‘sudden’ implies that the fight should not have been pre-arranged. A fight is not *per se* a palliating circumstance, only an unpremeditated fight

¹⁹ *Aman*, (1873) 5 N. W. P. 130; *Fukirigadu*, (1882) Weir (3rd Edn.) 180.

²⁰ *Subba Naik*, (1898) 21 Mad. 249.

²¹ *M. & M.* 261; *Karam Singh*, (1926) 27 P. L. R. 182, 27 Cr. L. J. 459, [1926] AIR (L) 219.

²² 1 East P. C. 241.

²³ *Zalim Rai*, (1864) 1 W. R. (Cr.) 33; *Ameera*, (1866) P. R. No. 12 of 1866.

²⁴ *Nga Shan Gui*, (1885) S. J. L. B. 371.

²⁵ *Akal Mahomed*, (1865) 3 W. R. (Cr.) 18.

¹ *Po Kin*, (1904) 2 L. B. R. 320, 1 Cr. L. J. 1128.

² *Nawab*, (1914) P. R. No. 31 of 1914, 15 Cr. L. J. 610; *Nawab*, (1932) 33 P. L. R. 279, 33 Cr. L. J. 446.

³ *Jumma Khan*, (1934) 36 Cr. L. J. 914, [1935] AIR (Pesh.) 59.

is such."⁴ If, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and, in the course of the scuffle, after the parties are heated by the contest, one kills the other with a deadly weapon, it is culpable homicide and not murder.⁵ The lapse of time between the quarrel and the fight is therefore a very important consideration. If there intervenes a sufficient time for passion to subside and for reason to interpose, the killing will be murder.⁶ The occasion must not only be sudden, but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is peculiarly requisite where the attack is made with deadly or dangerous weapons.⁷ The word 'fight' is used to convey something more than a verbal quarrel. A man who inflicts a large injury in the abdomen of another, penetrating to the bowels, one of the most vital parts of the body, cannot be heard to say that he has not done this with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused (s. 300, 2ndly) or with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death (s. 300, 3rdly).⁸

If A has formed a deliberate design to kill B, and, after this, they meet and have a quarrel, and many blows pass, and A kills B, this will be murder, if the jury are of opinion that the death was in consequence of previous malice, and not of the sudden provocation.⁹

"If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things, first, that there should be that provocation, and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation. . . If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms 'malice', in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder. And so if you find that, before the stroke is given, there is a determination to punish any man who gives a blow with such an instrument as the one which the prisoner used [viz., a sword stick], because, if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such a wound to the passion of anger excited by that blow, for no man who was under proper feelings,—none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument."¹⁰ "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. . . If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious and diabolical mind, . . . then you will find him guilty of murder."¹¹

Without the offender having taken undue advantage or acted in a cruel or unusual manner.—Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under this Exception. This Exception cannot apply where the wounds inflicted on the person of the deceased cannot be said to have been given without the offender having taken undue advantage,

⁴ *Rohimuddin*, (1879) 5 Cal. 31.

⁵ *Snow's Case*, (1776) 1 Leach 151.

⁶ *Foster*, 296.

⁷ 1 East P. C. 242.

⁸ *Sunnumuduli*, (1946) 25 Pat. 336.

⁹ *Kirkham*, (1837) 8 C. & P. 115.

¹⁰ Per Parke, B., in *Thomas*, (1837) 7 C. & P. 817, 818, 819.

¹¹ Per Lord Tenterden in *Lynch*, (1832) 5 C. & P. 324, 325.

irrespective of the fact that it happened in the heat of passion upon a sudden quarrel.¹² When this Exception is applicable at the beginning of a fight, it cannot be held that one of the participants has taken an undue advantage over the other, because the latter has acknowledged defeat and has turned tail, and thereupon the former combatant pursues the advantage which he has obtained.¹³

"When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues—it is manslaughter; and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters a contest, dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder."¹⁴

Cases.—Sudden fight.—Where the accused while smarting from a severe blow from a stick in the midst of a sudden fight and possibly apprehensive of further violence, finding a knife at hand, took it up, and in the *melee* inflicted a wound which caused the death of the deceased, it was held that the case fell within this Exception.¹⁵

A conviction for murder was held to be wrong in a case where the accused taking advantage of an incident which occurred in what till then had been a fair fight, struck his opponent, and knocked him over.¹⁶ Where a person, under heat of passion, on a sudden quarrel, snatched up a log of a heavy wood and struck another with it on a vital part with so much force and vindictiveness as to cause that other person's death almost on the spot, it was held that the offence committed was culpable homicide not amounting to murder.¹⁷ A dispute having suddenly arisen concerning the cutting of a sugar-cane crop, three men armed with *lathis* attacked one of the men who were engaged in cutting the crop and beat him so severely that he died, his skull being broken in three places. It did not appear which of the injuries had been caused by which of the assailants who were acting in concert. It was held that the accused were guilty of culpable homicide not amounting to murder inasmuch as the matter was sudden and the injuries had been inflicted in the heat of passion.¹⁸ Where, in the course of a sudden fight, the deceased grappled with the accused from behind, and the accused then struck at him with his pocket knife without any deliberate aim, it was held that the accused did not intend to cause death or to inflict such injury as was likely to cause death, but as he must have known that a blow with a weapon of this kind was likely to cause death, the offence fell under cl. (2) of s. 304.¹⁹ Where there was a dispute between A and B with respect to a piece of land and when A tried to harrow the land, B sent his men to unyoke the bullocks. A sudden fight arose between A and B and their partisans in which A inflicted serious injuries on B with a knife and the latter died and A also suffered injuries but did not die, it was held that as death was caused in a sudden fight under grave provocation A was only guilty of culpable homicide not amounting to murder.²⁰ Where the quarrel which led to the fight in which the deceased was killed was sudden and the parties had in all probability run to take part in the fight with the winnowing instruments which they were using in their respective threshing floors and fought with them, it was held that the offence committed was not murder, but culpable homicide not amounting to murder under s. 304, part 1.²¹

¹² *Abdul Aziz*, (1933) 14 P. L. T. 464, 35 Cr. L. J. 725, [1933] AIR (P) 508; *Rajamani Nadar*, [1933] M. W. N. 1430; *Ram Nath*, (1933) 10 O. W. N. 986, 35 Cr. L. J. 115, [1933] AIR (O) 438; *Prem Singh*, (1942) 44 P. L. R. 457, 44 Cr. L. J. 117, [1942] AIR (L) 301.

¹³ *Nga Nyi*, (1936) 38 Cr. L. J. 321, [1937] AIR (R) 2.

¹⁴ Per Bayley, J., in *Whiteley's Case*, (1829) 1 Lewin 173, 175.

¹⁵ *Somiruddin*, (1875) 23 W. R. (Cr.) 48; *Feroze*, (1925) 26 P. L. R. 620, 27 Cr. L. J. 26, [1925] AIR (L) 633; *Hans Raj Singh*, (1945) 48 P. L. R. 56, 47 Cr. L. J. 234; *Mahanarani*, (1945) 47 Cr. L. J. 469, [1945] A. L. J. R. 358, [1946] AIR (A) 19.

¹⁶ *Kewul Dosad*, (1864) W. R. (Gap No.) (Cr.) 36.

¹⁷ *Rajoo Ghose*, (1867) 7 W. R. (Cr.) 70 [106]. (In the original Edition of the *Weekly Reporter* there is a misprint in numbering the pages). *Nga Shan Gyi*, (1885) S. J. L. B. 371.

¹⁸ *Gulab*, (1918) 40 All. 686, *Chandan Singh*, (1917) 40 All. 103, dissented from; *Bikram Singh*, [1929] A. L. J. R. 508, 30 Cr. L. J. 410, [1929] AIR (A) 535.

¹⁹ *Jagat Singh*, (1925) 27 P. L. R. 6, 28 Cr. L. J. 87.

²⁰ *Khurkhur Lohar*, (1928) 11 P. L. T. 366, 31 Cr. L. J. 433, [1929] AIR (P) 518.

²¹ *Abbas Khan*, (1931) 32 P. L. R. 513, 34 Cr. L. J. 535, [1932] AIR (L) 3.

Undue advantage.—Where a person, during the course of a sudden fight, without premeditation and probably in the heat of passion, took undue advantage and acted in a cruel manner in using a knife or a dagger, it was held that there was no ground for holding that his act did not amount to murder.²² If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such a weapon must be held to have taken an undue advantage and not entitled to the benefit of this Exception.²³ Where a man used a hatchet on another unarmed man and struck him a blow on the head with that hatchet splitting his skull while he was under no reasonable apprehension of injury to himself, it was held that he could not claim the protection of this Exception.²⁴ Fighting under an advantage, if death ensues, is always murder.²⁵ The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both the lungs and of the spleen. It was held that they were guilty of murder as the intention was clear whether to kill or to cause dangerous injury.¹

Where the accused's party pursued the complainants in three boats for a long distance and then when they had them in their power landed and attacked them with spears and killed three of them, it was held that their action did not come within this Exception.²

13. Exception 5.—Death caused by consent of persons above age of eighteen years.—The authors of the Code give the following reasons for not punishing homicide by consent so severely as murder: "In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of lingering disease, the freedman who in ancient times held out the sword that his master might fall in it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law as assassins.

"Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view; one end is, that people may not be murdered; another end is, that people may not live in constant dread of being murdered. The second end is perhaps the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population; but the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a mil-

²² *Nga Kaman*, (1903) 9 Burma L. R. 145; *Nga Shwe Tha U*, (1884) S. J. L. B. 271; *Muthumada Nadan*, (1915) 16 Cr. L. J. 747, [1915] AIR (M) 1214 (2); *Allah Ditta*, (1920) 25 Cr. L. J. 547, [1922] AIR (L) 260; *Kesar Singh*, (1924) 26 Cr. L. J. 398, [1925] AIR (L) 244; *Khair Din*, (1931) 32 Cr. L. J. 1254, [1931] AIR (L) 280; *Umar Khushal*, (1939) 41 Cr. L. J. 574, [1940] AIR (Pesh) 1; *Nur Khan*, (1929) 31 Cr. L. J. 289, 30 P. L. R. 487, [1929] AIR (L) 719; *Lal Singh*, (1946) 48 Cr. L. J. 786.

²³ *Po Kin*, (1904) 2 L. B. R. 810, 1 Cr. L.

J. 1128; *Amarnath Singh*, (1928) 5 O. W. N. 391, 30 Cr. L. J. 178, [1928] AIR (O) 282.

²⁴ *Kanshi*, (1926) 27 Cr. L. J. 566, 27 P. L. R. 244, [1926] AIR (L) 361; *Sher Alam*, (1927) 28 Cr. L. J. 415, [1927] AIR (L) 808; *Madaru*, (1927) 5 O. W. N. 29, 29 Cr. L. J. 230, [1928] AIR (O) 221.

²⁵ *Whiteley's Case*, (1829) 1 Lewin 178.

¹ *Nawab*, (1914) P. R. 31 of 1914, 15 Cr. L. J. 610.

² *Adil Mohamed*, (1908) 8 C. L. J. 561, 9 Cr. L. J. 32.

lion of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles. 'No number of suicides, or of homicides committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors.'"³

This Exception refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.⁴ It should receive a strict and not a liberal construction, and in applying the Exception it should be considered first with reference to the act consented to or authorized, and next with reference to the person or persons authorized, and as to each of those some degree of particularity at least should appear upon the facts proved before the Exception can be said to apply. It must be found that the person killed, with a full knowledge of the facts determined to suffer death, or take the risk of death; and that this determination continued up to, and existed at, the moment of his death.⁵ Pigot, J., observed: "I cannot read it [Exception 5] as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances not merely of time, but of the mode of inflicting it, specially consented to as for instance in the case of *suttee*, or of duelling, which were, no doubt, chiefly in the minds of the framers of the Code."⁶ The Exception will not apply where there is an agreement to fight between two riotous mobs armed with all sorts of weapons the character of which is left to individual choice. Where a person kills another who is more than eighteen years of age, and pleads it was done with the consent of the deceased, in circumstances in which the Court can hold that it is not impossible that the deceased feeling desperate and depressed asked to be killed, and no motive is proved against the accused for deliberately killing the deceased of his own free will, he is entitled to the benefit of this Exception.⁷

The consent given by the victim who though not yet eighteen is approaching that age mitigates the gravity of the offence of murder in the sense of making it unnecessary to pass the extreme sentence of death.⁸

Consent.—It must be such as has been defined in s. 90, *supra*.

Illustration.—The case supposed in the Illustration to this Exception is one of the offences expressly made punishable by s. 305.

English law.—Homicide is neither justified nor extenuated by reason of any consent given by the party killed. Exception 5, therefore, is a departure from the English law.

Cases.—**Death caused by consent.**—Where the accused caused a pile to be lighted, and persuaded a *suttee* to reascend it, after she had once left it, and she was burnt;⁹ where the accused acting upon the express desire of an adult emasculated him, and death ensued owing to the rough manner of the operation;¹⁰ where the accused was repeatedly requested by his wife, who was overwhelmed with grief at the death of her child, to kill her, did kill her one night while she was asleep;¹¹ where the accused killed his concubine at her request and with her own consent;¹² where certain snake charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake, and from the effect of the bite three of such persons died;¹³ where the accused finding that his life had become unbearable owing to domestic troubles, decided to take his own life and began to load a gun for the purpose but this having come to the knowledge of his wife, she pressed him hard to kill her first, and in consequence of what she said and the taunts then given to him by his

³ Note M, pp. 145, 146.

⁴ *Rohimuddin*, (1879) 5 Cal. 31, See *Po Set*, (1910) 5 L. B. R. 160, 11 Cr. L. J. 345.

⁵ *Nayamuddin*, (1891) 18 Cal. 484, F.B., commenting on certain observations in *Samshere Khan*, (1880) 6 Cal. 154.

⁶ *Nayamuddin*, (1891) 18 Cal. 484, 489n, F.B.;

⁷ *Kanaga Kosavan*, (1930) 54 Mad. 504.

⁸ *Masum Ali*, (1928) 30 Cr. L. J. 855, [1929] AIR (L) 50.

⁹ *Sahablolli Keetloll*, (1863) 1 R. J. P. J. 174.

¹⁰ *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.

¹¹ *Anunto Rurnagat*, (1866) 6 W. R. (Cr.) 57.

¹² *Nainamullu*, [1940] Mad. 428.

¹³ *Poonai Fattamah*, (1869) 12 W. R. (Cr.) 7, 3 Beng. L. R. (A. Cr. J.) 25.

parents, he took her life by firing a shot at her;¹⁴ and where a woman expostulated her lover to kill her as owing to the scandal she was ashamed to go back to her village and she could not find a house to live in although she was wandering from place to place and she took a knife out of his waist, put it into his hand and asked him to cut and throw her away and be off, and he thereupon cut her neck and returned to his village,¹⁵ it was held in all those cases that the accused came under this Exception, because in all of them the element of consent had entered in a greater or less degree. The accused killed his stepfather, who was an infirm old man and an invalid, with the latter's consent, in order to get three innocent men, his own enemies, hanged. It was held that his act fell within this Exception and he was punishable under s. 304.¹⁶

Premeditated fight.—This Exception was held not to apply to a case where two bodies of men, for the most part armed with deadly weapons, deliberately entered into an unlawful fight, each being prepared to cause the death of the other, and aware that his own might follow, but determined to do his best in self-defence, and in the course of the struggle death ensued.¹⁷ In a case in which it was found that all the accused were armed with deadly weapons and were guilty of rioting, that the fight was premeditated and prearranged, a regular pitched battle or trial of strength between the two parties concerned in the riot, and that one of the accused in the course of the riot, and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act would be said to bear a less grave character by reason of this Exception. It was held that upon such finding the case did not fall within the Exception.¹⁸

Death caused by voluntary act of deceased resulting from fear of violence.

—If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result.¹⁹ "If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed."²⁰ "A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take."²¹ The act of the person attacking will, in such a case, amount to murder. Where the deceased was on horseback, and the accused struck him with a stick, and the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture, it was held that the accused was guilty of murder.²² Similarly, where the accused in unlawfully assaulting a girl, who at that time had in her arms an infant, so frightened the infant that it had convulsions, although previously healthy, and from the effects of which it eventually died in about six weeks, it was held that the accused was guilty of manslaughter.²³

It may be observed that the wording of this section and s. 307 does not seem to cover such acts.

¹⁴ Per Aston and Heaton, JJ., in *Purushotam Nilkant Kasbekar*, Criminal Confirmation Case No. 9 of 1906, decided on August 2, 1906 (Unrep. Bom.)

¹⁵ *Kanaga Kosavan*, (1930) 54 Mad. 504.

¹⁶ *Ujagar Singh*, (1917) P. R. No. 45 of 1917, 19 Cr. L. J. 125, [1918] AIR (L) 145.

¹⁷ *Rohimuddin*, (1879) 5 Cal. 31.

¹⁸ *Nayamuddin*, (1891) 18 Cal. 484, F.B.

¹⁹ Per Lord Coleridge, C. J., in *Halliday*, (1889) 61 L. T. 701, 702; *Martin*, (1881) 8 Q. B. D. 54.

²⁰ Per Denman, J., in *Towers*, (1874) 12 Cox 530, 533.

²¹ Per Erskine, J., in *Pitts*, (1842) Car. & M. 284, 285.

²² *Hickman*, (1831) 5 C. & P. 151.

²³ *Towers*, (1874) 12 Cox 530, 533.

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Culpable homicide by causing death of person other than person whose death was intended.

COMMENT.

The doctrine inculcated in this section is called, by Hale and Foster, a transfer of malice. Others describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. If the killing take place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out.

"It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice, and that is enough."²⁴

Where a mistake is made in respect of the person, as where the offender shoots at A supposing that he is shooting at B, it is clear that the difference of person can make none in the offence or its consequences; the crime consists in the wilful doing of a prohibited act; the act of shooting at A was wilful, although the offender mistook him for another.

Similarly, there will be no difference where the injury intended for one falls on another by accident. If A makes a thrust at B, meaning to kill, and C throwing himself between, receive the thrust and die, A will answer for it as if his mortal purpose had taken place on B.

The same principle is applicable where, through accident, or the mistake of a party not privy to the criminal design, the mischief falls either on a person not intended, or on the party intended, but in a different manner from that intended. A designing to poison her own child, who lived in the house of B, delivered to B a bottle of poison, with directions to administer a portion of it to the child; B, not knowing that the bottle contained poison, left it on the mantelpiece in her house, having forgotten to administer any portion of it to the child; during her absence C, the son of B (a child of five years old), finding the bottle on the mantelpiece, administered a portion to the child of A, and the child died of the poison, it was held that A was guilty of murder.²⁵

If A counsel B to poison his wife, B accordingly obtains poison from A and gives it to his wife in a roasted apple, the wife gives it to a child of B not knowing it contained poison, who eats it and dies, this is murder in B though he intended nothing to the child.¹

Scope.—This section has given rise to a difference of opinion as to its scope. In a Madras case² the accused, Suryanarayana, with the intention of killing one Appala Narasimhulu, on whose life the accused had effected large insurances without his knowledge and in order to obtain the sums for which he was insured, gave him some sweetmeat (*halva*), in which a poison containing arsenic and mercury in soluble form had been mixed. Appala ate a portion of the sweetmeat, and threw the rest away. This occurred at the house of the accused's brother-in-law where the accused had asked Appala to meet him. One Rajalakshmi, the daughter of the accused's brother-in-law aged eight or nine years, picked up the sweetmeat without the knowledge of the accused and ate it and gave some to another little child who also ate it. The two children died from the effects of the poison but Appala Narasimhulu, though the poison severely

²⁴ Per Lord Coleridge, C. J., in *Latimer*, (1886) 17 Q. B. D. 359, 361.

²⁵ 7th Parl. R., 27; *Michael's Case*, (1840) 2 Mood. Cr. C. 120.

¹ 1 Hale P. C. 486.

² *The Public Prosecutor v. Suryanarayana-moorthy*, [1912] M. W. N. 136, 139, 143, 149, 22 M. L. J. 333, 338, 343, 352, 13 Cr. L. J. 145, 147, 150, 154, 155; *Narayanappa*, [1934] M. W. N. 99.

affected him, eventually recovered. The accused was sentenced to transportation for life by the Sessions Judge for having attempted to murder Appala Narasimhulu, but he was acquitted on the count of murdering the two children. On appeal against the acquittal, Benson and Abdur Rahim, J.J., held that the accused was guilty of murder, but Sundara Aiyar, J., held that he was not. Benson, J., observed : "The section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible, as we have seen, from those sections, just as an explanation to a section does. The rule could not well be stated as an explanation to either s. 299 or s. 300 as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not lie on the surface of s. 299 yet is, as we have seen, deducible from the generality of the words 'causes death' and from the illustration to the section ; and the rule then goes on to state that the *quality* of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed a rule deducible from the language of the ss. 299 and 300 though not, perhaps, lying on their very surface." Sundara Aiyar, J., said : "That section apparently applies to a case where the death of the person whose death was intended or known to be likely to occur by the person doing the act, does not, as a fact, occur but the death of some one else occurs as the result of the act done by him. It evidently does not apply where the death both of the person whose death was in contemplation and of another person or persons, has occurred. Can it be said that, in such a case, the doer of the act is guilty of homicide with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur ? Are we to hold that a man who knows that his act is likely to cause the death of one person is guilty of the death of all the others who happen to die, but whose death was far beyond his imagination ? Such a proposition it is impossible to maintain in criminal law. Section 301...has reference to a case where a person intending to cause the death of A, say by striking or shooting him, kills B because B is in the place where he imagined A to be, or B rushes in to save A and receives the injury intended for A. The reason for not exculpating the wrong-doer in such cases is that he must take the risk of some other person being in the place where he expected to find A, or, of some one else intervening between him and A. The section is a qualification of the rule laid down in s. 299 and is evidently confined to cases where the death of the person intended or known to be likely to be killed does not result...If a person is intended by s. 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and, what is more important, s. 301...would not be limited to cases where the death of the particular individual intended or foreseen does not occur. The general theory of the criminal law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue ; for otherwise he could not be said to have caused the effect 'voluntarily', and a person is not responsible for the involuntary effects of his acts. Illustrations A and B in my opinion support this view. Sections 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily ; and s. 321 shows that hurt to the particular person in question must have been intended or foreseen. In the eye of the law, no doubt, a man will be taken to have foreseen what an ordinary individual ought to foresee, and it will not be open to him to plead that he himself was so foolish as, in fact, not to foresee the consequence of his act. A person might in some cases be responsible for effects of which his act is not the proximate cause where the effect is likely to arise in the ordinary course of events to result from the act. This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occurring ; when the effect is not due merely to physical causes set in operation by an act, but other persons' wills intervening are equally necessary causes with the original act to lead to the result, it is more difficult to decide whether the act in question can be said to be the cause of the effect finally produced. The Code throws very little light on the question. Ordinarily, a man is not criminally responsible for

the acts of another person, and ordinarily his act should not be held to be the cause of a consequence which would not result without the intervention of another human agency." Abdur Rahim, J., observed : "Obviously it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result as it often happens is due to series of causes. We have to consider in each case the relative value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if A mixes poison in the food of B with the intention of killing B and B eats the food and is killed thereby, A would be guilty of murder even though the eating of the poisoned food which was the voluntary act of B intervened between the act of A and B's death. So here the throwing aside of the sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause."

The Allahabad High Court has approved of the majority view in the Madras case. A woman was carrying on an intrigue with a man who gave her some poison to administer to her husband. She prepared sweetmeats mixed with the poison which were eaten by one M who died as the result thereof. The husband and three others also partook of the sweetmeats and suffered considerably but did not die. She, however, intended to kill her husband and not M. It was held that she was guilty of murder.³

CASES.

Where the accused intending to kill the husband of a woman, with whom he was carrying on an adulterous intrigue, waylaid him in the dusk, but by mistake killed a third party who came along the road;⁴ where the accused intending to kill B, killed A by a blow with a highly lethal weapon whom he had no intention of killing;⁵ where the accused gave some poisoned rice-water to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison,⁶ it was held in all these cases that the offence committed was that of murder. Where the second accused procured oleander seeds and gave them to the first accused so that he might administer them to A in order to kill her in furtherance of a common intention, and the first accused crushed the seeds and mixed the powder and some arsenic in butter-milk and gave the butter-milk to A but the butter-milk was drunk by B and he died, it was held that both the accused were guilty under this section.⁷

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

COMMENT.

Where the Legislature recognizes two sorts of punishment it implicitly recognizes the existence of degrees in crimes technically the same. These degrees are to be determined by the circumstances of the case, and among them, and perhaps the most important of them, are the state of mind of the offender, and the degree of moral obliquity displayed by the act. There is an undoubted connection, though one not easily formulated, between the ethical quality of a crime and its proper punishment.

³ *Jeoli*, (1916) 39 All. 161, distinguished in *Khelawan*, (1926) 27 Cr. L. J. 1400, [1927] AIR (A) 104, so far as punishment is concerned.

⁴ *Government v. Govinda Ballajee*, (1828) 1 M. Dig. N. S. 125.

⁵ *Phomonee Ahum*, (1867) 8 W. R. (Cr.) 78; *Suba*, (1927) 29 Cr. L. J. 280, [1928] AIR (L) 344.

⁶ (1869) 12 W. R. (Cr. L.) 2.

⁷ *Boredi Kondamma*, [1948] 1 M. L. J. 1; [1947] M. W. N. 771.

"Although the law has provided an alternative punishment, either is not to be passed indifferently at the discretion of a Judge; but...where the accused has been found guilty of deliberate murder, he must pass sentence of death, and...the minor sentence should only be awarded when there is some extenuating circumstance, some excuse which, though the law does not regard it as sufficient to reduce the killing to the offence of culpable homicide not amounting to murder, still is ground for looking leniently on the act."⁸

The sentence consequent upon a conviction for murder must be death. If there exist any grounds for mercy, that circumstance will have to be considered by the Crown or its executive minister, and all that a Court of Justice can do is to submit a recommendation after passing the sentence of law.⁹ But the law lays down two sentences in cases of murder, and naturally the Court leans towards the more lenient sentence if it is consistent with the ends of justice.¹⁰ The Calcutta High Court is of opinion that attention should be paid to the age of the accused. Where, therefore, a girl of sixteen was charged with deliberately killing her husband by administering arsenic she was transported for life in consideration of her age.¹¹ The sentence of death is not passed if there are some extenuating circumstances. Where the accused murdered his wife under an unfounded suspicion as to her chastity, the sentence was reduced to transportation.¹² When convicting of murder the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case.¹³ The fact that the accused had the capital sentences suspended over their heads for nearly six months is a matter for the consideration of the High Court. The sentence of death which might have been rightly passed by the Sessions Judge in the first instance ought not to be confirmed unless he thinks that such sentence should be carried out at the time final orders are passed.¹⁴

The Calcutta High Court is also of opinion that if two Judges of the Division Court differ as to the proper sentence to be passed, one favouring the death penalty and the other transportation for life, that itself is a sufficient ground for holding that the death penalty should not be inflicted.¹⁵

In Burma, where knives are freely used on the lightest occasion, it is unsafe to lay down as a general rule that mere absence of premeditation or deliberate intent to kill is a good ground for abstaining from passing a capital sentence in a case where a knife is used. To justify the passing of a sentence of transportation for life in cases of murder the Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances. The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so.¹⁶ It is not necessary to pass sentences of death on all the persons taking part in an ordinary murder as distinguished from murder in dacoity. A death sentence should be reserved for the principal offenders.¹⁷

The following are suggested as some reasons for not passing a capital sentence upon a conviction under s. 302:—

- (1) The offender being under eighteen years of age.
- (2) There having been no intention to commit murder, the offence falling under the fourth clause of section 300, Indian Penal Code.
- (3) The murder, though intentional, having been committed without premeditation, and in the heat of passion, without special brutality.

⁸ Per Wilkinson, J., in *Kamal*, (1873) P. R. No. 13 of 1873.

⁹ *Said*, (1896) Unrep. Cr. C. 852; *Dina-bandhu Ooriya*, (1929) 31 Cr. L. J. 737, [1930] AIR (C) 199; *Dukari Chandra Karmakar*, (1929) 33 C. W. N. 1226, 31 Cr. L. J. 817, [1930] AIR (C) 193; *Khudu Rajak*, (1929) 11 P. L. T. 166, 31 Cr. L. J. 727, [1930] AIR (P) 252.

¹⁰ Per Crump, J., in *Shafi Ahmed*, Case No. 22, 2nd Criminal Sessions, decided on May 23, 1925 (Unrep. Bom.).

¹¹ *Jasha Bewa*, (1907) 11 C. W. N. 904, 6

Cr. L. J. 154.

¹² *Dina Bandhu Moitra*, (1908) 8 C. W. N. 218, 1 Cr. L. J. 62.

¹³ *Dewan Singh*, (1895) 22 Cal. 805.

¹⁴ *Autor Singh*, (1913) 17 C. W. N. 1218, 14 Cr. L. J. 642.

¹⁵ *Dukari Chandra Karmakar*, supra.

¹⁶ *Nga Tha Sin*, (1902) 1 L. B. R. 216; *Nga Shwe Gon*, (1903) 10 Burma L. R. 128, 1 Cr. L. J. 665. See also *Shwe Cho*, (1905) 3 L. B. R. 111, 3 Cr. L. J. 25.

¹⁷ *Mi Shabi*, (1899) P. L. J. B. 564.

(4) The murder having been committed upon grave provocation, the provocation not being both grave and sudden so as to reduce the offence to culpable homicide not amounting to murder.

(5) Reasonable doubt as to the sanity of the offender at the time of committing murder, actual insanity not being proved.

(6) Where murder has been committed by more than one person, and it appears that the offender acted under the instigation of another, and did not take a principal part in committing the murder.

This is not intended to be an exhaustive statement of reasons for not passing a capital sentence. In each case the Sessions Judge must exercise his own discretion with deliberation. The extreme penalty of the law should be reserved for cases of deliberate murder, for cases where murder is committed to facilitate the commission of some other offence or to avoid arrest for an offence, and for other heinous cases of murder".¹⁸

PRACTICE.

Evidence.—Prove (1) that the death of a human being has actually taken place. That a murder has been committed by some one, is essentially necessary to be proved.

(2) That such death has been caused by, or in consequence of, the act of the accused.

Where there is no evidence to prove that the accused had anything to do with the death of the deceased, no conviction could stand.¹⁹

Where the medical evidence does not support that the deceased met with a violent death, no charge of murder can be brought home to any one.²⁰

(3) That such act was done with the intention of causing death;²¹ or that it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death; or

that the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

The Rangoon High Court has indicated the various stages of dealing with cases of homicide.²²

The mere fact that the bodily injury caused resulted in death in the ordinary course of nature, does not necessarily mean that the accused intended to cause such bodily injury.²³ There must always be a finding that the act which caused the death was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to cause death. A finding of inflicting an injury that was merely likely to cause death would not of necessity amount to murder.²⁴ The intention or knowledge with which the act which caused death was committed is not constructive or a presumption of law, but a matter of fact to be judged of in each case, and proof of collateral facts to explain the motives and designs of the accused is admissible.²⁵

Proof of motive or previous ill-will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death¹ or when the

¹⁸ Per Hosking, J. C., in *Mung U*, (1894) P. J. L. B. 112, 114; *Mangrey*, O. S. C. 210; *Indar Singh*, (1929) 31 Cr. L. J. 180, [1930] AIR (L) 227 (attack result of foul language by the deceased); *Judagi Mallah*, (1929) 8 Pat. 911 (death during drunken brawl); *Bahawal*, (1931) 32 P. L. R. 810, 33 Cr. L. J. 184, [1932] AIR (L) 5; (conflict provoked by deceased); *Abdullah*, (1932) 33 P. L. R. 382, 33 Cr. L. J. 338, [1932] AIR (L) 369; and *Hari Singh*, (1931) 33 P. L. R. 154, 33 Cr. L. J. 577, [1932] AIR (L) 302 (provocation grave but not sudden); *Mabaijan Bibi*, (1932) 33 Cr. L. J. 476, [1932] AIR (C) 658 (desperation on account of starvation).

¹⁹ *Rajani Kanto Koer*, (1908) 8 C. W. N. 22,

1 Cr. L. J. 10.

²⁰ *Subkaran*, (1934) 11 O. W. N. 722, 35 Cr. L. J. 992, [1934] AIR (O) 286.

²¹ *Ananda*, (1905) 7 Bom. L. R. 985, 3 Cr. L. J. 85.

²² *Nga Chit Tin*, (1939) 40 Cr. L. J. 725, [1939] AIR (R) 225.

²³ *Hla Tun*, (1898) P. J. L. B. 452.

²⁴ *Apahu alias Apana*, (1923) 1 Ran. 285.

²⁵ See ill. (a) to s. 6, ill. (b) and (c) to s. 7, ill. (a) to s. 8, and ill. (o) to s. 14 of the Indian Evidence Act.

¹ *Jaichand Mundle*, (1867) 7 W. R. (Cr.) 60; *Hikayat Singh*, (1932) 11 Pat. 280.

offender is caught red-handed while committing murder.² Where the fact of murder has been clearly established, it is by no means incumbent on the prosecution to show what particular motive actuated the criminal's mind and induced him to commit the particular crime.³ Where, however, the prosecution puts forward a substantive case as to the motive for the crime, the evidence regarding the motive has got to be considered in order to judge of the probabilities. Failure to prove motive, however, cannot outweigh the positive evidence as to the crime.⁴ The motive may never be discovered and the suggestion of a motive, possibly a wrong motive, may lead the Court astray.⁵ But motive for a crime, while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged.⁶

The Lahore High Court has held that murders among Jats are actually committed from motives of pride to avenge what appear to be comparatively harmless insults.⁷ In cases in which death ensues from violence used, and there is no evidence of intention other than what is to be inferred from the accused's act, it is necessary to consider whether the accused must have known, when committing the act, that—

(a) it might possibly, but was unlikely to cause death or injury sufficient in the ordinary course of nature to cause death;

(b) it was likely to cause death or injury sufficient in the ordinary course of nature to cause death;

(c) it probably would cause death or injury sufficient in the ordinary course of nature to cause death.

If the act falls within the first category, it would not amount to more than hurt or grievous hurt; if under the second category, it would be culpable homicide not amounting to murder; if under the third category it would amount to murder.⁸

In a murder case the omission of the prosecution to show how the investigation proceeded step by step and to bring out in evidence the manner in which the various witnesses were traced is a serious defect.⁹

Suspensions, however strong, furnish no legal grounds for the conviction of an accused on a charge of wilful murder. Where there is no eye-witness to the actual commission of the murder the fact that there is very strong suspicion attaching to the accused in respect of the murder is not sufficient to convict him.¹⁰

The accused was charged with murder. The facts proved against him were: (1) Enmity against the deceased; (2) he was seen on the night of the murder digging in a field where the body of the deceased was subsequently found and, on being questioned, said he was digging out the stump of a tree; (3) on being questioned during the search of the deceased he gave false information; and (4) stains of human blood were found on his loin cloth though it had apparently been washed. It was held that having regard to the cumulative effect of the evidence the accused was rightly convicted of murder.¹¹

Onus.—The prosecution must prove the circumstances which ordinarily constitute the offence of murder; and the accused, the circumstances, if any, of exceptions which take the case out of that category.¹² The burden lies on the prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. The burden is not cast upon an accused person of proving that no crime has been committed though it has been established that the accused has special knowledge on the point whether a crime was committed or not.¹³ If a man takes away the

² *Fazal Din*, (1929) 31 Cr. L. J. 765, 30 P. L. R. 749.

³ *Lakshman Narayan*, Criminal Appeal No. 256 of 1912, decided on July 22, 1912, by Chandavarkar and Batchelor, JJ., (Unrep. Bom.); *Mohna*, (1924) 26 Cr. L. J. 774, [1925] AIR (L) 328.

⁴ *Nishi Kanta*, (1924) 41 C. L. J. 35, 26 Cr. L. J. 805, [1925] AIR (C) 525.

⁵ *Dwarka*, (1930) 8 O. W. N. 107, 32 Cr. L. J. 697, [1931] AIR (O) 119.

⁶ *Rannan*, (1926) 7 Lah. 84, 89.

⁷ *Pohla*, (1925) 26 P. L. R. 791, 27 Cr. L. J. 241.

⁸ *Shwe Hla U*, (1908) 2 L. B. R. 125, 1 Cr. L. J. 184; *Nga Nu Ban*, (1906) U. B. R. (1904-06) (P. C.) 33, 5 Cr. L. J. 306.

⁹ *Feroze*, (1930) 31 Cr. L. J. 871, [1930] AIR (L) 659.

¹⁰ *Ratan*, (1932) 8 Luck. 301.

¹¹ *Mangal Singh*, (1937) 64 I. A. 134, 39 Bom. L. R. 960.

¹² *Sheikh Choolhye*, (1865) 4 W. R. (Cr.) 35; *Asiruddin Ahmed*, (1904) 8 C. W. N. 714, 1 Cr. L. J. 708; *Ratan*, (1932) 8 Luck. 301.

¹³ *Kanakasabai Pillai*, [1939] M. W. N. 883, (1938) 50 L. W. 452, 41 Cr. L. J. 369, [1940] AIR (M) 1.

life of another, the onus is on him to show circumstances which justify his doing so.¹⁴ The onus of proving grave and sudden provocation, such as would reduce the offence of murder to one of culpable homicide not amounting to murder, is on the accused.¹⁵

A trustworthy dying declaration corroborated by surrounding circumstances is sufficient to support a conviction for murder.¹⁶ No reliance can be placed on a dying declaration made at a time when the deceased must have come to know that the accused had been already named as the actual assailant.¹⁷

The accused on his trial is merely on the defensive and owes no duty to any one but himself. He cannot be convicted because he has not tried to explain to the Court how a death has occurred or by whose means.¹⁸ Where a Sessions Judge in a trial on a charge of gun-shot murder against N found that N and another person L were seen immediately after the report of the gun at the scene of occurrence each with a gun in his hand, but he did not find which of them fired the fatal shot, his only finding being that either N or L fired the shot that killed the deceased, and there was no finding in the judgment that N and L had a common intention and acted in concert and that the gun was fired in furtherance of their common intention, it was held that the legal inference from those findings must be that neither N nor L was guilty of the offence of murder.¹⁹

It is the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with accused's innocence. Where the accused is not represented, or not properly represented, the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and, if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because not offered by the accused.²⁰

In a case of murder it is unsafe to rely upon the evidence of witnesses who have resiled from their previous statements. Where the evidence given at the trial did not implicate the accused but the earlier statements recorded under ss. 288 and 164, Criminal Procedure Code, tended to implicate him and the motive alleged was not proved, it was held that the conviction for murder could not be sustained.²¹

Circumstantial evidence.—A conviction on circumstantial evidence cannot be based unless and until all the inferences to be drawn from the whole history of the case point so strongly to the commission of the crime by the accused that the defence theory appears on the face of it impossible or highly improbable. The charge of murder, like any other charge of an offence, can be established by inferences, but when there is extremely little in the way of direct evidence it is due to the accused that there should be no exaggeration of minor incidents in the case and that each inference against him should be verified with scrupulous accuracy.²² Circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, sufficiently high that a prudent man, considering all the facts and realizing that the life or liberty of the accused depends upon the decision, feels justified in holding that the accused committed the crime.²³ Circumstantial evidence must be consistent, and consistent only with the guilt of the accused; if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. One of the circumstances which has to be taken into account

¹⁴ *Asiruddin Ahmed*, (1904) 8 C. W. N. 714, 1 Cr. L. J. 708; *Jhakri Chamar*, (1912) 16 C. L. J. 440, 18 Cr. L. J. 905.

¹⁵ *Rakha*, (1925) 6 Lah. 171, 175; *Krishnama Naicken*, (1930) 54 Mad. 678; *Umar Khan*, (1931) 32 P. L. R. 804, 33 Cr. L. J. 186, [1932] AIR (L) 11; *Ghulam Sarwar*, (1937) 18 Lah. 726.

¹⁶ *Karim Khan*, (1908) 9 Cr. L. J. 156.

¹⁷ *Muzaffar*, (1926) 27 P. L. R. 632, 28 Cr. L. J. 114.

¹⁸ *Jehmal Narayan*, (1894) Cr. R. No. 4 of 1894, Unrep. Cr. C. 686.

¹⁹ *Nibaran Chandra Roy*, (1907) 11 C. W. N. 1085, 6 Cr. L. J. 304.

²⁰ *Basangouda Yamanappa*, (1940) 43 Bom. L. R. 144, [1941] Bom. 315. *Dicta* to the contrary

in *Narayana*, (1932) 56 Mad. 231, dissented from.

²¹ *Ayyamperumal Pillai*, [1925] M. W. N. 319, 22 L. W. 405, 27 Cr. L. J. 18, [1925] AIR (M) 879.

²² *Bhagwan Kaur*, (1911) 12 Cr. L. J. 412; *Ahmad*, (1913) 14 P. L. R. 733, 1 Cr. L. J. 275. See *Raghunandan Koeri*, (1920) 1 P. L. T. 684, 22 Cr. L. J. 154; *Majhi*, (1924) 26 Cr. L. J. 760, [1925] AIR (L) 323; *Alla Rakha*, (1927) 29 P. L. R. 227, 28 Cr. L. J. 758, [1927] AIR (L) 658.

²³ *Dina*, (1928) 29 Cr. L. J. 640; *Hem Chandra Halder*, (1934) 38 C. W. N. 582, 35 Cr. L. J. 712, [1934] AIR (C) 407.

is the fact that the accused has offered no explanation, or has offered a particular explanation; but it must be borne in mind that the accused cannot go into the witness-box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. Often the accused is an illiterate person, and makes a statement under s. 362, Criminal Procedure Code, which is obviously untrue, or he is not prepared to admit anything.²⁴ Where the evidence against the accused is circumstantial in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.²⁵ It is unsafe to convict a person of murder on circumstantial evidence, where the separate pieces of circumstantial evidence relating to the movements of the accused and which converge on their guilt bear palpable signs of conviction and do not fit in with the conduct of rational persons.¹ In a case of murder by opium poisoning the prosecution evidence that the accused put some sugar into the vessel in which milk was given to the deceased and stirred the milk with his finger after putting the sugar into it and the deceased died a few hours afterwards, was held to be not sufficient for convicting the accused, particularly when the motive for murder was not strong and the habit of eating opium was common among the class of people to which the deceased belonged.² If it is proved that a person was found, soon after the murder of another person, in possession of property which was on the person of the latter when last seen alive, an inference might be drawn in some circumstances that he obtained possession of the property by the murder of the deceased; but it is essential to justify the inference that there is satisfactory proof that the property was in fact in the possession of the deceased when last seen alive.³ Where the wife of the accused met her death by an unnatural cause, for instance, breaking of her several ribs, the husband was held to be not guilty of murdering her simply on suppositions, as there was nothing very strong connecting him with causing her death intentionally. The mere fact of his trying, with the help of others, to burn the body secretly or taking it in a bundle instead of, as usual, on a bed or litter though suspicious was considered by the Court to be not sufficient evidence of his guilt. An effort to dispose of the body of a dead person in an unusual way is sometimes due to fright of a weak-minded person which can be based on several grounds. But no person can be convicted of an offence on pure circumstantial evidence so long as it is compatible with his innocence.⁴ A conviction for murder cannot be sustained where the only circumstantial evidence against the accused was that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel, carried towards a canal in which her body was afterwards found completely dismembered, specially when the evidence of identification of the body is unsatisfactory and there is no direct evidence connecting the accused with the commission of the crime.⁵ Where unexplained possession of stolen property belonging to a deceased person is the only circumstance appearing in the evidence against an accused charged with murder and theft, he cannot be convicted of murder unless it is satisfactorily proved that possession of property could not have been transferred from the deceased to the accused except by the former being murdered.⁶ This case has not been followed in a subsequent case in which it is held that when things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he admits having concealed those things and fails to give any explanation for their possession, those may be important facts for use in making an inference that the accused took part in the murder.⁷ The possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft; this particular fact of presumption commonly forms also a material element of evidence in cases of murder, while special application

²⁴ *Basangouda Yamanappa*, (1940) 43 Bom. L. R. 144, [1941] Bom. 315.

²⁵ *Hassan Din*, (1942) 44 P. L. R. 554, 44 Cr. L. J. 397, [1943] AIR (L) 56.

¹ *Sambhu Patra*, (1930) 31 Cr. L. J. 438.

² *Kala Singh*, (1911) 12 P. L. R. 902, 12 Cr. L. J. 484.

³ *Moyila Kurmiah*, [1913] M. W. N. 145, 14 Cr. L. J. 49; *Public Prosecutor v. Munayya*,

[1911] 2 M. W. N. 478, 21 M. L. J. 1071, 12 Cr. L. J. 564.

⁴ *Lachman Singh*, (1909) 10 P. L. R. 335, 11 Cr. L. J. 130.

⁵ *Chuhar Singh*, (1914) 16 P. L. R. 598, 16 Cr. L. J. 89, [1914] AIR (L) 582.

⁶ *Sogaimuthu Padayachi*, (1925) 50 Mad. 274.

⁷ *Narayana*, (1932) 56 Mad. 231.

of it has often been emphatically recognised.⁸ Where in the case of a prosecution for murder the only fact that was proved was that the dead body of the deceased was recovered from the house of the accused, buried in one of the rooms inside his house, but the accused was in jail at the time of the recovery, it was held that the accused could not be called upon to explain how the corpse of the deceased came to be buried in his house. Had the accused been present in his house at the time of the recovery of the corpse from his house he could certainly have been called upon to explain the fact.⁹

In a murder case a Court has to be satisfied not of the probabilities but of the certainty beyond any reasonable doubt that the accused is guilty.¹⁰

Where a woman is charged with the murder of her new-born infant, there must be evidence to show that the child was born alive. The fact that the lungs on section floated in water is not an infallible test of live-birth.¹¹

The evidence of blood-stained nails is not only of no value but may be extremely dangerous to innocent persons. It has frequently been given in the past as evidence corroborating an approver or as circumstantial evidence connecting an accused person with homicide. It may have led to the miscarriage of justice.¹²

Eye-witness.—There is no rule of law that if there be no eye-witnesses to a murder, the accused should not be sentenced to death. It is not difficult to produce false evidence of eye-witnesses. It is, on the other hand, extremely difficult to produce circumstantial evidence of a convincing character and therefore circumstantial evidence, if convincing, is more cogent than the evidence of eye-witnesses.¹³

Demeanour.—It is not safe to base a conviction of culpable homicide only on the evidence of accused's demeanour.¹⁴

Confession.—If A and B are jointly tried for the murder of C, a confession of A is admissible against B.¹⁵ If A is accused of killing C, any statement made by C before his death as to the cause of it is receivable in evidence.¹⁶

Discovery of body of person murdered not absolutely necessary.—Lord Hale laid down: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead".¹⁷ This is a rule of caution and not of law. If the circumstantial evidence is very strong a conviction could be made.¹⁸

The term *corpus delicti* is an invention of the jurists of the Middle Ages, and was used by them to denote the whole of the facts which constitute the crime of killing when the body of the killed had been found. A mixture of German and Roman views led to the proposition (which has found its way into English penal law) that the proof of the aggregate of facts constituting the offence failed when the body was not found. The expression was then extended to other offences, and was used to denote that the qualities necessary to bring a fact within the operation of a rule of criminal law had been shown to attach to the fact. The jurists of the Middle Ages, however, never conceived the dead body in murder, or the object stolen in theft, to be that 'corpus'. The expression itself has many vices, but in the sense in which its authors used it is at least intelligible.¹⁹

The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of murder. To recognize any such condition precedent, as being absolutely necessary to conviction in all cases, would be to afford complete immunity and certain escape to those murderers who are cunning or clever enough to make away with or destroy the bodies of their victims. Such a principle once admitted would in some instances render the administration of justice impossible.²⁰ But when the body of the person said to have been murdered is not forth-

⁸ *Sheikh Neamatulla*, (1918) 17 C. W. N. 1077, 14 Cr. L. J. 556; *Chintamani Shahu*, (1930) 31 Cr. L. J. 1229, [1930] AIR (C) 379.

⁹ *Bhagauti*, (1934) 9 Luck. 636.

¹⁰ *Anandi*, (1916) 17 Cr. L. J. 102, [1916] AIR (A) 363.

¹¹ *Boya Latchmakka*, [1939] M. W. N. 1130.

¹² *Ulagar Singh*, [1939] Lah. 206; *Terugu*, (1936) 38 Cr. L. J. 49, [1936] AIR (R) 468.

¹³ *Tulsi Gangota*, (1932) 34 Cr. L. J. 395, 14 P. L. T. 96, [1933] AIR (P) 180.

¹⁴ *Abdul Ghani*, (1926) 28 P. L. R. 27, 28

Cr. L. J. 116, [1927] AIR (L) 51.

¹⁵ Ill. (a) to s. 30, Indian Evidence Act.

¹⁶ Ill. (a) to s. 32, *ibid*.

¹⁷ 2 Hale P. C. 290.

¹⁸ *Hindmarsh's Case*, (1792) 2 Leach 569; *Cheverton*, (1862) 2 F. & F. 833; *Attorney-General v. Edwards*, [1935] I. R. 500.

¹⁹ (1873) 7 M. H. C. (Appx.) 19.

²⁰ Per Straight, J., in *Bhagirath*, (1880) 3 All. 383, 384; *Rogi*, (1881) 1 A. W. N. 112; *Sedhu*, (1882) 2 A. W. N. 160; *Poorusoolah Sikhdar*, (1867) 7 W. R. (Cr.) 14.

coming, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted.²¹ The absence of the dead body makes the onus upon the prosecution much heavier than in ordinary cases.²² Where the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed is as safe as any other such inference.²³ But a Judge exercises a proper discretion in not passing a sentence of death in a case in which the dead body has not been found.²⁴ Where the dead body does not appear and the factum of death is established by nothing but a retracted confession, sentence of transportation may be awarded instead of the heavier sentence.²⁵ But it has been held that where the Court is convinced that the man was dead, death sentence may be passed even if the body has not been found. The question of sentence should be determined upon the gravity of the offence quite irrespective of the circumstance whether the body has or has not been discovered.¹

If the accused confess in the most circumstantial manner to having committed a murder, the finding of the body is not absolutely essential to a conviction.² The Bombay High Court in a case held the accused guilty of attempt to murder where the body was not found but the accused had admitted that he had thrown a girl of less than two years of age into a canal, where the water was deep, and swollen by the monsoon.³ In a later case the High Court observed that "it may also be conceded that if the body is not found one requires stronger evidence of the killing than would otherwise be necessary. But the quantity and nature of the evidence necessary to convince the Court must depend on the circumstances of the case."⁴ Before a conviction of murder can be obtained, the Court must be satisfied that the person alleged to have been murdered is actually dead. A man was brutally beaten with *lathis* into unconsciousness by the accused who, subsequently, dragged him along the ground up to a certain river, leaving traces of blood both on the fields and on the railway line. The man had never been seen since. It was held that the conclusion that he was dead could not be arrived at though it was exceedingly unlikely that he was alive. In the circumstances the accused were not convicted of murder under s. 302 but of an attempt to murder under s. 307.⁵

In a charge of child murder, the only evidence was the confession of the accused, and no dead body of the child was found. The jury acquitted the accused of murder, and found her guilty of concealment of birth. It was held that there was no sufficient evidence of a separate existence of the child to convict of murder, but sufficient to convict for concealment of birth, although no dead body had been found.⁶

Bombay Circulars.—In murder cases the constable or other person, who took the corpse to the Medical Officer for *post-mortem* examination, should always be sent to the Sessions Court as a witness.⁷ In all important criminal cases, and especially in cases of murder and dacoity, it is desirable that the Police Officer by whom the investigation was conducted should be in readiness to be examined, if necessary, as witness in regard to the circumstances of the investigation. The Police Officer should bring with him his diary of the case and also the memorandum of the statement of the witnesses taken down by him under s. 161 of the Code of Criminal Procedure.⁸

When death or grievous hurt has been caused by a blow from a stick or other weapon, the weight and dimensions of the weapon should be stated in the Sessions Court proceedings, with such particularity as may enable the High Court (which has no opportunity of seeing it) to form an opinion as to the character of the weapon and the intention with which it was probably used. The mere entry of "a stick" or "a

²¹ *Adu Shikdar*, (1885) 11 Cal. 635; *Azam Ali*, (1929) 31 Cr. L. J. 230, [1929] AIR (A) 710.

²² *Rajkumar Singh*, (1928) 9 P. L. T. 449, 29 Cr. L. J. 913, [1928] AIR (P) 473.

²³ *Mehr Khan*, (1886) P. R. No. 6 of 1886. See also *Biru*, (1890) P. R. No. 15 of 1890.

²⁴ *Budduruddeen*, (1869) 11 W. R. (Cr.) 20.

²⁵ *Ragha*, (1925) 23 A. L. J. R. 821, 26 Cr. L. J. 1431, [1925] AIR (A) 627.

¹ *Ram Nath*, (1926) 1 Luck. 327; *Munda*, (1930) 32 Cr. L. J. 493, [1931] AIR (L) 25.

² *Petta Gazi*, (1865) 4 W. R. (Cr.) 19.

³ *Kashna*, (1894) Cr. R. No. 7 of 1894, Unrep. Cr. C. 687.

⁴ Per Broomfield, J., in *Harkison Harjivan*, (1938) Criminal Appeal No. 222 of 1938, decided by Broomfield and Macklin, JJ. on September 23, 1938 (Unrep. Bom.)

⁵ *Bandhu*, (1894) 22 A. L. J. R. 340, 25 Cr. L. J. 900, [1924] AIR (A) 662, explained in *Ram Nath*, (1926) 1 Luck. 327.

⁶ *Maud Kersey*, (1908) 21 Cox 690.

⁷ B. H. C. Cr. C. (1931), Ch. V, s. 31, p. 55.

⁸ *Ibid*, s. 84, p. 56.

stone" in the list of property produced before the Sessions Court does not enable the High Court to judge whether the stick or the stone was deadly or a comparatively harmless weapon.⁹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where culpable homicide has been committed, *prima facie*, the principal issue is : whether the culpable homicide does or does not amount to murder. In all ordinary cases, the issue ought to be tried, and ought not to be prejudged, by any authority less than the authority of a Court of Session.¹⁰ It is the duty of the Court first of all to consider whether the case is not of murder as defined in s. 300, and if it considers that it does not fall within the definition, to give reasons. If the accused intended to cause such injuries as were likely to result in death it must be presumed that they knew that such injuries were likely to cause death as a person must be presumed to know the natural consequences of his act. The first part of s. 304 should be applied only where the offence is not murder by reason of its falling within one of the Exceptions in s. 300.¹¹

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why a sentence of death was not passed.¹²

If the case falls under one of the Exceptions to s. 300 and the Judge convicts the accused on the charge of culpable homicide not amounting to murder, he should record under which of the Exceptions the case falls.¹³

In cases where it is difficult to determine whether the offence committed by the accused is culpable homicide or culpable homicide amounting to murder the accused should be convicted of the lesser offence.¹⁴

The law prescribes only two possible punishments for murder—death or transportation for life. It is the duty of the Sessions Judge to examine every commitment order bearing this in mind, and if there is any possibility that murder has been committed he must either try the case himself, or send it to an Additional Sessions Judge, if one is available. Should a Court not empowered to impose the legal sentence find that a case of this type has been inadvertently transferred to it, it should not proceed to try it, but should return the case at once to the transferring authority for necessary orders.¹⁵

Chemico-legal and post-mortem examinations.—See Chapter X of the Madras High Court Rules of Criminal Practice ; c. 8 of the Lahore Rules, Vol. 2, pp. 55-70; s. 105 of the Oudh Criminal Digest ; and s. 218 of the Upper Burma Court Manual.

A *post-mortem* report is not evidence, and can only be used by the witness who conducted the *post-mortem* enquiry as an aid to memory.¹⁶

Poisoning.—Judges who try cases of murder by poisoning should invariably put beyond the possibility of doubt the identification of every single thing that is suspected to contain any poison. The evidence should be complete as to the history of such articles and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction, and there should be no possibility of any question being raised as to the identity of any such article.¹⁷ Where the accused was proved to have put some powder in the food, which was found by the Chemical Examiner to contain poison, but there was no statement or evidence of the quantity of poison found in the food, or of the probable effect on any one who might have eaten it, it was held that the accused could not be regarded, under the circumstances, to have intended to cause anything more than hurt and could only be convicted of attempt to commit an offence under s. 328.¹⁸ Before a person can be convicted of murder by poisoning, it is essential to prove that the death of the deceased was caused by poison, that the poison in question was in the possession of the accused, and that the poison was administered to the deceased by the accused. Where the cause of death

⁹ B. H. C. Cr. C. (1931), Ch. IV, s. 68, p. 48.

¹⁰ *Subbappa*, (1912) 15 Bom. L. R. 308, 14 Cr. L. J. 235; *Naba*, (1911) 12 P. L. R. 737, 12 Cr. L. J. 393.

¹¹ *Gajraj*, (1942) 18 Luck. 235.

¹² Criminal Procedure Code, s. 367 (5).

¹³ *Kalika Misser*, (1866) 1 Agra 3.

¹⁴ *Nga Po Aung*, (1889) S. J. L. B. 459.

¹⁵ *Bhola Bind*, (1943) 22 Pat. 607.

¹⁶ *Rangappa Goundan*, (1935) 59 Mad. 340.

¹⁷ *Shridhar*, (1905) 7 Bom. L. R. 640, 2 Cr. L. J. 585.

¹⁸ *Mi Pu*, (1909) 5 L. B. R. 79, 10 Cr. L. J. 363.

cannot be ascertained with certainty, a conviction for murder by poisoning cannot be sustained.¹⁹ Where the accused who had contracted illicit relations with a man and was delivered of a child was charged with having put the infant to death and it appeared that she was in possession of opium four days before the child's birth and the death of the child was found to be due to opium, it was held that the only reasonable inference was that the accused had caused the death of the child by administering opium to it.²⁰

In a trial for murder by arsenic poisoning the prosecution must prove that the deceased died of such poisoning; that the accused administered arsenic to the deceased with intent to murder. If the prosecution wishes to establish the first proposition by means of the Chemical Examiner, and weight is to be attached to his evidence, he must be called, sworn, and offered for cross-examination. By his evidence he must prove that at least two grains of arsenic were administered to the deceased before death. He can do this by proving the discovery of this amount in the body of the deceased, or by accounting for its absence in part. He may attribute the loss to vomiting, purging, or the natural elimination of the poison from the body before death,—taking into consideration the lapse of time between the hour arsenic had been taken and the hour of death.²¹ Mere examination of vomit or night-soil is insufficient to prove conclusively death from arsenic poisoning.²² It is not enough for the Chemical Examiner merely to state his opinion that arsenic was detected. He must state the grounds on which he arrives at that opinion. In India the Chemical Examiner merely tenders a report and he does not appear and give evidence. It is therefore extremely desirable that his report should be full and complete and take the place of evidence which he would give if he were called to Court as a witness.²³ When a report is received from the Chemical Examiner containing a quantitative analysis, it should be shown to the medical officer who conducted the *post-mortem* examination so that he may be in a position to state before the committing Magistrate what are the medico-legal inferences to be drawn from the report.

Pleader for defence.—See Bombay High Court Criminal Circular Orders, (1931 Ed.), Ch. IV, s. 74, p. 49, as regards the orders issued for the appointment of counsel or pleader for the defence in murder cases.²⁴

Plea of guilty.—‘Murder’ is a technical word and unless it is explained as directed by s. 300, the plea of guilty should not be accepted. The nature of the offence should be properly explained to the accused.²⁵ In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and not to convict solely on the plea of the accused.¹ It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence will be a sentence of death.² Before such a plea can be accepted the record should clearly show that the person who is charged understands and admits such facts as would bring his offence within the definition of murder.³ It is the practice of the Sessions Courts in the Bombay Province never to accept a plea of guilty to a capital charge. There is, however, no reason why, if proper safeguards are taken, such a plea should not be accepted. Such safeguards must include the accused's representation by counsel who must be in a position to answer the questions of the Court, with regard to whether the accused knows what he is doing and the consequences of his plea and also a medical report or medical evidence upon him. Unless such safeguards are taken and unless the Judge is prepared to accept a plea of guilty, the proper course is to tell the accused that he should “claim to be tried”, and if he refuses to claim to be tried, to record the plea of “does not plead”.⁴

¹⁹ *Gurdevi*, (1922) 26 Cr. L. J. 593, [1923] AIR (L) 325; *Gajrani*, [1933] A. L. J. R. 1617, 34 Cr. L. J. 754, [1933] AIR (A) 394; *Gaya Kunwar*, (1933) 11 O. W. N. 312, 35 Cr. L. J. 700, [1934] AIR (O) 62; *Anandi*, (1916) 17 Cr. L. J. 102, [1916] AIR (A) 363.

²⁰ *Alam Bibi*, (1932) 33 P. L. R. 223, 33 Cr. L. J. 448, [1932] AIR (L) 297.

²¹ *Happu*, (1933) 56 All. 228, 234; *Sarabjit*, (1933) 10 O. W. N. 771, 35 Cr. L. J. 189, [1933] AIR (O) 382.

²² *Sikandar*, [1930] A. L. J. R. 1405, 31 Cr. L. J. 862, [1930] AIR (A) 532.

²³ *Gajrani*, [1933] A. L. J. R. 1617, 34 Cr. L.

J. 754, [1933] AIR (A) 394.

²⁴ See also *Wasudev Hari Chapekar*, (1899) 1 Bom. L. R. 856.

²⁵ *Aiyawu*, (1885) 9 Mad. 61.

¹ *Bhadu*, (1896) 19 All. 119; *Vishwanath*, [1945] Nag. 492; *Abdul Kader Allarakhia*, (1946) 49 Bom. L. R. 25, s. B.

² *Chinia*, (1906) 8 Bom. L. R. 240, 3 Cr. L. J. 337; *Lawmya Shiddappa*, (1917) 19 Bom. L. R. 356, 18 Cr. L. J. 699.

³ *Nga Han*, (1919) 3 U. B. R. 137, 20 Cr. L. J. 540, [1919] AIR (UB) 23.

⁴ *Abdul Kader Allarakhia*, (1946) 49 Bom. L. R. 25, s. B.

If the accused in answer to a charge of murder states that he committed the offence but alleges provocation, such a statement does not amount to a plea of guilty on the charge. He must be put on his trial in order to ascertain whether the provocation was grave and sudden enough to prevent the offence from amounting to murder.⁵

Admissions dispensing with proof of facts.—Except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential, are not permitted in a criminal trial. In a murder case, no consent or admission by the accused's advocate to dispense with the medical witness can relieve the prosecution of proving by evidence the nature of the injuries received by the deceased and that the injuries were the cause of death; and the conviction that has taken place in the absence of such evidence cannot stand.⁶

Charge to jury in case of provocation.—In charging the jury on the point of provocation in a case of culpable homicide a Judge should tell the jury that, to bring the case within the exception, the accused must have been deprived of the power of self-control by grave and sudden provocation, that there ought to have been sufficient cause for such loss of self-control, and that the provocation was not voluntarily provoked by the accused as an excuse for doing harm.⁷

It is the duty of the Judge to explain the distinctions between murder and culpable homicide, and the jury as judges of facts have to decide the issue about sufficient provocation.⁸

Direction as to commitment.—*Calcutta Circular.*—In cases where death appears to have resulted from injuries voluntarily inflicted by the party accused, Magistrates ought to be very careful not to take it upon themselves to absolve the accused from the graver charge and convict him of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder, or culpable homicide not amounting to murder.⁹

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, did commit murder by intentionally (*or knowingly*) causing the death of (*specify the name of the deceased*), and thereby committed an offence punishable under s. 302 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

The intent or knowledge necessary to constitute murder should be set out in the charge.¹⁰ The charge should follow the language of s. 300.¹¹

Where an accused is charged with murdering one person he cannot be convicted for attempting to murder another person for there are two different offences.¹²

Punishment.—"The extreme sentence is the normal sentence: the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so".¹³ Where a murder is by a bully, a man armed with a deadly weapon against a man who is unarmed, the proper sentence is that of death.¹⁴ Where the murder is premeditated, cold-blooded and brutal, extreme penalty must be imposed.¹⁵ The fact that the sentence of death passed on a co-accused was commuted by the executive Government is no judicial consideration for not passing the sentence of death on the accused.¹⁶ The fact that the murderer had no personal grudge against his victim and was either a hired murderer or one who was ready to kill another in order to please his master or landlord is no ground for not passing the capital sentence.¹⁷

⁵ *Sakharam Ramji*, (1890) 14 Bom. 564; *Netal Luskur*, (1885) 11 Cal. 410.

⁶ *Rangappa Goundan*, (1935) 59 Mad. 349.

⁷ *Gunesh Luskur*, (1868) 9 W. R. (Cr.) 72.

⁸ *Dadubhai*, (1895) Unrep. Cr. C. 766, Cr. R. No. 30 of 1895.

⁹ C. H. C. R. & O., Vol. I, c.i., s. 45, p. 15. See also *Weir* (3rd Edn.) 157.

¹⁰ *Nga Nge*, (1897) P. J. L. B. 328.

¹¹ *Sheo Shankar*, (1925) 2 O. W. N. 862, 27 Cr. L. J. 62, [1926] AIR (O) 148.

¹² *Waryam Singh*, [1941] Lah. 423.

¹³ *Nga Tha Sin*, (1902) 1 L. B. R. 216, 219, F.B.

¹⁴ *Motiram Chandiram*, (1940) 42 Cr. L. J. 786, [1941] AIR (S) 117.

¹⁵ *Amir Singh*, (1932) 33 P. L. R. 411, 32 Cr. L. J. 576, [1932] AIR (L) 245.

¹⁶ *Amar Singh*, (1940) 42 Cr. L. J. 156, [1940] AIR (L) 494.

¹⁷ *Asa Ram*, (1933) 34 P. L. R. 427, 34 Cr. L. J. 372, [1933] AIR (L) 623. See *Mi Hein*, (1933) 34 Cr. L. J. 835, [1933] AIR (R) 134, where the lesser penalty was inflicted.

The Federal Court has power, where there has been inordinate delay in executing death sentences in cases which come before it, to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts. It is a jurisdiction which any Court should be slow to exercise.¹⁸ If the presiding Judge does not pass the sentence of death, he is bound to record the reasons why death sentence was not passed,¹⁹ that is to say, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstances.²⁰ A woman threw her children into a well and jumped into the well herself but afterwards, repenting of her intention to take her own life, managed to get out. The reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery, she was convicted for murdering the children. It was held that the sentence of transportation for life was proper and not that of death.²¹ Where in a case of murder, the circumstances are such as to justify the imposition of the lesser penalty the Sessions Judge himself can do so and it is not necessary to pass a sentence of death and to recommend that in the circumstances of the case, the Government might commute the death penalty.²² Whilst bearing in mind that the primary responsibility for the sentence is his, he should not lose sight of the fact that, should he pass sentence of death, the matter will further be considered by the High Court before the sentence is confirmed. Where a sentence of transportation for life has been passed, there are manifest objections to enhancing it even when a sentence of death ought to have been passed. There is no such objection to commuting a sentence of death to one of transportation for life, and such commutation should not be considered as any reflection on the way in which the Sessions Judge has exercised the discretion given him by law.²³ Where on a conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satisfied that, on the evidence in the case, the sentence of death is the only possible sentence which could have been passed by the Sessions Court.²⁴ If the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law.²⁵ In passing sentence on an accused person convicted of the offence of murder, regard should be had to the circumstances of the case. Where the accused is convicted of murder only by reason of his case coming under cl. (4) of s. 300, a sentence of death is uncalled for.¹ Where the condition of the accused rendered it likely that if he were hanged, decapitation would ensue, the sentence of death was commuted to one of transportation for life.²

The Federal Court of India has held that it cannot be laid down that in the case of a conviction under this section read with s. 149 the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. If there is a finding that the accused, though they were among the rioters some of whom, in pursuance of the common object of the unlawful assembly as at that stage constituted, committed the murder, had themselves taken no part in the assault upon the deceased, the lesser sentence would meet the ends of justice in their case. Where there is no such finding but on the contrary it is found that the accused were among those who inflicted the injuries received by the deceased, the sentence of death cannot be said to be inappropriate.³

¹⁸ *Piars Dusatth*, [1944] F.C.R. 61, 114, 115, (1943) 23 Pat. 159, 180, 181.

¹⁹ Section 367 (6), Criminal Procedure Code, 1898; *Ramudu*, [1943] Mad. 148.

²⁰ *Shree Hla U*, (1922) 11 L.B.R. 323, 23 Cr. L. J. 437, [1922] AIR (LB) 32; *Sohrai Sao*, (1929) 9 Pat. 474; *Nareh Singh*, [1935] O. W. N. 321, 36 Cr. L. J. 529, [1935] AIR (O) 265; *Sukhrum Singh*, [1944] O. W. N. 419.

²¹ *Karuppal*, [1940] M. W. N. 943, (1940) 52 L. W. 472, [1940] 2 M. L. J. 492, 42 Cr. L. J. 270, [1941] AIR (M) 50.

²² *Sorimuthu Pillai*, [1941] 2 M.L.J. 399, [1941] M. W. N. 847, (1941) 54 L. W. 312, 43 Cr. L. J. 56, [1941] AIR (M) 894.

²³ *Ma Shree Yi*, (1923) 1 Ran. 751.

²⁴ *Gunduthalayan*, (1929) 53 Mad. 585.

²⁵ *Public Prosecutor v. Paramandi*, (1921) 44 Mad. 443; *Mohammed Yusif*, (1929) 31 Cr. L. J. 1026, [1930] AIR (S) 225; *Seshayya*, [1941] Mad. 340.

¹ *Nga Po Aung*, (1889) S. J. L. B. 459.

² *Boodhoo Jolaha*, (1878) 2 C. L. R. 215.

³ *Rajagopalan*, [1944] F. C. R. 169.

Delay in making reference.—The accused were sentenced to transportation for life instead of death, on account of the delay occasioned by the making of a reference to the full bench when the case was pending before the High Court.⁴

Absconding accused.—In a case of murder in which the extreme penalty of the law is called for, the circumstance that the murderer absconded for a number of years before he was brought to trial is not by itself a ground for reducing the sentence of death to one of transportation for life.⁵

Absence of premeditation.—The mere absence of premeditation may or may not form in every case of murder a sufficient ground for imposing the lesser penalty.⁶ Where the murder committed is not premeditated in any way but is the result of impulse and temper, the proper sentence is one of transportation for life, though the assault was a violent one.⁷ Where an assault followed a sudden quarrel without premeditation and the accused came from a peaceful trading class, the extreme penalty was not inflicted.⁸ Where murder, even if not premeditated, is carried out with deliberate and persistent ferocity, the only proper sentence to be passed in such a case is one of death.⁹ The fact that an accused person is about twenty years of age and that his act was prompted by feelings of veneration for the founder of his religion and anger at one who had scurrilously attacked him is not a sufficient reason for not imposing the extreme penalty.¹⁰ Where both the assailants of the deceased were armed with *kirpans* and both of them used them, the offence committed was murder and the bare fact that there was only one fatal blow and it was not known which of the two appellants caused it was not sufficient to reduce the offence to one under s. 304-II or s. 225. But the fact that the origin of the assault was shrouded in obscurity was sufficient ground for not exacting the extreme penalty of law.¹¹

Benefit of doubt.—An accused person is entitled to the benefit of a reasonable doubt in the matter of sentence as in the matter of conviction.¹² A feeling of doubt as to the guilt of the accused is a matter to be considered by the tribunal before but not after the verdict and has no place in the determination of the sentence after conviction. The law does not recognize the right of a judicial tribunal to give effect to more than one degree of doubt.¹³

The sentence of transportation for life was never intended to be imposed in a case where there appears to be some doubt. If the Court at the end of a case is left in any reasonable doubt about the matter, it must acquit; but on the other hand if it is left in no reasonable doubt concerning the guilt of the accused, the appropriate penalty must in all cases be imposed. Where there is a doubt in a murder case, the Court should not and cannot pass a sentence of transportation for life.¹⁴

It is not permissible for a Judge to sentence a prisoner to transportation for life on the ground that he is sufficiently certain of the guilt but not sufficiently certain to sentence him to death.¹⁵ A Judge should not sentence a person accused of murder to transportation for life, instead of sentencing him to death, merely on the ground that the evidence is not strong enough to justify an irrevocable sentence. If the Court has any doubt as to the guilt of the accused it should acquit him.¹⁶

L, C, K and D conspired to kill S. In pursuance of such conspiracy, L, first, and then C, struck S on the head with a club, and S fell to the ground. While S was lying on the ground, K and D struck him on the head with their clubs; it was held that,

⁴ *Mahabir Singh*, [1944] 2 Cal. 287.

⁵ *Chattar Singh*, (1878) 2 All. 33.

⁶ *Bhyri Rajayya*, (1920) 13 L. W. 612, 22 Cr. L. J. 613, [1921] AIR (M) 303; *Pirithi*, (1924) 26 Cr. L. J. 349, [1924] AIR (L) 654; *Hasil*, (1941) 43 P. L. R. 672, 43 Cr. L. J. 370, [1942] AIR (L) 37.

⁷ *Sankappa Shetty*, [1940] M. W. N. 963, (1940) 52 L. W. 689, 42 Cr. L. J. 558, [1941] AIR (M) 326; *Girdhari Teli*, [1940] P. W. N. 625, (1940) 41 Cr. L. J. 587, [1940] AIR (P) 605.

⁸ *Bhana Mal*, (1929) 31 Cr. L. J. 731, [1930] AIR (L) 154; *Inayat Khan*, (1934) 16 Lah. 589; *Chenchuramayya*, [1945] 2 M.L.J. 547, [1945] M. W. N. 732.

⁹ *Mangrey*, (1892) 1 O. D. 414; *Dwarka*,

(1927) 4 O. W. N. 977, 28 Cr. L. J. 980, [1927] AIR (O) 588; *Niamat Khan*, (1930) 31 P. L. R. 411, 32 Cr. L. J. 51, [1930] AIR (L) 409.

¹⁰ *Ilam Din*, (1929) 30 Cr. L. J. 1125, [1930] AIR (L) 157; *Allah Wadhaya*, (1929) 31 Cr. L. J. 527, [1930] AIR (L) 51.

¹¹ *Sher Singh*, (1931) 32 P. L. R. 537, 32 Cr. L. J. 1083, [1931] AIR (L) 538.

¹² *Ma Shwe Yi*, (1923) 1 Ran. 751; *Gorakh*, (1938) 40 P. L. R. 542.

¹³ *Sohrai Sao*, (1929) 9 Pat. 474, 486.

¹⁴ *Jaddu Ahir*, (1935) 36 Cr. L. J. 1496, [1935] AIR (A) 919.

¹⁵ *Khudu Rajak*, (1929) 11 P. L. T. 166, 31 Cr. L. J. 727, [1930] AIR (P) 252.

¹⁶ *Sohrai Sao*, (1929) 9 Pat. 471.

inasmuch as K and D did not commence the attack on S, and it was doubtful whether S was not dead when they struck him, transportation for life was an adequate punishment for their offence.¹⁷

Bona fide dispute.—The minimum sentence that a Court can pass under this section is transportation for life. But where both the parties had fought in the *bona fide* belief that they were in the right a recommendation to the Provincial Government for reduction of sentence under s. 401, Criminal Procedure Code, may be made.¹⁸

Constructive liability.—It is not necessary to impose the major penalty of death for a constructive liability for murder when the accused were presumably acting in the exercise of a supposed right and it does not appear that any of them personally set out with the deliberate intention of causing death.¹⁹

Custom of killing for unchastity.—The Baluchi custom of killing for unchastity cannot be taken into consideration in mitigation of sentence to be passed under this section.²⁰

Drunkenness.—Although s. 86 attributes to a drunken man the knowledge of a sober man when judging of his action, it does not give him the same intention, and, therefore, drunkenness or a state of intoxication affords a sufficient excuse for not exacting the extreme penalty of the law.²¹ *Pal Singh's* case has been distinguished in a subsequent case in which it is said that in the former the accused had no motive to cause the death of his victim and that the attack was a sudden one. Where, however, the accused primed themselves with drink in order to wreak vengeance upon their enemy and beat him mercilessly, the penalty of death was inflicted.²² Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation.²³ Drunkenness even though voluntary could be taken as a sufficient justification in proper cases for not imposing the capital sentence.²⁴ Accused challenged the deceased to fight with him and on the refusal of the latter pushed his head and asked him to assault the accused. Thereupon the deceased gave him a blow. Immediately the accused drew a knife and inflicted several fatal wounds as a result of which the deceased died immediately. It was held that the accused was guilty of murder as an intention to cause death could be inferred from the nature of the injuries put that as the parties were drunk and as the first blow was struck by the deceased the lesser penalty should be imposed.²⁵

Excitement.—When the accused commits a murder in a moment of extreme excitement the lesser sentence of transportation for life is the appropriate sentence.¹

Father and son.—Where father and son jointly commit murder and the son may well have been under the influence of the father, the son will be awarded the lesser punishment of transportation for life.²

Infants.—Under the several Children Acts, no child under the age of fourteen years shall be sentenced to death or transportation.³

Injuries sustained by accused.—Severe injuries sustained by the accused are not sufficient to mitigate the punishment, especially when the attack upon the deceased was deliberate and pursued to a fatal end.⁴

¹⁷ *Pachayanna*, [1941] Mad. 172.

¹⁸ *Mehdi*, [1945] Lah. 267, 277.

¹⁹ *Fatima*, [1942] Lah. 470, 482.

²⁰ *Kaim*, (1934) 36 Cr. L. J. 497, 28 S. L. R. 279, [1935] AIR (S) 44; *Rahim Khan*, (1913) 7 S. L. R. 118, 15 Cr. L. J. 501.

²¹ *Pal Singh*, (1917) P. R. No. 28 of 1917, [1917] AIR (L) 22; *Tincouri Dhopi*, (1922) 27 C. W. N. 290, 39 C. L. J. 34, [1923] AIR (C) 460; *Nga Sein Ge*, (1933) 35 Cr. L. J. 1065, [1934] AIR (R) 10; *Nga Po Than*, (1938) 40 Cr. L. J. 67, [1938] AIR (R) 448.

²² *Sheru*, (1923) 7 Lah. 50.

²³ *Waryam Singh*, (1926) 7 Lah. 141.

²⁴ *Samman Singh*, [1943] Lah. 39, *Waryam Singh*, (1926) 7 Lah. 141, commented on.

²⁵ *Nga Sein Ge*, (1933) 35 Cr. L. J. 1065, [1934] AIR (R) 10.

¹ *Kalicharan*, [1947] Nag. 226.

² *Kala*, (1943) 46 P. L. R. 69, 45 Cr. L. J. 660, [1944] AIR (L) 206.

³ Bom. Act XIII of 1924, s. 22; Beng. Act II of 1922, s. 21; Mad. Act IV of 1920, s. 22; C. P. Act X of 1928, s. 26; 22, & 23 Geo. V, c. 26, s. 19 (2); 22 & 23 Geo. V, c. 47, s. 14 (2); *Ramudu*, [1943] Mad. 148; *Provincial Government, Central Provinces and Berar v. Mekhoo*, [1942] Nag. 305.

⁴ *Subbigadu*, [1940] 2 M. L. J. 1018, [1940] M. W. N. 1236, (1940) 52 L. W. 884, 42 Cr. L. J. 305, [1941] AIR (M) 280.

Insulting language.—Insulting language used by the deceased towards the accused though not enough to entitle him to the benefit of the first Exception is a mitigating circumstance to reduce the sentence to one of transportation for life.⁵

Jointly committing murder.—The Patna High Court has held that in deciding as to whether some or all of a number of persons are to be sentenced to death after a conviction for murder, *prima facie* all the persons convicted should be sentenced to the extreme penalty and it is only where special circumstances are shown in favour of any individual that the Court sentences such individual to the alternative punishment of transportation for life.⁶ Where one accused was mainly responsible for the murderous assault and the other accused who were his relatives joined him under his influence, it was held that the ends of justice would be met if those other accused were sentenced to transportation for life only.⁷ It is not proper that the less severe sentence should be passed when the heinousness of the crime is aggravated because several persons have conspired together to commit it and have jointly perpetrated it. The sentiment of a Judge that because it is impossible to differentiate between co-murderers and pass capital sentence on some of them, it is wrong to carry out the law and sentence seven men to death, cannot be too strongly reprobated. A Judge is wrong where he fails to sentence accused persons to death when they have deserved that punishment, and he errs grievously in yielding to such irrelevant considerations. "Judges are sworn to administer the law not as they wish it to be, but as they find it".⁸ As many of the murders can only be committed by a gang, too much leniency should not be exercised in favour of persons where participation alone makes it possible that the crime should be committed even though some of them might have no direct motive for committing the murder, and probably were only participating to oblige their friends.⁹ The Lahore High Court has taken the same view and held that where several persons join together to murder another and do murder him under such circumstances that there can be no doubt that the intention was to murder, every one of them ought to receive the sentence of death, unless there is any circumstance to distinguish one case from another.¹⁰ When a person is mercilessly beaten to death, it is no ground for not awarding the capital penalty that it is not known who inflicted the fatal blow.¹¹ The Madras and the Patna High Courts have held accordingly.¹²

The question whether more persons than one should be hanged for a single murder is one of nicety. In a case *Fulton, J.*, said: "The murder was cruel and deliberate. All who took part in it might justly be condemned to die. But as usual in cases where many prisoners are involved, we hesitate to confirm so many sentences and try to discriminate".¹³ In a later case,¹⁴ *Crump, J.*, stated: "As regards the sentences, I feel that the infliction of six sentences of death in one and the same case is rather apt to fail of the effect, which such sentences would otherwise have. It is possible that a wholesale penalty of this kind does not ineffectually act as a deterrent, but rather shocks the public conscience which is a thing that should be avoided at all costs. It is also usual in a case of this kind to distinguish, if possible, between the cases of accused persons where a large number have been found guilty of murder". Endorsing the above remarks, *Barlee, J.*, added: "We cannot confirm all the six sentences of death. These sentences may be logical but I can see no object in requiring six lives for one. The object of punishment in such cases, is, firstly, to satisfy the feelings of revenge of the relations

⁵ *Vayanakunnu Vedan*, [1941] M. W. N. 872.

⁶ *Shafi Khan*, (1928) 8 Pat. 181; *Tun Khine U*, (1938) 40 Cr. L. J. 49, [1938] AIR (R) 331.

⁷ *Sheo Prasad*, (1941) 17 Luck. 376.

⁸ *Mazaddi Rai*, (1932) 11 Pat. 807.

⁹ *Sukhram Singh*, (1944) 46 Cr. L. J. 532, [1944] O. W. N. 419, [1945] AIR (O) 140.

¹⁰ *Chanan*, (1935) 17 Lah. 536, dissenting from *Tarat Singh*, (1931) 33 P. L. R. 1, 33 Cr. L. J. 457, [1932] AIR (L) 189. Where the common object of an assembly was the beating of a person and death was not intended, the sentence of death is not passed on those who are constructively liable, but is passed on those who

brought about the death: *Gurdev Singh*, (1947) 49 P. L. R. 137, 49 Cr. L. J. 26.

¹¹ *Rattu*, (1946) 48 P. L. R. 176, 47 Cr. L. J. 826, [1946] AIR (L) 293.

¹² *Maruthiah Thevar*, [1941] M. W. N. 953; *Chundru Pallayya*, [1943] M. W. N. 11, (1941) 44 Cr. L. J. 489, [1943] AIR (M) 315; *Mahadeo Nath Khetri*, (1940) 42 P. L. T. 1035, 42 Cr. L. J. 603, [1941] AIR (P) 550.

¹³ *Basvanthi*, (1900) 25 Bom. 168, 175, 2 Bom. L. R. 761, 768.

¹⁴ *Maribasappa Parappa*, (1922) Confirmation Case No. 14 of 1922, decided by Shah, Ag. C. J., and Crump, J., on July 13, 1922 (Bom. Unrep.)

of the deceased and to prevent them from taking revenge afterwards...Secondly punishment must be deterrent".¹⁵

The mere fact, however, that it is impossible to say which of the accused actually inflicted the fatal wound is no reason at all for refraining from passing the death sentence, where the Court is satisfied that there was a common intention to murder, brutally carried out, and that all took part in the beating, the result of which was death. In this Lahore case, three persons were sentenced to be hanged for the murder of one person.¹⁶ It is followed in a subsequent case in which six persons were hanged for a single murder.¹⁷ In a Madras case four persons were sentenced to death for killing one man.¹⁸

Mental derangement.—A person was tried for murdering his two children and convicted under this section. At or about the time when the accused committed the murderous attack on his two little children, his mind was unsound, but it could not be said with any degree of certainty that he did not know that what he was doing was wrong or contrary to law. It was held that the sheer brutality of the assault in the absence of any provocation was a circumstance which would lead to the inference that the mind of the accused was in fact unhinged and far from normal. Under these circumstances, capital sentence was not imposed.¹⁹

Motive.—Where the facts proved established that the accused was not actuated by any 'baser motive', but he committed the offence of murder in the honest, though unfounded, belief that by so doing he was saving the life of, and alleviating the sufferings of others, the sentence of transportation, instead of a death sentence, was held to be the proper sentence.²⁰

Penitence.—Penitence is not a factor which may induce the Court to pass the lesser penalty.²¹

Persuasion.—A person did not inflict any injury on the deceased and it appeared that he was acting under the influence of his brother when he accompanied the latter to the place where the offence was committed. It was held that under those circumstances the extreme penalty of law should not be exacted in his case.²²

Provocation.—Where the provocation caused to the accused is very grave though not sudden the Court is justified in not inflicting sentence of death²³ and recommending the case to the Government for reduction in sentence.²⁴ Provocation, which is not sufficient to reduce an offence of murder to that of culpable homicide, may be taken into consideration, together with other circumstances, in passing the alternative sentence of transportation for life. The first wife of a tea garden cooly was unfaithful and left him. He had another wife who behaved in a similar manner. She was taken back and forgiven, but she again ran away and refused to return to her husband, who murdered her in her lover's hut. The cooly was twenty-five years old, of humble origin and limited intelligence. He confessed his guilt and stated that the action of his wife had made it impossible for him to face his relatives. It was held that these were circumstances which the Court should take into consideration and which would justify it in passing the alternative sentence of transportation for life rather than the sentence of death.²⁵ Where one of the accused did not hit any of the opposite party though he had fired and the shooting was in revenge for an insult of which deceased's

¹⁵ *Padmanna Gundappa*, (1931) Confirmation Case No. 19 of 1931, decided by Patkar and Bariee, JJ., on October 13, 1931 (Unrep. Bom.).

¹⁶ *Mewa*, (1935) 16 Lah. 1131, 1133.

¹⁷ *Ramji Lal*, [1940] Lah. 554.

¹⁸ *Lakshumanna*, [1938] 2 M. L. J. 1028, 48 L. W. 730, [1938] M. W. N. 1166, 40 Cr. L. J. 249, [1939] AIR (M) 109. See *Kuar Koeri*, (1937) 18 P. L. T. 416, 38 Cr. L. J. 1007, [1937] AIR (P) 497.

¹⁹ *Mitha*, (1932) 34 P. L. R. 1044, 34 Cr. L. J. 909, [1933] AIR (L) 123; *Nga Po Swa*, (1935) 37 Cr. L. J. 435, [1936] AIR (R) 113.

²⁰ *Mato Ho*, (1920) 1 P. L. T. 282, 21 Cr. L. J. 603, [1921] AIR (P) 63.

²¹ *Mominuddi Sardar*, (1934) 39 C. W. N. 262, 36 Cr. L. J. 1254, [1935] AIR (C) 591.

²² *Gulab*, (1925) 2 Lah. C. 14, 26 Cr. L. J. 1133, [1925] AIR (L) 584; *Indar Singh*, (1930) 31 Cr. L. J. 815, [1930] AIR (L) 545.

²³ *Nur Ilahi*, (1933) 35 Cr. L. J. 1476, [1934] AIR (L) 239; *Bhagwana*, (1932) 34 P. L. R. 255, 34 Cr. L. J. 711, [1933] AIR (L) 434; *Inayat Khan*, (1934) 16 Lah. 589; *Rameshwar Binjhia*, (1934) 35 Cr. L. J. 1128, [1934] AIR (P) 356; *Mussammatt Pathani*, (1934) 35 P. L. R. 559, 36 Cr. L. J. 247, [1934] AIR (L) 673; *Puran*, (1915) 17 Cr. L. J. 190; *Prem Singh*, (1942) 44 P. L. R. 457, 44 Cr. L. J. 117, [1942] AIR (L) 301; *Bharosa*, [1940] Nag. 679.

²⁴ *Bhondur*, (1935) 38 P. L. R. 43.

²⁵ *Rama Koya*, [1939] 2 Cal. 518.

brother was guilty, it was held that it was not necessary to exact the extreme penalty of death.¹

Where the deceased used highly provocative language towards the accused, a sentence of five years' rigorous imprisonment was deemed to be sufficient.² Where the fight is sudden and of a trivial origin and the accused is of young age, loses temper and inflicts the fatal injury in his anxiety to help his brother, the extreme penalty of death is not called for.³

Sex of accused.—The sex of the offender ought not to be taken into account in passing sentence, unless there are extenuating circumstances. Women who commit cold-blooded murder are generally very hard-hearted, more cruel and more daring than even males; and anybody who is acquainted with the habits, traditions and antecedents of women who commit this class of offence must be satisfied that the sentence of death is by no means a harsh sentence to pass on such women. Cases of this kind stand upon a footing different from the cases where women are led into killing their children to cover their own shame because of the cruelty of social customs and laws which their society enforces, with relentless rigour. Where, therefore, a barren woman killed another's child to get children, the Court passed a sentence of death.⁴ The existence of a young baby born to the accused since the murder, which was a cold-blooded one, was held to be no ground for passing the lesser sentence, transportation for life, when there were no extenuating circumstances.⁵ "There is no rule that a woman is protected by her sex from the death penalty. Of course, where a man and a woman are jointly charged with an offence, the Court may often take the view that the woman acted under the influence of the man, and that is always a reason for imposing a lesser sentence upon her. But if the Court comes to the conclusion that both parties are equally guilty, the fact that one of them is a woman is no ground for making a distinction in the sentence."⁶ Comparative lenity to women is a commonly accepted rule of practice though not of law, but in dealing with an atrocious crime the mere sex of the criminal should not bar the imposition of a sentence which would be considered appropriate in the case of a man.⁷ The Court sometimes takes into consideration the age of the accused when passing sentence. Where a young girl of fifteen years killed her step-son because her husband was illtreating her, the Court sentenced her to transportation for life.⁸ Where a woman murders her newly-born illegitimate child there are mitigating circumstances sufficient to reduce the appropriate penalty of death very much below a sentence of transportation for life.⁹

Oudh Rule.—In the case of a female prisoner charged with an offence punishable with death, Sessions Judges shall at the close of the trial inquire from such prisoner whether she pleads that she is or is not quick with child. If she alleges or he has reason to suppose that she is quick with child, he shall then make inquiries to ascertain whether she is or is not quick with child and report the result of his inquiries in his judgment.¹⁰

Madras Rule.—In all cases where women are convicted for the murder of their infant children, a reference should be made, through the High Court, to the Government with an expression by the Sessions Judge of his opinion as to the propriety or otherwise of reducing the sentence.¹¹

Lahore Rule.—In every case in which a sentence of transportation for life is passed on a woman for the murder of her infant child, and the sentence is not appealed

¹ *Sher Khan*, (1940) 42 P. L. R. 614, 42 Cr. L. J. 82, [1940] AIR (L) 485.

² *Goshain*, (1920) 19 A. L. J. R. 851, 21 Cr. L. J. 607, [1920] AIR (A) 199; *Abdul Alim*, (1926) 27 Cr. L. J. 1392, [1927] AIR (A) 105; *Indar Singh*, (1930) 31 Cr. L. J. 815, [1930] AIR (L) 545; *Hari Singh*, (1931) 33 P. L. R. 154, 33 Cr. L. J. 577, [1932] AIR (L) 302.

³ *Dalel*, (1945) 48 P. L. R. 106, 47 Cr. L. J. 730, [1946] AIR (L) 222.

⁴ Per Chandavarkar, J., in *Umi kom Jayaji*, Confirmation Cases Nos. 112 and 119 of 1911, decided on March 23, 1911, by Chandavarkar and Heaton, JJ., (Unrep. Bom.); *Ma Shree*

Yi, (1923) 1 Ran. 751.

⁵ *Thita Chamma*, [1940] 2 M. L. J. 551, [1940] M. W. N. 961, (1940) 52 L. W. 549.

⁶ Per Beaumont, C. J., in *Ambu Malku*, Confirmation Case No. 17 of 1941, decided on August 19, 1941, by Beaumont, C. J., and Sen, J. (Unrep. Bom.)

⁷ *Rasammal*, (1914) 16 Cr. L. J. 20, [1915] AIR (M) 821.

⁸ *Daulan*, (1925) 26 P. L. R. 550, 26 Cr. L. J. 1373, [1926] AIR (L) 144.

⁹ *Dhanva Kunbi*, (1923) 25 Cr. L. J. 63, [1924] AIR (N) 119.

¹⁰ O. Cr. R. (1943 edn.), ch. IX, s. 3, p. 14.

¹¹ M. H. C. R. P. (1931 edn.), s. 260, p. 70.

against, the record of the case shall, after the expiration of the period allowed for appeal, be forwarded to the High Court for submission to Government, with a view to the consideration of the question whether any commutation or reduction of the sentence should be allowed.¹²

Superstition.—Where an illiterate young woman living in the midst of environments reminiscent only of the dark ages and where gross ignorance and superstition prevailed and throughout whose life all opportunities of receiving education and enlightenment had been denied, believed that the death of her children was the direct result of the influence of the 'evil shadow' cast upon her by another woman, her husband's brother's wife, and in this superstitious state of mind picked up the latter's child and caused its death, it was held that, under the circumstances, transportation for life was a sufficient punishment.¹³

Youth.—Youth alone in every case is not such an extenuating circumstance as would justify the imposition of the lesser penalty.¹⁴ Although the High Court cannot pass any sentence less than that of transportation for life even where the accused is rather young, the authorities who are entitled to exercise the prerogative of the Crown are not restrained from any such consideration.¹⁵ But youth should be taken into consideration with the other facts of the case.¹⁶ If in consequence of inexperience and youth the accused commits murder in vindication of a supposed wrong, the youth, in conjunction with other circumstances, may be taken into consideration in favour of the accused and the lesser of the two punishments may be awarded.¹⁷ Where there is the additional circumstance of want of motive for the crime and the probability of the accused being merely a tool in the hands of third persons¹⁸ or where there is provocation,¹⁹ the lesser penalty may be inflicted. The tender age of the accused may, by itself, be a sufficient reason for awarding the sentence of transportation for life.²⁰ Where the murder cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance the capital sentence might not be the appropriate one.²¹ When murder is found to have been committed under provocation which is not such as to take the case out of this section, but which is still such as, having regard to the age of the accused and the class to which he belongs, filled him with blind passion and banished self-control, there is a fit case for awarding the lesser penalty of transportation for life.²² But in the case of a ruthless and brutal murder tender age is not a sufficient reason,²³ nor is it so where the murder is caused as a hired

¹² L. H. C. R. (1942 edn.), Vol. III, Ch. XX-D.

¹³ *Sardaran*, (1933) 34 Cr. L. J. 1251, [1933] AIR (L) 718.

¹⁴ *Nga Ba Thin*, (1922) 1 B. L. J. 70; *Kachria*, (1921) 18 N. L. R. 101, 22 Cr. L. J. 757; *Ismail*, (1928) 29 Cr. L. J. 540; *Kolanda Nayakkan*, (1930) 53 Mad. 861; *Bhagwandin*, (1930) 7 O. W. N. 767, 32 Cr. L. J. 83, [1931] AIR (O) 89; *Sheo Dina*, (1933) 35 Cr. L. J. 464, [1933] AIR (A) 939; *Matilal Mullick*, (1934) 39 C. W. N. 199, 36 Cr. L. J. 1220, [1935] AIR (C) 526; *Moti Ram*, (1933) 35 P. L. R. 201, 35 Cr. L. J. 455, [1933] AIR (L) 998; *Hari Kishan*, (1931) 34 P. L. R. 691, 34 Cr. L. J. 720, [1933] AIR (L) 305; *Gian Chand* (1937) 18 Lah. 481; *Gurdev Singh*, (1947) 49 P. L. R. 137, 49 Cr. L. J. 26.

¹⁵ *Jhiktu Bhogta*, (1941) 43 P. L. T. 763, 43 Cr. L. J. 544, [1942] AIR (P) 427.

¹⁶ *Tiri*, (1930) 9 Ran. 81; *Chit Tha*, (1918) 9 L. B. R. 165, 19 Cr. L. J. 648, [1918] AIR (LB) 58; *Nga Pyan*, (1902) 1 L. B. R. 359, dissented from. The latter case was also not followed in *Nga Tha Kin*, (1911) 1 U. B. R. 87, 12 Cr. L. J. 448; *Nathu*, [1940] A. L. J. R. 607, (1940) 42 Cr. L. J. 115, [1940] AIR (A) 480; *Nga Chit Tee*, (1939) 41 Cr. L. J. 706, [1940] AIR (R) 140; *Saddiq*, (1942) 45 P. L. R. 140, (1942) 44 Cr. L. J. 546, [1943] AIR (L) 104.

¹⁷ *Nathu*, [1940] A. L. J. R. 607, (1940) 42

Cr. L. J. 115, [1940] AIR (A) 480.

¹⁸ *Harnamun*, (1928) 29 Cr. L. J. 682, [1928] AIR (L) 855; *Sikandar*, (1931) 32 P. L. R. 414, 32 Cr. L. J. 645, [1931] AIR (L) 536.

¹⁹ *Nga Khwet*, (1941) 43 Cr. L. J. 266, [1941] AIR (R) 319.

²⁰ *Madho*, (1926) 27 Cr. L. J. 955, 22 N. L. R. 104, [1926] AIR (N) 461, *Kachria*, sup., dissented from; *Thakura Singh*, (1928) 30 Cr. L. J. 65, [1929] AIR (L) 64; *Sheobalak*, (1927) 29 Cr. L. J. 400, 11 N. L. J. 7, [1928] AIR (N) 108; *Mohan Lal*, (1931) 32 Cr. L. J. 682, [1931] AIR (L) 177; *Satyanarayanamurthy*, [1937] M. W. N. 1133; *Mohammad Din*, (1937) 18 Lah. 653; *Maghar Singh*, [1941] Lah. 366; *Nasib Singh Prem Singh*, (1942) 45 P. L. R. 82, 44 Cr. L. J. 552, [1943] AIR (L) 89.

²¹ *Kolanda Nayakkan*, (1930) 53 Mad. 861; *Yara*, (1932) 34 Cr. L. J. 375, [1933] AIR (L) 229.

²² *Mominuddi Sardar*, (1934) 39 C. W. N. 262, 36 Cr. L. J. 1254, [1935] AIR (C) 591.

²³ *Amir*, (1926) 29 Cr. L. J. 1017, [1928] AIR (L) 531; *Muhammad Sultan*, (1927) 29 Cr. L. J. 211; *Bhawani*, (1932) 9 O. W. N. 1161, 34 Cr. L. J. 250, [1933] AIR (O) 52; *Allah Baksh*, (1933) 35 P. L. R. 115, 35 Cr. L. J. 288, [1933] AIR (L) 956; *Bhagwan Chand*, (1932) 35 Cr. L. J. 619, [1934] AIR (L) 20; *Janghi*, (1938) 11 O. W. N. 119, 35 Cr. L. J. 664, [1934] AIR (O) 19.

assassin.²⁴ Where two boys between sixteen and seventeen years of age committed a cold-blooded and atrocious murder of a boy aged eight years for the purpose of gain, it was held that the sentence of death was proper.²⁵

Frontier and Burma.—As to the punishment in the Frontier Districts, see the Frontier Crimes Regulation,¹ and as to Burma, see the Burma Laws Act.²

Fine.—The usual practice in the Punjab is to avoid the imposition of fines where death sentences have been given.³

303. Whoever, being under sentence of transportation for life¹, commits murder, shall be punished with death.

Punishment for murder by life convict,

COMMENT.

This section makes capital sentence compulsory in the case of a convict who commits murder while undergoing a sentence of transportation. Thus, where a person under sentence of transportation for life on a conviction for murder is found guilty of murder on a subsequent and different charge, the only sentence that can be passed on him according to this section is that of death.⁴

1. 'Being under sentence of transportation for life'.—These words indicate that the sentence of transportation must have been passed on the accused. It is immaterial whether he was already transported or not.

A sentence of transportation for life means a sentence of transportation for the whole of the remaining period of the convicted person's natural life. If a person, who has been sentenced to transportation for life and whose sentence (after he had served a part of it) has been remitted under s. 401, Criminal Procedure Code, by the Government upon conditions, commits murder after his release, he must be considered as "being under sentence of transportation for life" within this section, and the Court must pass a sentence of death upon him.⁵ The Chief Court of Sind has dissented from this view and has held that when an accused person has been convicted of murder and sentenced to transportation for life, and the remainder of that sentence has been remitted without condition by the Provincial Government under s. 401 of the Criminal Procedure Code, he can no longer be said to be under a sentence of transportation for life and therefore the provisions of this section could not apply.⁶

304. Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

COMMENT.

This section "creates no offence, but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be in-

²⁴ *Abdulla*, (1941) Criminal Confirmation No. 19 of 1941, decided by Broomfield and Wassoodew, JJ., on October 2, 1941 (Bom. Unrep.).

²⁵ *Ramuḍu*, [1943] Mad. 148.

¹ Reg. III of 1901, ss. 11 (3) (d) and 12 (2).

² Burma Act XIII of 1898, s. 4 (3) (b) and

Sch. II.

³ *Chuha*, (1913) P. R. No. 18 of 1913, 14 Cr. L. J. 522.

⁴ *Doorjodhun Shamonto*, (1873) 19 W. R. (Cr.) 45.

⁵ *Po Kum*, [1938] Ran. 44.

⁶ *Ghulam, Md.*, [1943] Kar. 25.

flicted, where, an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the *Exceptions* to s. 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result, but intention to cause death or bodily injury likely to cause death is absent".⁷ If the act of the accused falls within either of the clauses 1, 2 and 3 of s. 300 but is covered by any of the five Exceptions, it will be punishable under the first part. If the act comes under clause 4 of s. 300 but is covered by any of the Exceptions it will be punishable under the second part.⁸ The first part of this section applies where there is guilty intention and the second part applies where there is no such intention, but there is guilty knowledge.⁹ There was a sudden quarrel about cattle bell, between A and B. The quarrel resulted into sudden and unpremeditated fight. When B lifted up his stick to strike A, A gave him a blow with his *kulhari*, B died on the next day. It was held that though A had a right of private defence it was not within his right to use the *kulhari* with the force he did and which caused the death. He was held guilty under s. 300(1), and not under s. 302.¹⁰

The second part of this section is to be read with the last few words of s. 299 and has no reference to s. 300 or to the Exceptions therein, and must not be confused with culpable homicide not amounting to murder.¹¹

Where the finding of the Sessions Judge was that "the accused must have known that he was likely to cause death" and the conviction was under s. 302 for an offence falling under s. 300 (4), it was held that, on the Court's finding, the accused was guilty of an offence under the second part of this section, and not under s. 302.¹²

Applicability of s. 34.—Section 34 of the Code can apply to a case under the second part of this section. Although to constitute an offence under the second part there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may have the common intention to do that act.¹³ The Chief Court of Oudh has held that a common intention is an intention shared by the person who has caused death and by the other assailants who did not themselves cause death. If the act which caused death is neither murder nor culpable homicide because the person who dealt the blow did not have such intention as is specified under s. 299 or s. 300, but only the knowledge which is specified in either of these two sections, there is no intention which can be shared by all the assailants who did not strike the fatal blow and, therefore, s. 34 cannot apply. The knowledge referred to in ss. 299 and 300 is personal knowledge of the person who struck the blow and it is difficult to see how it can be shared by his co-assailants, but in any case s. 34 is restricted to common intention and does not embrace any knowledge.¹⁴

The Allahabad High Court has held that s. 34 cannot be made applicable to the second part of this section. Under s. 34 there must be the furtherance of the common intention, while under the second part of this section there is no question of intention.¹⁵

Whipping.—As to whipping in Upper Burma for this offence, see the Burma Laws Act,¹⁶ s. 4 (b) and Sch. II.

⁷ Per Straight, J., in *Idu Beg*, (1881) 3 All. 776, 778; *Attru*, (1891) P. R. No. 9 of 1891; *Masti*, (1910) P. R. No. 3 of 1911, 12 Cr. L. J. 274; *Lehna Singh*, (1927) 28 P. L. R. 631, 28 Cr. L. J. 590, [1927] AIR (L) 526; *Sunder Singh*, (1928) 31 Cr. L. J. 43, [1929] AIR (L) 180; *Mohammadi Gul*, (1932) 28 N. L. R. 233, 33 Cr. L. J. 849, [1932] AIR (N) 121, F.B.; *Gajraj*, (1942) 18 Luck. 235.

⁸ *Barkatulla*, (1887) P. R. No. 32 of 1887.

⁹ *Ifatulla Akanda*, (1931) 58 Cal. 1138, 1146; *Chhotey Lal*, (1932) 10 O. W. N. 482, 35 Cr. L. J. 58, [1933] AIR (O) 269; *Nga Tun*, (1916) 17 Cr. L. J. 335.

¹⁰ *Abdul Rahman*, (1945) 47 Cr. L. J. 810, 48 P. L. R. 39, [1946] AIR (L) 275.

¹¹ *Munni Lal*, [1943] All. 853.

¹² *Nga Po Saw*, (1928) 2 B. L. J. 99.

¹³ *Adam Ali Taluqdar*, (1926) 31 C. W. N. 314, 28 Cr. L. J. 334, [1927] AIR (C) 324, sub. nom., *Abdul Gaffur Panchayet*, (1926) 45 C. L. J. 131; *Ram Prasad*, [1947] A. L. J. 277, 48 Cr. L. J. 866.

¹⁴ *Sunder Singh*, (1939) 14 Luck. 660, *Zahid Khan*, (1938) 14 Luck. 378, distinguished.

¹⁵ *Ramnath*, [1943] A. L. J. R. 207, (1943) 44 Cr. L. J. 624, [1943] AIR (A) 271.

¹⁶ Act XIII of 1898.

Council of elders.—See the Punjab Frontier Crimes Regulation, 1901,¹⁷ as to inquiry by a council of elders in a Punjab Frontier District. See also the Frontier Crimes Regulation,¹⁸ and the Criminal Tribes Act.¹⁹

PRACTICE.

Evidence.—Prove (1) the death of the person in question.

(2) That such death was caused by the act of the accused.

(3) That the accused intended by such act to cause death; or that he intended by such act to cause such bodily injury as was likely to cause death; or

that he knew that such act of his would be likely to cause death.

“The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed.

“The existence of a particular evil motive such as hatred, avarice, jealousy, etc., is not necessary. It is no part of the definition of culpable homicide that the act which causes death should be a malicious act. Malice is not made a necessary ingredient. Whatever may be the motive which incites the action, and whether or not any motive whatsoever be discoverable, the question for investigation is this:—Did the accused person intend to cause death, or a bodily injury likely to end in death; or did he know that it was a probable result of his act? If such was his purpose and design, or such his knowledge,—and none of the General Exceptions of this Code are applicable,—the act is an offence within this definition, although there is no apparent motive for it. If the intention or knowledge is clearly shewn, it is needless to enquire into the motives. It must not, however, be forgotten that under certain circumstances the existence of a motive may become an important element in a chain of presumptive evidence, as tending to shew the intention of the accused person.

“It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind? They can be ascertained only from external and visible acts. Observation and experience enable us to judge of the connection between men's conduct and their intentions. We know that a sane man does not usually commit certain acts heedlessly or unintentionally—and generally we have no difficulty in inferring from his conduct what was his real intention upon any given occasion.”²⁰

Where the case is on the border line between murder and culpable homicide not amounting to murder, the accused is entitled to the benefit of any reasonable doubt and he can be convicted only under this section.²¹

Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two will be convicted under this section but both of them can be convicted of an offence under s. 325.²² But where two or more persons band themselves together for the express purpose of taking a man's life and are found guilty of murder the Court is not justified in refraining from passing a sentence of death, which would otherwise be proper, merely on the ground that it cannot find definitely which of the accused delivered the blow which is to be regarded as fatal.²³ It was found that three appellants came determined to take possession of the *taur* armed with clubs and in the course of the fight one of them, who was armed with an iron-shod *lathi*, inflicted a fatal injury on the head of the deceased and fractured his skull. It was held, under the circumstances, that the assailant who caused the fatal injury was rightly convicted under the

¹⁷ Reg. III of 1901, s. 12.

¹⁸ *Ibid.*, s. 6.

¹⁹ Act II of 1897, s. 6.

²⁰ M. & M. 230, 231.

²¹ *Nga Po Ein*, (1933) 35 Cr. L. J. 1112, [1934] AIR (R) 110.

²² *Agra*, (1914) P.R. No. 37 of 1914, 16 Cr. L. J. 209, [1914] AIR (L) 579; *Jhandu*, (1924) 26

Cr. L. J. 653, [1924] AIR (L) 555; *Datta Ram v. Daya Ram*, (1924) 26 Cr. L. J. 381, [1924] AIR (L) 654; *Dalip Singh*, (1924) 26 Cr. L. J. 757, [1925] AIR (L) 318.

²³ *Tirumaligadu*, (1928) 52 Mad. 147; *Parshadi*, [1929] A. L. J. R. 244, 30 Cr. L. J. 559, [1929] AIR (A) 160.

second part of this section and his companions were rightly held guilty under s. 325, as they certainly knew that grievous hurt was likely to be inflicted and came prepared to inflict it in furtherance of the common object.²⁴ Where four accused simultaneously attacked the deceased with lathis and caused several injuries two of which proved fatal but there was no evidence to show which particular assailant caused the fatal injuries and there was no concert or pre-arranged plan to justify the application of s. 34, it was held that none of the four accused could be convicted of the offence under this section, but it could be presumed that every one of them had at least the intention of causing grievous hurt and therefore each one of them was guilty of an offence under s. 325.²⁵

The Allahabad High Court has held that when death has occurred, it is obviously unsatisfactory to find a man guilty of grievous hurt and the Legislature has taken into consideration that the intention to cause grievous hurt may be a more serious moral offence than the knowledge that death is likely to occur, by making imprisonment obligatory under s. 325 and not under the second part of this section.¹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Calcutta Circular.—(a) Sessions Judges, in all cases in which they may convict of culpable homicide not amounting to murder, shall invariably mention in their remarks on the trial the circumstances under which the culpable homicide was held not to amount to “murder”.

(b) Sessions Judges shall invariably record their opinion whether the act by which death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death, or with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death. And, in cases tried by a jury, they should be careful to obtain a specific verdict on these points.²

Patna Circular.—(a) Sessions Judges, in all cases in which they may convict of culpable homicide not amounting to murder, shall invariably mention in their remarks on the trial the circumstances under which the culpable homicide was held not to amount to “murder”.

(b) Sessions Judges shall invariably record their opinion whether the act by which the death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death, or with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death.

And, in cases tried by jury, they should be careful to obtain a specific verdict on these points.³

The Central Provinces Circular.—In view of the distinctive penal provisions contained in s. 304 of the Penal Code, Sessions Judges and Magistrates specially empowered will, in all cases in which they may convict the accused of culpable homicide not amounting to murder, invariably record their opinion whether the act by which the death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death; or with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death.⁴

Venue.—See ills. (a) and (b) to s. 179, Criminal Procedure Code.

Committal.—Where death has resulted from a violent attack, the Magistrate must commit the accused to the Court of Session on a charge of culpable homicide not amounting to murder.⁵

Charge to jury.—In his charge to the jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in this section, and direct them to find specially under which, if either, the accused is guilty.⁶ Where

²⁴ *Hoshnak Singh*, (1927) 29 P. L. R. 265.

²⁵ *Bishwanath*, [1946] O. W. N. (H.C.) 38, [1946] AIR (A) 153, [1945] A. L. J. R. 531, 47 Cr. L. J. 532.

¹ *Munni Lal*, [1943] All. 853.

² C. H. C. R. & O., Vol. I, c. i. s. 74, p. 28.

³ Pat. H. C. Cr. C., para. 42 (a), (b), pp. 18,

19.

⁴ C. P. Cr. C. (1929), Part I, C. I, p. 1.

⁵ *Gopinath Saha*, (1877) 1 C. L. R. 141; (1881) 1 Weir 288.

⁶ *Kalichurn Dass*, (1871) 15 W. R. (Cr.) 17, 6 Beng. L. R. (Appx.) 86; *Ladkya*, (1890) Cr. C. No. 62 of 1890, Unrep. Cr. C. 530; *Hari*, (1895) Cr. R. No. 4 of 1895, Unrep. Cr. C. 735.

the Judge omitted to require the jury to do this, the High Court held that the conviction was for the lighter description of the offence.⁷ In a trial on a capital charge the jury should be directed in the event of finding that the accused culpably caused the injuries which resulted in death to find with what intention he did so. If they find that his intention was to cause only such bodily injury as was likely to cause death, they should find the accused guilty of culpable homicide not amounting to murder. The general conduct of the accused at the time of committing the act the nature of the weapon used, the number and nature of the wounds inflicted are all considerations which should guide the jury in arriving at the intention of the accused.⁸

A verdict of guilty under the first part of this section read with s. 34 may not be theoretically impossible, but it is almost impossible to visualise the practical mentality that can conceive a common intention to commit culpable homicide not amounting to murder by exceeding the right of private offence. It is difficult to suppose that two or more persons, who have the right of private defence, would in real life have a sort of discussion to reach such a common intention exceeding that right. In a clear case of murder or nothing, to direct the jury that they might alternatively return a verdict of guilty under the first part of this section read with s. 34 is to give the jury an opportunity to bring in a loophole verdict thereby avoiding the necessity of returning a verdict entailing capital punishment.⁹

If an accused had knowledge necessary to justify under this section he must have known that the injury intended to be caused endangered life. Hence, in a case where the accused who stabbed the deceased with a knife in the abdomen was charged under s. 302 of the Code, the correct direction was that the accused would be guilty under s. 326 if the jury did not find the intention requisite under s. 302 or s. 304, Part I, but had knowledge that the wound inflicted was likely to endanger life.¹⁰

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, committed culpable homicide not amounting to murder, causing the death of——, and thereby committed an offence punishable under s. 304 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.¹¹

Punishment where provocation caused by adultery.—The Bombay High Court has observed that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour, and death caused under such circumstances must be visited with a very light sentence. It, therefore, passed a sentence of six months' rigorous imprisonment where death was the result of provocation of this sort.¹² The Madras High Court passed a sentence of one year's rigorous imprisonment in similar circumstances.¹³ Similarly, the former Chief Court of the Punjab had sentenced the accused to one year's imprisonment where he caught the deceased in the act of adultery with his married sister and struck him one blow on the head with a stick which killed him by fracturing his skull.¹⁴ The Lahore High Court passed a sentence of three months' rigorous imprisonment where the accused killed the deceased who was found lying on the same cot as his wife and who had carried on adulterous intercourse with his wife when he was in jail.¹⁵ In a similar case the Allahabad High Court imposed five years' rigorous imprisonment.¹⁶ Where the accused actually caught the deceased (his married sister) in the act of sexual intercourse with a stranger, and being enraged gave a number of blows which caused her death, it was held that under the circumstances

⁷ *Ameer Khan*, (1869) 12 W. R. (Cr.) 35, 6 Beng. L. R. (Appx.) 87 (F.N.)

⁸ *Kya Nyan*, (1913) 8 L. B. R. 125, 15 Cr. L. J. 678, [1914] AIR (LB) 216.

⁹ *Debee Charan Haldar*, [1937] 2 Cal. 250.

¹⁰ *Asgar Ali Mandal*, [1944] 2 Cal. 305.

¹¹ Criminal Procedure Code, Sch. V, xxviii(6).

¹² *Asha Gopal*, (1897) Unrep. Cr. C. 932, Cr. R. No. 42 of 1897.

¹³ *Govindappa*, [1981] M. W. N. 558. In *Subbiah Naidu*, [1934] M. W. N. 688, the facts

were somewhat different and a sentence of five years' rigorous imprisonment was imposed. In *Sarabjit*, (1933) 10 O. W. N. 771, 35 Cr. L. J. 189, [1933] AIR (O) 382, transportation for life was deemed to be sufficient. See also *Sheo Baran Singh*, (1933) 35 Cr. L. J. 232, [1933] AIR (A) 533.

¹⁴ *Fazal Dad*, (1904) P. R. No. 4 of 1904, 1 Cr. L. J. 501.

¹⁵ *Hussain*, [1939] Lah. 278.

¹⁶ *Mehdi Ali*, [1941] All. 608.

of the case three years' rigorous imprisonment was sufficient.¹⁷ Where murder was committed in the heat of passion and on the spur of the moment, after the accused's patience had been strained by the deceased (his immoral wife) to the utmost, the sentence of five years' rigorous imprisonment was deemed sufficient.¹⁸ Where the husband suffered for a long time through the obstinacy, viciousness, and flagrant immorality of his wife whom he drowned in the river Jhelum by giving a push while bathing, it was held that the above circumstances entitled him to a lenient sentence and the Court imposed three years' rigorous imprisonment.¹⁹

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

The Penal Code of some countries provides specially for the reduction or even the entire remission of punishment for the slaying of an adulterer taken in the act. The Indian Penal Code, like that of most other countries, makes adultery punishable as a crime. However the matter may be regarded from a moral point of view, the law forbids the husband to take vengeance with his own hands, and, if he chooses to avenge his injury himself, he does so at his peril. At the same time the amount of punishment to be imposed is discretionary, so that while it is made sufficiently severe to deter the injured husband from resort to excess in violence, it may not be made so severe as to encourage adulterers with the hope of immunity from immediate chastisement.²⁰ The Baluchi custom of killing for unchastity is no extenuation of the crime of murder and cannot be taken into consideration in the mitigation of sentence.²¹

Where the accused was found to have murdered his wife under a mistaken impression that she was unchaste, the High Court set aside the punishment of death passed upon him and sentenced him to transportation for life.²² But a mere suspicion of a wife's conduct is no extenuation of a deliberate act of murder.²³ Where the act is deliberate to get rid of a wife,²⁴ or where the husband leaves his wife for several months and subjects her to temptations and kills her lover²⁵ the extreme penalty must be inflicted.

Right of defence exceeded.—Where, in an affray respecting land, one party were the aggressors, and the other side (had the affair not ended fatally) would have been in the legal exercise of the right of defence of property and would have been entitled to the benefit of s. 104, it was held that one year's rigorous imprisonment was sufficient.¹

A crowd of five or six persons was engaged in a free fight using hatchets and *lathis*, and some of them were shouting that they were being robbed of property; accused N, not being in the fight himself and not knowing who were the robbers and who were the robbed, fired a gun shot at the crowd to scare them away but killed one of them. It was held that the law does not give a person the right to defend another man's person or property when he finds some unknown persons engaged in a free fight, that such an act cannot be covered by s. 79, as there was lack of good faith, that is due care and caution, Nor does such an act fall under s. 304A, which excludes culpable homicide; the person who fired a gun at a crowd must know that if the shot hit one of the crowd in a vital part of his body, he would die of the injury so caused. Such an act would fall under the second part of this section.²

Sudden quarrel.—The accused and the deceased exchanged abuses on which accused gave the deceased a single blow on the head causing fracture of the skull, and then refrained from causing any further injury. It was held that a sentence of two years' rigorous imprisonment was appropriate.³ Where there was a quarrel between the father and the son, and the latter suddenly got enraged, struck the former in the heat of passion and caused three or four injuries including one on the head which proved

¹⁷ *Allah Ditta*, (1933) 35 Cr. L. J. 1445, [1934] AIR (L) 428.

¹⁸ *Hira Singh*, (1932) 34 P. L. R. 889, 34 Cr. L. J. 1159, [1933] AIR (L) 126.

¹⁹ *Ghulam Mohammad*, (1934) 35 P. L. R. 746, 36 Cr. L. J. 683, [1934] AIR (L) 675.

²⁰ *Nga Lu Mya*, (1894) 1 U. B. R. (1892-1896) 213.

²¹ *Kaim*, (1934) 36 Cr. L. J. 497, 28 S. L. R. 279, [1935] AIR (S) 44.

²² *Dina Bandhu Moitra*, (1903) 8 C. W. N. 218, 1 Cr. L. J. 62.

²³ *Dasan alias Devan*, [1929] F. M. W. N. 269, 30 L. W. 229, 30 Cr. L. J. 630, [1929] AIR (M) 495.

²⁴ *Chava Indramma*, [1929] M. W. N. 270, 30 Cr. L. J. 971, [1929] AIR (M) 667.

²⁵ *Pateshwari*, (1928) 5 O. W. N. 160, 29 Cr. L. J. 465, [1928] AIR (O) 241.

¹ *Shunker Singh*, (1864) 1 W. R. (Cr.) 34; *Fuzza Meeah*, (1866) 6 W. R. (Cr.) 89.

² *Budho*, [1944] Kar. 420.

³ *Farida*, (1933) 34 P. L. R. 993, 35 Cr. L. J. 174, [1933] AIR (L) 851.

fatal, it was held that the offence of the accused fell under the latter part of this section.⁴ Where there was a violent altercation between a husband and wife and the husband threw a stone which killed the wife, the Court altered the sentence of death to one of transportation for life.⁵

In a quarrel between the accused's wife and his brother's wife, the latter abused the accused's daughters, whereupon the accused hit her a single violent blow with a stick which he picked up there and then. The woman died of her injury the following day. There was no feeling of enmity between the accused and the deceased. It was held that the quarrel being unpremeditated and the blow having been struck in the heat of passion, a severe sentence was not called for, and that a sentence of three years' rigorous imprisonment would meet the ends of justice.⁶ Where the deceased had used abusive and provocative language and the accused had only struck one blow, a sentence of three years' rigorous imprisonment was held to be sufficient.⁷

The deceased cut off branches from a tree apparently belonging to the accused who objected. An altercation ensued in which the accused struck the deceased a blow on the head with an iron-bound *lathi*. It was held that though the accused had a right to prevent the deceased from taking away the branches of the tree, he had no justification for hitting the deceased on the head as he did and was sentenced to two years' imprisonment.⁸

304A. Whoever causes the death of any person by doing any rash or negligent act¹ not amounting to culpable homicide² shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Causing death by negligence.

COMMENT.

This section deals with homicide by negligence.

Object.—The Code as it originally stood contained no adequate provision for the punishment of what English law called manslaughter by negligence. In the draft Code there was a section which punished this offence, but by some accident it had been omitted from the Code when it was passed into law. The present section inserted by Act XXVII of 1870, s. 12, supplied the omission.

Scope.—The provisions of this section seem to apply to cases where there is no intention to cause death and no knowledge that the act done in all probability would cause death.⁹ It only applies to such acts as are rash and negligent and are directly the cause of death of another person. It must be read along with ss. 336, 337 and 338. All these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient.¹⁰

This section does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338 or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender,

⁴ *Wali*, (1933) 34 P. L. R. 330, 34 Cr. L. J. 1173, [1933] AIR (L) 664.

⁵ *Sowarao*, (1866) P. R. No. 105 of 1866.

⁶ *Karam Ilahi*, (1927) 29 Cr. L. J. 33.

⁷ *Ghauvs*, (1930) 32 P. L. R. 387, 32 Cr. L. J. 1082, [1931] AIR (L) 523. Not followed in *Jai Mangal*, [1936] A. L. J. R. 462, 37 Cr. L.

J. 864, [1936] AIR (A) 437.

⁸ *Ziada*, (1933) 35 P. L. R. 195, 35 Cr. L. J. 461, [1933] AIR (L) 1052; *Sadhu*, (1937) 40 P. L. R. 935, 39 Cr. L. J. 927, [1938] AIR (L) 618.

⁹ *Sukaroo Kobiraj*, (1887) 14 Cal. 566, 569; *Nashkir*, (1912) 14 P. L. R. 879.

¹⁰ *Chhallu*, [1941] All. 441.

and placed in their appropriate place in the class of offences of the same character.¹¹ Where the act is in its nature criminal, this section has no application.¹²

This section does not apply to cases where the death has arisen, not from the negligent or rash mode of doing the act, but from some result supervening upon the act which would not have been anticipated.¹³

1. 'Rash or negligent act.'—A rash act is primarily an overhasty act, and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and caution.¹⁴

Criminal rashness "is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."¹⁵ Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.¹⁶ In order to establish criminal liability the facts must be such that the negligence of the accused goes beyond a mere matter of compensation between subjects and shows such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.¹⁷

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death. To say that because, in the opinion of the operator, the sufferer could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception...It is clear, however, that if the words 'not amounting to culpable homicide' are a part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death."¹⁸

"Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished...Supposing a man performed a surgical operation, whether from losing his head, or from forgetfulness, or from some other reason, omitted to do something he ought to have done, or did something he ought not to have done, in such a case there would be negligence. But if there was only the kind of forgetfulness which is common to everybody, or if there was a slight want of skill, any injury which resulted might furnish a ground for claiming civil damages but it would be wrong to proceed against a man criminally in respect of such injury.

¹¹ *Ketabdi Mundul*, (1879) 4 Cal. 764, 766; *Pika Bewa*, (1912) 39 Cal. 855; *Hasan*, (1900) 2 Bom. L. R. 613; *Istlingapa*, (1912) 14 Bom. L. R. 887, 13 Cr. L. J. 798; *O'Brien*, (1880) 2 All. 766; *Randhir Singh*, (1881) 3 All. 597; *Idu Beg*, (1881) 3 All. 776; *Saifulla*, (1882) P. R. No. 15 of 1882.

¹² *Damodaran*, (1888) 12 Mad. 56; *Mehr Iahi*, (1911) P. W. R. (Cr.) No. 26 of 1911, 12 Cr. L. J. 485.

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¹³ *Heera*, (1901) 3 Bom. L. R. 394.

¹⁴ *Nga Myat Thin*, (1898) P. J. L. B. 426.

¹⁵ Per Straight, J., in *Idu Beg*, (1881) 3 All. 776, 779, 780; *Smith*, (1925) 53 Cal. 333.

¹⁶ Per Alderson, B., in *Blyth v. Birmingham Waterworks Company*, (1856) 11 Ex. 781, 784.

¹⁷ *Chhotey Lal*, [1944] All. 674, 677.

¹⁸ *Nidamarti Nagabhushanam*, (1872) 7 M. H. C. 119, 120.

But if a surgeon was engaged in attending a woman during her confinement, and went to the engagement drunk, and through his drunkenness neglected his duty, and the woman's life was in consequence sacrificed, there would be culpable negligence of a grave kind. It is not given to everyone to be a skilful surgeon, but it is given to everyone to keep sober when such a duty has to be performed."¹⁹

The words "rashly and negligently" are distinguishable and one is exclusive of the other. The same act cannot be rash as well as negligent.²⁰

To render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part. It is not every little trip or mistake that will make him so liable.²¹ The distinction between the negligence which is sufficient ground for a civil action and the higher degree which is necessary in criminal proceedings is sharply insisted on in several cases.²²

A person driving a motor car is under a duty to control that car; he is *prima facie* guilty of negligence if the car leaves the road and dashes along into a tree and it is for the person driving the car to explain the circumstances under which the car came to leave the road. Those circumstances may be beyond control, and may exculpate him, but in the absence of such circumstances, the fact that the car left the road is evidence of negligence on the part of the driver.²³ The mere velocity of a vehicle is not the only criterion of rash and negligent driving, which may also consist in taking, while driving, risks which by the exercise of a little diligence could be avoided. Driving a car recklessly until it comes so close to a pedestrian that it becomes impossible to save the collision cannot be characterised as rash and negligent driving. As between a pedestrian and a driver of a motor vehicle, the responsibility of the latter is greater as the duty to use care increases in proportion to the danger involved in dealing with the instrument that a person brings for his own purpose in close proximity to others. Ordinarily pedestrians using the road are not exempt from the duty to take care of themselves, but negligence, if any, on the part of a pedestrian cannot excuse negligence on the part of a driver of a motor car.²⁴

Death must result from rash or negligent act.—"Death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must have been the *causa causans*; it is not enough that it may have been the *causa sine qua non*."²⁵ The rash or negligent act means the act which is the immediate cause of death and not any act or omission which can at most be said to be a remote cause of death.¹ In cases falling under this section it is dangerous to attempt to distinguish between the approximate and ultimate cause of death due to a rash and negligent act.² Where a person using a road was accidentally killed in consequence of it being out of repair through neglect of trustees, appointed for the purpose of repairing the roads, to contract for repairing it, it was held that they were not chargeable with manslaughter.³ If the driver of a carriage be racing with another carriage, and from being unable to pull up his horses in time the first mentioned carriage is upset, and a person thrown off it and killed, this is manslaughter in the driver of that carriage.⁴ Death caused by negligence is to be treated in law as death caused by any other form of negligence.⁵

2. 'Not amounting to culpable homicide.'—"Section 304A is directed at offences outside the range of ss. 299 and 300, and obviously contemplates those cases

¹⁹ Per Stephen, J., in *Doherty*, (1887) 16 Cox 306, 309.

²⁰ *Shakir Khan*, (1930) 31 P. L. R. 955, 32 Cr. L. J. 587, [1931] AIR (L) 54.

²¹ Per Lush, J., in *Finney*, (1874) 12 Cox 625, 626.

²² *Noakes*, (1866) 4 F. & F. 920.

²³ *Ratnam Mudaliar*, (1934) 66 M. L. J. 318, [1934] M. W. N. 102, 35 Cr. L. J. 691, [1934] AIR (M) 209.

²⁴ *Mohammad Bux*, (1935) 31 N. L. R. (Sup.) 26, 36 Cr. L. J. 1368, [1935] AIR (N) 200. See *Priestley*, (1948) 46 Cr. L. J. 759, [1944] AIR (S) 124, where the accused while driving a car at a speed of between twenty-five

to thirty miles an hour knocked down a pedestrian at night and was held not guilty because the road being uneven, and the bumps common, the accused could not realise that the accident had occurred.

²⁵ Per Jenkins, C. J., in *Omkar*, (1902) 4 Bom. L. R. 679, 682; *Sat Narain Pandey*, (1932) 55 All. 263; *Ledger*, (1862) 2 F. & F. 857.

¹ *Akbar Ali*, (1936) 12 Luck. 336.
² *Khanmahomed*, (1936) 38 Bom. L. R. 1111, 38 Cr. L. J. 660, [1937] AIR (B) 96.

³ *Pocock*, (1851) 5 Cox 172.

⁴ *Timmins*, (1836) 7 C. & P. 499.

⁵ *Andrews*, (1937) 30 Cox 576.

into which neither intention nor knowledge...enters. For the rash or negligent act which is declared to be a crime is one 'not amounting to culpable homicide', and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded. Section 304A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description. According to English law, offences of this kind would come within the category of manslaughter, but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with a narrower range of punishment proportioned to their culpability. It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts. There may be in the act an absence of intention to kill, to cause such bodily injury as is likely to cause death, or of knowledge that death will be the most probable result, or even of intention to cause grievous hurt, or of knowledge that grievous hurt is likely to be caused. But the inference seems irresistible that hurt at the very least must be presumed to have been intended, or to have been known to be likely to be caused. If such intention or knowledge is present, it is a misapplication of terms to say that the act itself, which is the real test of the criminality, amounts to no more than rashness or negligence."⁶ The accused, while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomited and bled from the nose, and within little more than an hour died. Upon the *post-mortem* examination it was found that her "spleen was badly ruptured, almost torn across; death was caused by rupture of the spleen." There were no signs of disease of the spleen, though it was a little enlarged. The Sessions Judge convicted him under this section, but the High Court altered the conviction to one under s. 325 on the ground that the blow was wilfully and consciously given to the deceased by the accused and the consequences that resulted from it could not change a wilful and conscious act into a rash or negligent one and it was found that the accused neither intended to kill nor to cause bodily injury likely to cause death and that he had not the knowledge that death would be the probable result.⁷

Death caused by person practising surgery or medicine.—Where a person practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter, but if there is no gross negligence it is not.⁸ Where a person acting as a medical man, whether licensed or unlicensed, administers to a patient a poisonous medicine without any intent of doing any bodily harm but with an intent to prevent or cure a disease and it kills the patient, he is guilty of an offence under this section.⁹

The duty of a medical man, who undertakes the treatment of a patient, is to use a fair and reasonable standard of care and competence. Before a medical man can be held criminally responsible for the death of his patient, the prosecution must prove all matters necessary to establish civil liability, except pecuniary loss, and in addition must prove negligence or incompetence on his part which went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State.¹⁰ Where a doctor prepared an injection by dissolving some powder in water which he gave to fifty-seven children of whom five died and others were made ill, it was held that negligence, to be criminal, must be gross and that the only negligence on which reliance could be placed being the single act of dissolving the powder in water, a criminal degree of negligence had not been proved merely because too strong a mixture had once been dispensed and a number of children made gravely ill.¹¹

⁶ Per Straight, J., in *Idu Beg*, (1881) 3 All: 776, 778, 779.

⁷ *Ibid*.

⁸ *Long*, (1831) 4 C. & P. 423; *Senior's Case*, (1832) 2 Mood. Cr. C. 346; *Nanny Simpson's Case*, (1829) 1 Lewin 172; *Spiler*, (1832) 5 C. & P. 333; *Fergusson's Case*, (1830) 1 Lewin 181; *Webb*, (1834) 1 M. & Rob. 405. See

Roscoe, 14th Edn., p. 821, *et seq.*, where all cases on the point are collected.

⁹ *DeSouza*, (1920) 42 All. 272; *Mahla*, (1924) 1 Lah. C. 398.

¹⁰ *Percy Bateman*, (1925) 19 Cr. App. R. 8, 769, 28 Cox 33.

¹¹ *Akerle*, [1943] A. C. 255.

Contributory negligence.—The doctrine of contributory negligence does not apply to criminal liability where the death of a person is caused partly by the negligence of the accused and partly by his own negligence. The doctrine of contributory negligence has no place in an indictment of criminal negligence.¹² Where a person is charged with the offence of causing loss of life by a negligent omission it is not open to him to rely on the plea of contributory negligence which is distinctly recognized in the law of torts but finds no place in an indictment for criminal negligence. In such a case the question is what was the proximate cause of the accident.¹³

If the accused is charged with contributing to the death of the deceased by his negligence, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death.¹⁴ A driver cannot absolve himself from the consequences of rash driving by merely showing that the person to whom or to whose property he has caused injury was himself negligent.¹⁵ If the negligent act or omission of a motor driver was the proximate and efficient cause of death, the fact that the deceased was himself negligent and so contributed to the accident or other circumstances by which the death was occasioned, does not afford therefore a defence to a charge under this section.¹⁶

CASES.

Rash or negligent act.—Where a railway official, after being instructed to move some trucks down an incline uncoupled and singly, disobeyed the instruction and lost control over them, and a coolie in trying to stop the trucks fell under the wheels and was killed;¹⁷ where an engine-driver failed to sound his whistle before starting the engine, and the engine having been put in motion caused a boy, who was painting a wagon, on the line, injury, which resulted in his death;¹⁸ where the accused while out shooting with the deceased in a jungle separate from him, seeing something move in the jungle but without waiting to see what it was, fired and shot the deceased;¹⁹ where the accused cut out the piles of a person with an ordinary knife and, from the profuse bleeding, the person died;²⁰ where the accused struck at a man carrying a child and the blow fell on the child and killed it;²¹ where the accused received poison from her paramour to administer it to her husband as a charm and administered it with the result that death ensued, but she did not know that the substance given to her was noxious until she had seen its effects;²² where the accused administered to her husband a deadly poison (arsenious oxide) believing it to be a love potion in order to stimulate his affection for her, and the husband died from the effects of the poison;²³ where the accused administered a love potion (found to be aconite) to her husband, mother-in-law, and brother-in-law, thinking that it was some charm to procure their love as they were maltreating her because she was carrying on an intrigue with a close neighbour, and her

¹² *F. C. Woodward*, (1924) 18 S. L. R. 199, 27 Cr. L. J. 257, [1925] AIR (S) 233.

¹³ *Ibid.*

¹⁴ *Swindall*, (1846) 2 C. & K. 230, 232, referred to in (1871) 6 M. H. C. (Appx.) 31, 1 Weir 837 (F.N.); *Dant*, (1865) 10 Cox 102; *Hutchinson*, (1864) 9 Cox 555; *Jones*, (1869) 11 Cox 358; *Kew*, (1872) 12 Cox 355; *W. Walker*, (1824) 1 C. & P. 320; contra, *Birchall*, (1866) 4 F & F. 1087.

¹⁵ *Deota Misir*, [1931] A. L. J. R. 770, 32 Cr. L. J. 1061, [1931] AIR (A) 708; *Mohammad Bux*, (1935) 31 N. L. R. (Sup.) 26, 36 Cr. L. J. 1868, [1935] AIR (N) 200.

¹⁶ *Mohammad Bux*, *ibid.*; *Sheikh Jumman*, [1944] N. L. J. 451.

¹⁷ *Nand Kishore*, (1884) 6 All. 248.

¹⁸ *Thompson*, (1894) Cr. R. No. 47 of 1894, Unrep. Cr. C. 721.

¹⁹ *Nga Pan Gyi*, (1885) S. J. L. B. 308.

²⁰ *Sukaroo Kobiraj*, (1887) 14 Cal. 566; but see *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7, and *Gonesh Dooley*, (1879) 5 Cal. 351.

²¹ *Budhya*, (1888) Unrep. Cr. C. 398; *Jama*, (1888) P. R. No. 28 of 1888; *Kaku*, (1920) 1 L. L. J. 487, [1921] AIR (L) 297. (Sentence of six

months' rigorous imprisonment was held to be sufficient because the stick thrown at a woman which killed the child was a light one). But in *Sahae Rae*, (1878) 3 Cal. 623, such an act was held to be grievous hurt.

²² *Mussammatt Bakhan*, (1887) P. R. No. 60 of 1887; *Khema*, (1869) P. R. No. 8 of 1869; *Musst. Sultan*, (1884) P. R. No. 35 of 1884. Under similar circumstances the Bombay High Court acquitted the accused of the offence of murder: *Nagawa Bhimappa*, (1902) 4 Bom. L. R. 425; but in this case the question whether the act of the accused did not come under s. 304A was not considered.

²³ *Ramava Channappa*, (1915) 17 Bom. L. R. 217, 16 Cr. L. J. 805, [1915] AIR (B) 297; *Phulmani Mudain*, (1923) 25 Cr. L. J. 449, [1924] AIR (P) 635. See *Bai Chanchal*, Crim. Appeal No. 249 of 1916, decided by Beaman and Heaton, JJ., on August 10, 1916 (Unrep. Bom.), in which a woman who administered to her husband *dhatura* as a love philtre which made him ill was acquitted of the charge under s. 328 as it was not administered with a malicious desire of injuring her husband.

husband and mother-in-law died;²⁴ where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious, and mixed it with food believing that by doing so she would become rich, but four of the persons who ate the food died;²⁵ where the lessee of a ferry allowed an unsound boat to be used, and in consequence of its unsoundness, the boat sank while crossing the river and some of the persons in it were drowned;¹ where the accused being absorbed in an attempt to witness the preparations for a festival drove his cart on one side of the road regardless of the persons standing on that part of the road, and in so doing drove over and killed a child;² where the accused and the deceased were standing on the parapet of a deep well, and an altercation having arisen between them, the accused struck the deceased on the head with a club and the deceased lost his balance, fell into the well, and was drowned;³ where the accused sent two boxes containing fireworks to a railway company falsely declaring them to contain iron locks, with the result that in loading one of the boxes exploded killing one coolie, injuring another, and damaging the railway wagon in which it was being placed;⁴ where the accused had sexual intercourse with his child wife with such violence as to rupture the vagina and destroy the partition between the vagina and the rectum and the girl died;⁵ where the accused kicked his neighbour's boy who fell down and died;⁶ where the accused whose duty was to make a periodical inspection of certain boilers in order to see that they were in a fit condition to be worked failed to carry out his duty of inspecting the boilers from time to time and a boiler exploded and caused loss of life and injury to person;⁷ where the accused drove a motor bus on the wrong side of the road and neglected to blow his horn while passing by a stationary tram-car coming from the opposite direction and knocked down a boy of fourteen years, who had just got down from the rear of the tram-car, and he died of fracture of the skull;⁸ and where an engine-driver, while taking his engine to a water-column drove it with speed and failed to stop it in time and it collided with another engine standing at a short distance killing one man and injuring another,⁹ it was held in all those cases that the acts of the accused were either rash or negligent.

The accused had been in charge of a police-station, the vicinity of which had been much troubled by thieves. On one occasion a thief had fired at the accused. It having been reported to the accused that three thieves were prowling about, he, with two other men, went out to patrol. They saw a man crouching under a tree, and thinking he must be a thief, the accused fired at him, and killed him. The man proved to be a coolie. It was held that the accused was guilty of a most rash act.¹⁰ Where, by the bullet fired by the one or other of two accused persons who were practising at target shooting at a place near which was a public road which the accused would have noticed if they had used the least circumspection, a man was wounded resulting in his death, it was held that both the accused were guilty of an offence under this section, and that in such a case the one whose bullet struck the deceased and caused death could not be held to be the only principal offender under it, and the other whose shot did not strike the deceased, his abettor, under s. 114.¹¹ This case follows an English case the facts of which are similar. A, B and C went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B placed a board, which was handed to him by A, in the presence of C, in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy in a tree in a garden near the field, at a spot 393 yards distant from the firing point. A, B and C were all found guilty by a jury of manslaughter. It was held by the Court that A, B and C had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter.¹²

²⁴ *Pika Bewa*, (1912) 39 Cal. 855.

²⁵ *Jamna*, (1909) 31 All. 290.

¹ *Bhutan*, (1894) 16 All. 472.

² *Intru Souza*, (1886) 1 Weir 327.

³ *Chunni Lal*, (1889) P. R. No. 33 of 1889.

⁴ *Kamr-ud-din*, (1905) P. R. No. 22 of 1905, 2 Cr. L. J. 207.

⁵ *Shahu*, (1917) 11 S. L. R. 76, 18 Cr. L. J. 1003, [1917] AIR (S) 42. See Comment under s. 338, *infra*.

⁶ *Public Prosecutor v. Krishna Nair*, [1934] M. W. N. 856.

⁷ *F. C. Woodward*, (1924) 18 S. L. R. 199, 27 Cr. L. J. 257, [1925] AIR (S) 233.

⁸ *Bhagwandas Bakshi*, (1928) 30 Bom. L. R. 655, 29 Cr. L. J. 897, [1928] AIR (B) 208.

⁹ *Chhotey Lal*, [1944] All. 674.

¹⁰ *Wazirulzama Khan*, (1881) 1 A. W. N. 156.

¹¹ *Morgan*, (1909) 36 Cal. 302.

¹² *Salmon*, (1880) 6 Q. B. D. 79.

Where an assistant station-master on duty at a station gave the "line clear" on his own responsibility on a foggy night knowing that another train was standing at a particular point and the train which was allowed to pass came into collision with the standing train, it was held that the granting of "line clear" under the circumstances was in itself a rash and negligent act which rendered him amenable to punishment.¹³ An unqualified person who was in charge of a dispensary had to make up a quantity of quinine mixture for cases of fever. He went to a cupboard where non-poisonous medicines were supposed to be kept and took therefrom a bottle with an outside wrapper marked 'poison.' This wrapper he tore off and threw away. The bottle itself was labelled 'strychnine hydrochloride'; but, without regarding this, and apparently because there was a resemblance between this bottle and another in which quinine hydrochloride was kept, he made up the entire contents of the bottle as if it had been quinine. The result was that seven patients died. It was held that he was guilty under this section.¹⁴ The accused, a girl of seventeen, who happened to be carrying her infant daughter tied on her back, having been exasperated at an altercation which she had with her husband, attempted to commit suicide by jumping into a well. She was found alive in the well next day but her child was drowned. The trial Judge convicted her of an attempt to commit suicide and also of the murder of her infant child, under ss. 309 and 302. It was held that the offence which she had committed was not murder, but causing death by negligent omission, i.e., omission to put the child down before jumping into the well.¹⁵ Under somewhat similar facts, the Allahabad High Court held, distinguishing this case, that the woman was guilty of culpable homicide.¹⁶ The accused, a girl of twenty-years, who was turned out of her house by her husband, lived with her lover and had a child by him. She was later sent for by the *panchas* of her caste, who proposed to take her back into her caste, but asked her to leave the child with her lover. At the meeting of the *panchas*, where the accused had the child in her arms, she threw herself with the child into a well desperately in a fit of frenzy alarmed at the prospect of separation from the child. The child died, but the accused was rescued. It was held that she was guilty of offences under this section and s. 309.¹⁷ Accused, who was driving a lorry, seeing two bullock-carts coming towards him in the middle of the road, blew his horn with the result that one of the cart-drivers swung his cart to the wrong side of the road. Accused thereupon swerved off to the right so far as to strike a tree on the right-hand side, the lorry overturning and killing one passenger and injuring several others. There was no evidence that the negligent act of the cart-driver was so sudden that it was impossible for the accused to avoid the accident if he had had his lorry under proper control. It was held that the accused was guilty of an offence under this section.¹⁸ The accused, knowing that a pistol was loaded, was trying to unload it and while doing so, acted so negligently that the pistol went off and as a result the complainant's son was killed. It was held that the accused was guilty under this section.¹⁹ A Sub-Inspector of Police while pursuing a party of gamblers fired four shots in the air, but a person was injured and died immediately. The revolver which the Sub-Inspector used was a powerful weapon having range of one hundred yards. He fired the first shot from a distance of forty-nine cubits and the last shot thirty-four cubits from the crowd. The four shots were fired in succession while running and the surface of the ground where he ran was not level. It was held that if the Sub-Inspector had only taken sufficient care and caution he would not have fired the four shots, while running, even into the air from such a short distance as forty-nine and thirty-four cubits, seeing that the ground was uneven and that in case he slipped the bullets, which he discharged, might hit one of the crowd. His overhastiness consisted in running on an uneven ground and firing four shots in rapid succession. He was held guilty under this section.²⁰

¹³ *Tapti Prasad*, (1917) 15 A. L. J. R. 590, 18 Cr. L. J. 815, [1918] AIR (A) 429.

¹⁴ *DeSouza*, (1920) 42 All. 272; *Mahla*, (1924) 1 Lah. C. 398.

¹⁵ *Supadi Lukadu*, (1925) 27 Bom. L. R. 604, 24 Cr. L. J. 1016, [1925] AIR (B) 310; *Daxolama*, (1931) Cr. Review No. 49 of 1931, decided on February 16, 1931, by Madgavkar and Murphy, JJ. (Unrep. Bom).

¹⁶ *Dhirajia*, [1940] All. 647.

¹⁷ *Basava Nilappa Ajjannavar*, (1930) Criminal Appeal No. 426 of 1930, decided by Madgavkar and Barlee, JJ., on September 30, 1930 (Unrep. Bom).

¹⁸ *Deota Misir*, [1931] A. L. J. R. 770, 32 Cr. L. J. 1061, [1931] AIR (A) 708.

¹⁹ *Motan Ram*, (1930) 32 Cr. L. J. 463, [1930] AIR (L) 462.

²⁰ *Nga San Win*, (1933) 35 Cr. L. J. 248, [1933] AIR (R) 326.

A was driving a lorry at the speed of about twenty miles an hour when he was passed on his right side by another lorry going fast, which went on to the *kacha* part of the road, raised a great cloud of dust which completely blinded the driver and hid the road from him. Instead of stopping he proceeded further with the result that as he could not see the road he drove his lorry on the right side of the road instead of the left and collided with another lorry whereby several persons were injured and received grievous hurt and one died. It was held that A was guilty of a rash and negligent act.²¹ The Court observed that "when there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust, as so frequently happens in this province in dry weather when a car passes which goes in the *katcha* part of the road, it ought to be clearly recognized that it is the duty of all motorists under these conditions to stop their cars. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood."²² The accused, driving an over-loaded lorry, was signalled by a Sub-Inspector of Police to stop but he refused to do so and drove on at an excessive speed of about fifty miles an hour wishing to escape the chase by the Sub-Inspector. During the chase a small girl tried to cross the road and was knocked down and died. It was held that the accused was guilty of an offence under this section.²³

Acts neither rash nor negligent but intentional.—Where the accused gave the deceased a push which caused him to fall, and in such fall he broke his toe, and on the fifth day died of tetanus, this section was held not to apply. The High Court remarked that it was simply a case of using criminal force.²⁴ Where the accused threw his stick at the deceased with such force that it hit the deceased on the head with the point, and made a punctured wound which caused the death of the deceased, it was held that he had not committed an offence under this section, because the injury was intentionally caused to the deceased. He was, therefore, held guilty of causing hurt.²⁵ Where there was medical evidence to show that milk had been administered to a child in such quantities as to kill it, but there was no evidence to show that the milk was administered by the orders of the mother, or that she knew the quantity that was being administered, it was held that there was no evidence for a conviction under this section.¹ The accused was watching his field one dark night. Hearing a noise in the field he shouted, whereupon a thief ran out of it whom he followed and struck with a stick. The thief fell down, and the accused caught him and took him to a Zemindar's house. The thief became insensible there, and subsequently died from the effects of the blow which the accused had given him. It was held that he could not be convicted of an offence under this section.² Over-loading of a lorry may be an offence under the Motor Vehicles Act, but it cannot be regarded as a rash and negligent act within the meaning of this section.³ Similarly the overcrowding of a boat which capsized owing to strong wind was held to be no offence under this section.⁴ Accused was driving a motor lorry, which collided with another lorry coming in the opposite direction, with the result that a passenger on the accused's lorry was thrown out and died of the injuries. At that time another lorry was proceeding in front of the accused's lorry and a car had just passed the place; consequently a cloud of dust had gathered and visibility was very dim. The finding on the evidence was that the accused was driving too fast, considering the lack of visibility and that this act of driving too fast was rash and negligent. There was no finding that the accused was responsible for the collision. It was held that the conviction under this section could not stand.⁵

The accused's wife, eight or nine years of age, was brought by her father to his house for the purpose of being left there. At night the accused and his wife went inside the house; the fathers of both remaining outside in the verandah. After midnight the girl left the house with the intention of going home to her father's house, got into a canoe, which sank, and left her in the water, from which she was rescued by the accused's father, and brought back to the house by the accused. The accused, having pulled her into the house, kicked her on the back with his bare foot, from which

²¹ *Abdul Qayyum*, [1940] Lah. 646.

²² *Ibid.*, p. 648.

²³ *Gurdeo Singh*, [1941] Lah. 50.

²⁴ *Acharjys*, (1877) 1 Mad. 224.

²⁵ *Keegan*, (1893) Cr. R. No. 38 of 1893, Unrep. Cr. C. 673.

¹ *Mussumat Pemkoer*, (1873) 5 N. W. P. 88.

² *Bhikham*, (1881) 1 A. W. N. 103.

³ *Jaimal Singh*, (1932) 33 P. L. R. 492, 88 Cr. L. J. 436, [1932] AIR (L) 366.

⁴ *Raghu*, (1914) 16 Cr. L. J. 72.

⁵ *Sai Narain Pandey*, (1932) 55 All. 263.

kick the girl fell down and died. The Sessions Judge convicted the accused under this section. But the High Court set aside the conviction and convicted him of culpable homicide, observing: "To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death."⁶ Where the accused kicked a person on his stomach and struck him with a piece of stone on his head and back and that person died ten days after receiving the injuries, it was held that the section was not applicable to a case where injuries were inflicted neither rashly nor negligently but intentionally and designedly.⁷

Where the accused, the head-man of a village, quietly stood in a corner, looking at a performance, while holding a gun which was loaded and cocked. One of the actors of the performance who was playing the part of a drunken dacoit made an unprovoked assault on the accused to amuse the audience and a struggle ensued in the course of which the gun went off and killed the actor. It was held that the accused was not guilty of causing death by negligence.⁸

Too remote consequences.—B, an assistant station-master at a station G, had, in anticipation of receiving a line clear and caution message, and against rules written out in the prescribed form book a conditional message to the effect that on the arrival at G of a down train then due from a station S, the line would be clear for a certain up train at G to start for S. The guard of the latter train thereafter, without the knowledge of B and also against rules, entered the station-master's room in his absence, tore this imperfect certificate from out of the book and without reading it, as he ought to have done, signed and passed it on to the driver, and gave the signal for the train to start, but without taking the permission of the station-master as the rules required. The driver also, without examining the certificate, started the train and a collision took place in which several persons including the driver were killed. B and the guard were both convicted under this section. It was held that B was not liable; the consequences were too remote to have been caused by B's writing out the certificate in disobedience of the rule.⁹ Where the accused, driving a motor-car at night, entered a road which being under repairs was closed to traffic and ran over and killed two coolies who were sleeping on the road with their bodies completely covered up except for their faces, it was held that the accused was not guilty of causing death by a rash and negligent act as it could not be said that he should have looked out for persons making such an abnormal use of the road.¹⁰ Where the accused kept a bottle of the "Atlas Tree Killer" in his farm-shed and two of his farm servants drank the stuff thinking it to be arrack and died in consequence, it was held that the accused could not be prosecuted under this section.¹¹

Mistake of fact.—**Ghost.**—Where a person believing in good faith that the object of his assault was not a human being but a ghost, caused fatal injuries on another which resulted in the death of the latter, it was held that in view of the provisions of s. 79 of the Penal Code, the accused was not guilty of an offence under this section.¹² Where the accused entertained a belief that a stooping child whom he caught sight of in the early gloaming was a spirit or demon, the child being in a place which the accused and his fellow villagers deemed to be haunted, and acting on this belief caused the death of the child by blows he inflicted before he discovered his mistake, it was held that the accused was guilty under this section.¹³

English cases.—**Gross negligence.**—Where the defendant came to town in a chaise, and before he got out of it, he fired his pistols, which by accident killed a woman;¹⁴ where a workman threw down a piece of timber crying aloud 'stand clear' and was heard by all labourers but one on whom it fell and killed him;¹⁵ where a man turned out a horse known to be vicious on a common across which were public footpaths and

⁶ *Ketabdi Mundul*, (1879) 4 Cal. 764, 767.

⁷ *Isilingappa*, (1912) 14 Bom. L. R. 887, 13 Cr. L. J. 798.

⁸ *Babu Ram*, [1942] All. 884.

⁹ *Shankar Bal Krishna*, (1904) 32 Cal. 73.

¹⁰ *Smith*, (1925) 53 Cal. 333.

¹¹ *Agasthyalinga Goundan*, [1941] M. W. N. 684, (1940) 43 Cr. L. J. 126, [1941] AIR (M) 766.

¹² *Waryami Singh*, (1926) 28 Cr. L. J. 39, [1926] AIR (L) 554; *Bonda Kui*, (1940) 23 P. L. T. 670, [1942] P. W. N. 175, (1940) 43 Cr. L. J. 787, [1943] AIR (P) 64.

¹³ *Hayat*, (1887) P. R. No. 11 of 1888.

¹⁴ *Burton*, (1721) 1 Str. 481; *Haride*, 10 Rennels, 647.

¹⁵ *Hull*, (1664) Kelyng 40, 84 Eng. Rep. 1072.

he kicked a child who died;¹⁶ where the accused being employed to drive a cart sat in the inside instead of attending at the horse's head and that cart went over a child who was gathering up flowers on the road;¹⁷ where an unskilled practitioner prescribed dangerous medicines of which he was ignorant;¹⁸ where a man pointed a gun at another person without previously examining whether it was loaded or not, and it accidentally went off and killed that person;¹⁹ and where a lad, as a frolic, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the cartman was killed,²⁰ it was held that the accused were guilty of gross negligence.

No gross negligence.—The accused was an attendant at a lunatic asylum. Being in charge of a lunatic, who was bathing, he turned on hot water through mistake into the bath, and thereby scalded him to death. It was found that the lunatic was a man capable of getting out by himself and of understanding what was said to him and that he was told to get out. It was held that he was not guilty of gross negligence.²¹ The negligent act which causes death should be that of the party charged. Where it was the duty of the accused to attend a steam-engine but he had stopped it and gone away and, during his absence, a person came to the spot, and put it in motion and, being unskilled, was not able to stop it again, and a person was killed in consequence of its being in motion, it was held that the death was not the consequence of the accused's act.²² The negligence of the accused, however gross, will not render him responsible for a death which his diligence would not have averted.²³ The accused was indicted for the manslaughter of a passenger in a train of which he was in charge as guard. The accused had directed the train to be separated on an incline, whereby a portion of the train ran backwards and collided with another train, causing the death of many of the passengers. It was held that in order to convict the accused he must be found guilty of 'gross negligence' or 'reckless negligent conduct' and that mere intellectual defect or mistake of judgment, without wilful disobedience, as to a traffic regulation, would not create criminal liability.²⁴

On an indictment for the murder of an aged and infirm woman, by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines, and other necessaries, and not allowing her the enjoyment of open air, in breach of an alleged duty, Patterson, J., in his charge to the jury, said: "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter."²⁵

Where it was the duty of the accused as ground bailiff of a mine to cause the mine to be properly ventilated by causing air headings to be put up where necessary, and by reason of this omission another person was killed by an explosion of fire damp, it was held that the accused was guilty of manslaughter by negligence.¹

PRACTICE.

Evidence.—Prove (1) the death of the person in question.

(2) That the accused caused such death.

(3) That such act of the accused was rash or negligent, although it did not amount to culpable homicide.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Central Provinces Circular.—Section 304A of the Penal Code is not to be applied to cases in which there is voluntary commission of an offence against the person. The Courts should be guided by the following explanation taken from the judgment of the Madras High Court in the case of *Nidamarti Nagabhushanam*, 7 Madras High Court Reports 119, of the terms 'rashness' and 'negligence' as used in that section:—* * * *

¹⁶ *Dant's Case*, (1865) L & C. 567, 10 Cox 102.

¹⁷ *Knight's Case*, (1828) 1 Lewin 168.

¹⁸ *Markuss*, (1864) 4 F. & F. 356.

¹⁹ *Jones*, (1874) 12 Cox 628.

²⁰ *Sullivan*, (1886) 7 C. & P. 641.

²¹ *Finney*, (1874) 12 Cox 625.

²² *Hilton's Case*, (1838) 2 Lewin 214.

²³ *Dalloway*, (1847) 2 Cox 273.

²⁴ *Elliott*, (1889) 16 Cox 710.

²⁵ *Marriott*, (1838) 8 C. & P. 425, 433.

¹ *Haines*, (1847) 2 C. & K. 368.

It may be added that in cases in which there has been an intention to cause bodily injury, and the offence does not amount to culpable homicide, the person by whom death has been caused should be punished for causing either hurt or grievous hurt, according as his intention and the nature of the injuries inflicted bring the case within the definition of one or the other offence.²

Direction to jury.—Where an accused was charged with culpable homicide and the evidence showed that the deceased had an enlarged spleen, and that his death was caused by rupture of the spleen occasioned by blows inflicted by the accused on the body of the deceased, it was held that it was not sufficient in order to find the accused guilty of a rash act under this section, that the jury should be satisfied only of the prevalence of the disease of enlargement of the spleen in the district, and infer therefrom criminal rashness in beating the deceased; but that they should also be satisfied that the accused was aware of the prevalence of such disease in the district, and also aware of the risk to life involved in striking a person afflicted with that disease.³

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, caused the death of——by doing a rash or negligent act not amounting to homicide, to wit——, and thereby committed an offence punishable under s. 304A of the Indian Penal Code, and within my cognizance (*or cognizance of Court of Session*).

And I hereby direct that you be tried on the said charge.

Punishment.—The mere fact that a human life is lost by negligent driving of a car does not justify the Court in passing a deterrent sentence, if the lost life could not have been reasonably anticipated by the accused. In estimating the sentence passed on the accused in a case of causing death by negligence the Court has to consider whether the negligent act which has occasioned the death shows callousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused. It is no part of the duty of Courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of human life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence.⁴

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Abetment of suicide of child or insane person.

COMMENT.

Object.—This and the following sections have been inserted because the ordinary law of abetment is inapplicable. They apply when suicide is in fact committed.

'Suicide' is self-destruction by a person.

The Law Commissioners observe: "It seems to us that the rule would fall to be applied under these clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has by an illegal omission of his duty *intentionally* given him the opportunity, or permitted him to obtain the means of killing himself. It would apply also, we conceive, in the case of a person seeing another preparing to destroy himself, say by hanging, and allowing him to accomplish his purpose without any attempt to prevent him, if, as may be expected, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offences about to be committed in their presence. The intention here would be inferrible from the

² C. P. Cr. C. (1929), Part I, No. 2, ss. 1, 3, p. 3.

³ *Safatulla*, (1879) 4 Cal. 815.

⁴ *Khanmahomed*, (1936) 38 Bom. L. R. 1111, 81 Cr. L. J. 660, [1937] AIR (B) 96.

circumstances. In the former case collateral proof of the intention would be requisite. But we apprehend that it is *active* aid which is principally intended in these clauses, and to which the higher penalties are meant to be applied."⁵

PRACTICE.

Evidence.—Prove (1) the commission of suicide by a person.

(2) That the person who committed suicide was under eighteen years of age, or was insane, or delirious, or an idiot, or intoxicated.

(3) That the accused abetted the commission of such suicide.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, abetted the commission of suicide by AB, a person in a state of intoxication (*specify the state*), and thereby committed an offence punishable under s. 305 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

306. If any person commits suicide, whoever abets¹ the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Abetment of suicide is punishable under this section and attempt to commit suicide under s. 309.

Abetment of suicide is confined to the case of persons who aid and abet the commission of suicide by the hand of the person himself who commits the suicide. When another person, at the request of, or with the consent of, the suicider, has killed that person, he is guilty of homicide by consent, which is one of the forms of culpable homicide.⁶

1. 'Abets.'—See s. 108, *supra*.

CASES.

Suttee.—Three accused persons instigated a boy to light the pile of a *suttee* while another induced the woman to return to the pile after she had once retired from it, and she was immolated. The three persons were convicted of abetting culpable homicide, and the boy and other person, of abetting suicide.⁷ Where, in the presence of the accused, a woman prepared to commit suicide, and they followed her to the pyre and stood by her, her stepsons crying "*Ram Ram*", and one of the accused admitted that he told the woman to say "*Ram Ram*", and she would become *suttee*, it was held that those facts were sufficient to prove the active connivance of the accused, and to justify the inference that they had engaged with her in a conspiracy for the commission of the *suttee*.⁸ One R having died, his widow declared her intention to be a *suttee*. The accused sent word to the police, but before their arrival they took the body to the cremating place. The evidence was that the deceased having shown certain miracles they were overawed by her threats to curse them and did what she ordered them to do. They prepared the funeral pyre, placed her husband's body over it, and did not use any force to prevent her from sitting on the pyre and supplied her with *ghee* which she poured over the pyre and herself. It was held that the accused were guilty of abetment of suicide.⁹ Where a Hindu woman was burnt in the act of becoming *suttee*, those who assisted her in making her toilet, those who held up the screen for her, took her

⁵ First Report, ss. 322, 323.

⁶ *Sahebloll Reetloll*, (1863) 1 R. J. P. J. 174.

⁷ *Sahebloll Reetloll*, (1863) 1 R. J. P. J. 174.

⁸ *Mohit Pandey*, (1871) 3 N. W. P. 316;

Kinder Singh, [1933] A. L. J. R. 7, 34 Cr. L. J. 1069, [1933] AIR (A) 160.

⁹ *Ram Dayal*, (1918) 36 All. 26.

ornaments, supervised the cutting of her nails and the dyeing of her feet, prepared the pyre on which she seated herself and put the corpse upon the pyre were all held guilty of abetment of suicide. The Court observed that it was no defence to say that the abettors were in fact expecting a miracle and did not anticipate that the pyre would be ignited by human agency. The method of ignition of the fire whether miraculous, whether self-applied, or whether applied by others was immaterial."¹⁰

PRACTICE.

Evidence.—Prove (1) the commission of suicide by a person.

(2) That the accused abetted the commission thereof (*vide* s. 107).

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That on or about the—day of—, at—, one AB committed suicide, and that you abetted its commission by—(*specify the act*), and thereby committed an offence punishable under s. 306 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

307. Whoever does any act with such intention or knowledge,¹ and under such circumstances² that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

ILLUSTRATIONS.

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(b) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

COMMENT.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.¹¹

The authors of the Code say :—“These clauses appear to us absolutely necessary to the completeness of the Code. We have provided, under the head of bodily

¹⁰ *Vidyasagar Pandey*, (1928) 8 Pat. 74.

¹¹ *Stephen's Digest of Crim. Law*, Art. 50.

hurt, for cases in which hurt is inflicted in an attempt to murder; under the head of assault, for assaults committed in attempting to murder; under the head of criminal trespass, for some criminal trespasses committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder which are not trespasses, which are not assaults, and which cause no hurt. A, for example, digs a pit in his garden, and conceals the mouth of it, intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own, and no assault, for he has applied no force to Z. He may not have caused bodily hurt, for Z may have received a timely caution, or may not have gone near the pit; but A's crime is evidently one which ought to be punished as severely as if he had laid hands on Z with the intention of cutting his throat.

"Again, A sets poisoned food before Z. Here A may have committed no trespass, for the food may be his own; and if so, he violates no right of property by mixing arsenic with it. He commits no assault, for he means the taking of the food to be Z's voluntary act. If Z does not swallow enough of the poisoned food to disorder him. A causes no bodily hurt; yet it is plain that A has been guilty of a crime of a most atrocious description.

"Similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol intending to kill Z. If the shot proves fatal, A will be guilty of manslaughter; and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim.

"It is to meet cases of this description that clauses 308 and 309 [sections 307 and 308] are intended."¹²

Scope.—The intention or knowledge which is necessary to constitute murder may exist, combined with an act which falls short of the complete commission of that offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail or be intercepted or prevented from consummating the crime. This and the following section seem to apply to attempts to murder, in which there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. The act or omission, although it does not cause death, is carried to such a length as, at the time of carrying it to that length, the offender considers sufficient to cause death.¹³

To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds.¹⁴ This section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned but still there may be cases in which the culprit would be liable under this section. If a person knows that a certain result will ensue from his act he must be deemed to intend such result by the act. Further, it is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section.¹⁵

See notes on s. 511, *infra*, where there is a full discussion as to what constitutes an attempt.

1. 'Does any act with such intention or knowledge.'—For the purpose of constituting an attempt under this section there are two ingredients required, first, an evil intent or knowledge, and, secondly, an act done. If A intending to fire the stack of B, goes into a grocery shop and buys a box of matches, he does not commit the offence of attempting to fire the stack of B. But if he, having that intent, and

¹² Note M, pp. 150, 151.

¹³ M. & M. 274; *Rawal Arab*, (1898) Unrep. Cr. C. 964; *Mangavalli Ranganayakamma*, (1889) 1 Weir 328.

¹⁴ *Kyaw We*, (1908) 4 L. B. R. 311, 9 Cr. L.

J. 11, overruling *Nga Slave Nae*, (1869) S. J. L. B. 406; *Sukkirappa Goundan*, [1931] M. W. N. 861; *Rameshwar*, (1935) 10 Luck. 718.

¹⁵ *Mutalli*, (1929) 31 Cr. L. J. 782, [1930] AIR (L) 253.

having bought the box of matches, goes to the stack of B and lights the match, but it is put off by a puff of wind, and he is so prevented and interfered with, that would establish an attempt. If a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, he cannot escape criminal responsibility, and this because, his own set volition and purpose having been given effect to to their full extent, a fact unknown to him and at variance with his own belief intervened to prevent the consequences of that act which he expected to ensue, ensuing.¹⁶ The accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events.¹⁷ The intention or knowledge must be such as is necessary to constitute murder. Without this there can be no attempt to murder. Where persons, pursued by the police, turned round and fired, but nobody was hit and no bullets were found, it was held that they were guilty under this section.¹⁸ If a man fires off a fire-arm while a police-officer is attempting to arrest him, the natural conclusion is that he is attempting to shoot the police-officer. If the defence is that he had merely the intention of frightening the police-officer by firing in the air, then the burden of proving that fact is upon the defence.¹⁹

2. 'Under such circumstances.'—The Bombay High Court, differing from the meaning attached to these words in its earlier decision in *Reg v. Cassidy*,²⁰—viz., that there must be an act done under such circumstances that death might be caused if the act took effect, that is, the act must be capable of causing death in the natural and ordinary course of things—has held that they refer to facts which would introduce a defence to a charge of murder, such as, for instance, that the accused was acting in self-defence or in the course of military duty.²¹ The Lahore High Court has held that in order to bring a case within the purview of this section it is not necessary that the injury inflicted should in itself be sufficient in the ordinary course of nature to cause death. The language of the section makes it clear that even if mere hurt is caused by an act which is done with such intention or knowledge and under such circumstances that if by that act death is caused the offender will be guilty of murder, this section will apply. The section may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance and it cannot, therefore, be reasonably argued that unless an injury sufficient in the ordinary course of nature to cause death is inflicted on the victim, the intention contemplated by this section cannot be presumed. Under this section the intention precedes the act and is to be proved independently of the act, and not merely gathered from the consequences that ensue. All that is necessary to be established is the intention with which the act is done and if once that intention is established, the nature of the act will be immaterial.²² In this case the accused was in love with a woman and after her marriage their relations became strained. While she was on a visit to her parents' house, the accused went there armed with a spear and inflicted terrible wounds on her neck and jaw. It was held that he was guilty under this section.²³ Where the acts committed by the accused consisted only in running after the complainant with an axe in his hand and raising it to the shoulder when about four steps from the complainant, but before there was time to do anything further in pursuance of his purpose, the axe was snatched out of the accused's hand, it was held that the accused was not guilty of an attempt to commit murder as neither of his acts could *per se* have caused death, but that he was guilty of an attempt to cause grievous hurt.²⁴

¹⁶ *Niddha*, (1891) 14 All. 38, 43; *Abdul Rahaman*, (1908) 9 C. L. J. 432, 10 Cr. L. J. 57.

¹⁷ *Vasudeo Gogte*, (1932) 14 Bom. L. R. 571, 577, 56 Bom. 434, 439.

¹⁸ *Sudheendrakumar Ray*, (1932) 60 Cal. 643.

¹⁹ *Yashpal*, (1933) 55 All. 681.

²⁰ (1867) 4 B. H. C. (Cr. C.) 17, 21, followed in *Martu*, (1913) 15 Bom. L. R. 991 14 Cr. L. J. 641, in which a person struck his wife on her neck with an axe causing an incised wound, and it was held that he was guilty of causing hurt by a dangerous weapon (s. 324) and not of

attempt to murder.

²¹ *Vasudeo Gogte*, (1932) 34 Bom. L. R. 571, 576, 56 Bom. 434, 439.

²² *Ghulam Qadir*, (1936) 18 Lah. 111, 113, dissenting from *Martu*, (1913) 15 Bom. L. R. 991, 14 Cr. L. J. 641; *Provincial Government, Central Provinces and Berar v. Abdul Raheman*, [1943] Nag. 411.

²³ *Ghulam Qadir*, *ibid*.

²⁴ *Jiwan Das*, (1904) P. R. No. 30 of 1904, 1 Cr. L. J. 1078.

The Allahabad High Court has held that the words 'under such circumstances' mean that the act must be done in such a way and with such ingredients that if it succeeded, and death was caused by it, the legal result would be murder according to ss. 299 and 300.²⁵ If the injury is actually inflicted, the nature of such injury may be of considerable assistance in arriving at the finding whether the accused had the intention of causing the death of the victim. The liability of an accused must be limited to the act which he in fact did and should not be extended so as to embrace the consequence of another act which he might have done but did not.' The Nagpur High Court has followed this view and held that administration of powdered glass was an act capable of causing death and the person administering it would be guilty under this section.² In a subsequent case where the accused stabbed a police constable, who was taking them to a police station, in order to escape, and the wound inflicted amounted to simple hurt, it was held that the accused were not guilty under this section.³

The Patna High Court has also held that in order that an act shall amount to an attempt to murder under this section all that it is necessary to prove is that if the act had caused death it would have amounted to murder provided that it was done with such intention or knowledge as would be necessary to be proved in the case of murder. The fact that an act results in minor injuries at all is not relevant for the purpose of deciding whether it amounted to an attempt to murder or not. The section itself provides a punishment of ten years for doing an act which amounts to an attempt to murder even though the act causes no hurt to any one; but if hurt is caused the offender is liable to a heavier punishment of transportation for life. Whether a blow with a hatchet is or is not capable of causing death in the natural or ordinary course of events will depend on a number of circumstances, e.g., the strength of the blow and the persistence of the attack. Where a number of blows are struck at the neck of a person not in a position to defend himself and if the attack was successful it would be impossible to take any other view than that the act amounted to murder and that when death does not result from such an attack it is clearly an attempt to murder within the meaning of this section.⁴

Where the accused pointed an uncapped gun at his superior officer (believing the gun to be capped) with the intention of murdering him, but his rifle was pushed up, and he was prevented from pulling the trigger, it was held that he was guilty not under this section but under s. 511. In this case Westropp, J., said that there "may be an attempt under s. 511 which does not come within s. 307"; and "s. 307 was not intended to exhaust all attempts to commit murder which should be punishable under the Code."⁵ But the Allahabad High Court has laid down that s. 511 does not apply to attempts to commit murder which are fully and exclusively provided for by this section. In this case the accused pointed a loaded pistol at a person to shoot him and pulled the trigger. The cap exploded but the charge did not go off. The accused was convicted under this section. A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only prevented by some cause independent of his volition. Straight, J., observed: "Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences, which by the Code itself are punishable either with 'transportation or imprisonment.' It cannot properly be said that the offence of murder is punishable with either of those things. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word transportation have inserted the word 'death.' But, again, the section goes on and says that, certain things being done, the person who does those acts shall, 'where no express provision is made for the

²⁵ Per Straight, J., in *Niddha*, (1891) 14 All. 38, 42.

¹ *Wazira*, [1940] A. L. J. R. 11, 13; (1939) 41 Cr. L. J. 362, [1940] AIR (A) 113; *Ghulam Sabir Amir Khan*, (1941) 43 Cr. L. J. 595, [1942] AIR (Pesh) 21 (2).

² *Gangoo*, [1942] Nag. 122.

³ *Provincial Government, Central Provinces and Berar v. Abdul Raheman*, [1943] Nag. 411.

Some of the observations of Digby, J., throw doubt on the correctness of the conclusion in this case.

⁴ *Bharat Dube*, (1940) 22 P. L. T. 419, [1940] P. W. N. 74, 42 Cr. L. J. 303, [1941] AIR (P) 51, dissenting from *Martu*, (1913) 15 Bom. L. R. 991, 993, 14 Cr. L. J. 641.

⁵ *Cassidy*, (1867) 4 B. H. C. (Cr. C.) 17, 24, 25.

punishment of such attempt,' be punished in a particular way. As I have pointed out, by s. 307...there is express provision made in the Code itself for the punishment of an attempt to murder. It seems therefore to me that when the framers of s. 511 drew it up in the terms that they have drawn it up, they especially meant to exclude those attempts to commit offences which in the various preceding sections of the Code were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive and that no Court has any right to resort to the provisions of ss. 299 and 300 read with s. 511 for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307."⁶ The Lahore and the Nagpur High Courts have also dissented from the ruling in *Cassidy's* case.⁷ Mayne, in his Criminal Law, (4th edn., p. 532), thus criticises these remarks: "Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation for life, which under s. 303 is only punishable, and in fact can only be punished, with death. Cases of murder therefore do come within the letter of s. 511. It seems obvious too that those words in s. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation, but to exclude the numerous cases which are only punishable with fine. Further, that part of the learned Judge's reasoning would not apply to s. 308, which is in *pari materia* with s. 307, and worded in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that any attempt, coming under s. 511, which is specifically provided for elsewhere, must be dealt with under the express provision. For instance, an attempt to wage war against the King must be dealt with under s. 121. It is also quite clear that any attempt to commit culpable homicide which falls under s. 307 or s. 308, must be dealt with under them and not under s. 511. What the Bombay case decided was, that an act done towards the commission of an attempt to murder, which was not an act by which murder could be effected, came under s. 511 because it did not come within this section. That being so, it fell within the wording of s. 511, as being a case 'where no express provision is made by this Code for the punishment of *such* attempt.' According to Mr. Justice Straight, such a case would go wholly unpunished.

"The same judgment appears to express doubt as to the propriety of the Bombay ruling that the act done in that case, *viz.*, trying to discharge an uncapped rifle, supposed to be capped, did not come within s. 307. 'If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because, his own set volition and purpose having been given effect to to their full extent, a fact unknown to him and [at] variance with his own belief intervened to prevent the consequences of that act which he expected to ensue, ensuing.' This is well illustrated in *Emperor v. Ananda*.⁸ There the accused intending to kill his victim gave large doses of opium in milk but unknown to him the intended victim was a confirmed opium-eater and thus he escaped serious harm. But it may be submitted that the question is, not whether the accused would escape criminal responsibility—it was decided that he was liable under s. 511,—but whether he would be criminally responsible under the very special words of s. 307. If that section only applies where the prisoner has done an act, which, if carried to its utmost possible limits, without any interference from without, could cause death, and if his act could not have caused death, then his belief that it could have caused death is outside the question. Suppose, for instance, that *Cassidy* had put his rifle all ready loaded and capped for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle, which was unloaded, and the lock of which had been taken to pieces for repairs; that he had levelled it at his officer and pulled the trigger; it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder; but that is not enough. The section requires that he

⁶ *Niddha*, (1891) 14 All. 38, 41.

⁷ *Ghulam Qadir*, (1936) 18 Lah. 111; *Provincial Government, Central Provinces and Berar*

v. Abdul Raheman, [1943] Nag. 411.

⁸ (1905) 7 Bom. L. R. 985, 3 Cr. L. J. 85.

should have done the act. He intended to discharge his own loaded rifle. He presented and tried to discharge a weapon which was as harmless as a broomstick."

The Bombay High Court has doubted *Cassidy's* case in a case in which the accused fired two shots from a revolver at point-blank range at Sir Earnest Hotson, Acting Governor of Bombay, but the bullets failed to take effect owing either to some defect in the ammunition or to the intervention of a leather wallet and currency notes in his pocket. The High Court held that the accused was guilty under this section.⁹ Beaumont, C. J., commenting on *Cassidy's* case, observed: "The learned Chief Justice in giving judgment says that to bring the case within s. 307 the act must be capable of causing death in the natural and ordinary course of things, and if the act complained of is not of that description, a prisoner cannot be convicted of attempt to murder under this section; and then he holds that the gun not having been in fact capped the act of the prisoner was not one which could have caused death. He went on, however, to hold that the case could be brought within s. 511 of the Indian Penal Code, and the accused was convicted under that section. If the reasoning of the learned Judges in that case be right as to the construction of s. 307, and if the act committed by the accused must be an act capable of causing death in the ordinary course, it seems to me that logically the section could never have any effect at all. If an act is done which in fact does not cause death, it is impossible to say that that precise act might have caused death. There must be some change in the act to produce a different result, and the extent to which the act done must be supposed to be varied to produce the hypothetical death referred to in s. 307 is merely a question of degree. If a man points at his enemy a gun which he believes to be loaded but which in fact is not loaded intending to commit murder (which is *Cassidy's* case), it is no doubt certain that no death will result from the act. But equally certain is it that no death will result if the accused fires a revolver at his enemy in such circumstances that in fact, whether through defect of aim, or the activity of the target, the bullet and the intended victim will not meet. If, however, s. 307 does not cover the case of a man who fires a gun at his enemy with intent to kill him but misses his aim, it is difficult to see how the section can ever have any operation. The case of *Reg. v. Cassidy* was considered by Mr. Justice Straight in *Queen-Empress v. Nidha*,¹⁰ and he differs from the reasoning of the Bombay High Court. . . I myself prefer the reasoning of Mr. Justice Straight in that case to the reasoning of this Court in *Reg. v. Cassidy*, although, as I have pointed out, it is not necessary for us to differ from the latter decision, which is indeed binding upon us, because the facts in that case were quite different from the facts with which we have to deal. . . The words 'under such circumstances' refer to facts which would introduce a defence to a charge of murder, such as, for instance, that the accused was acting in self-defence or in the course of military duty. But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances which do not from their nature afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused's control which prevented that result, then it seems to me that the case falls within s. 307."¹¹

The Rangoon High Court has held in a case in which the accused presented a gun at the complainant and pulled the trigger, no report or discharge resulting, that, in the absence of evidence to show that the gun was loaded, the accused's act amounted to no more than presenting an unloaded gun at the complainant and pulling the trigger and that he was guilty under s. 352 and not this section.¹² The applicability of s. 511 of the Code is not discussed in this case.

The Court of Criminal Appeal in England has laid down that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt. In this case the accused was proved to have bought cyanide of potassium on December 22, 1909. On January 9, his

⁹ *Vasudeo Balwant Gogte*, (1932) 56 Bom. 434, 34 Bom. L. R. 571.

¹⁰ (1891) 14 All. 38.

L. C.—50

¹¹ *Vasudev Balwant Gogte*, (1932) 34 Bom. L. R. 571 576, 577, 56 Bom. 434, 437-39.

¹² *Nga Waik*, (1923) 1 Ran. 209.

mother was found dead in a sitting posture on a sofa, in her house. There was a round table standing two feet from the sofa, on the further side of which was a wine-glass, three-parts filled with a liquid made up of a drink called nectar, which was afterwards shown to contain two grains of cyanide of potassium. There were also on the table a nectar bottle, two lumps of sugar, and a spoon. There was no evidence to show that she had taken any of this liquid, and the result of the *post-mortem* and of the analysis of the contents of the wine-glass was to show she had not died from poisoning by cyanide of potassium, but that death was most probably caused by syncope or heart failure, due to fright or some other external cause; and, further, that the quantity of cyanide of potassium in the wine-glass was, even if she had taken the whole, insufficient to cause her death. The accused did not live in the house, but he said he had purchased the poison for case-hardening a chisel and had placed it in a cupboard in the room where the mother was found dead, and that he thought it possible she might have taken it from there. No traces of the poison, however, were found after her death either in the cupboard or in the house. There was a good deal of evidence showing that the accused had a motive for killing his mother, viz., to obtain her money. It was held that the evidence was sufficient to warrant the jury in drawing the inference that the accused had put the cyanide of potassium in the wine-glass with intent to murder his mother. It was urged on behalf of the accused that the act of which the accused was guilty, viz. the putting the poison in the wine-glass was a complete act and could not be and was not intended by the accused to have the effect of killing her at once. It could not kill unless it were followed by other acts which he might never have done. But the Court decided that the accused was guilty of attempt to murder.¹³ Under illustration (d) to this section if a person places poisoned food on another's table intending to kill him he is guilty of attempting to murder. But looking to the wording of this section the poisoned food should have been capable of causing death if it is eaten. In *White's* case it was found that two grains of cyanide of potassium were insufficient to cause death. It seems, therefore, doubtful whether this section would apply in similar circumstances.

3. 'Hurt.'—See s. 319, *infra*.

Amendment—Attempts by life-convicts.—This clause was provided by the Indian Penal Code Amendment Act (XXVII of 1870), s. 11, because a person attempting to murder might, if hurt was caused, be transported for life or imprisoned for ten years, but where the offender was already transported for life, the law, by a strange oversight, actually awarded no penalty. The words "the first paragraph of" in the last line of ill. (c) were inserted by the amending Act (XII of 1891), Sch. II.

CASES.

Death resulting not from act of accused but through other causes.

Where a child wrapped in a quilt was abandoned in a thicket close to a house and footpath, and was found very shortly after its exposure, the child having died, not from exposure but from the ignorance of the person who found it and who gave it no food,¹⁴ it was held that the offence of attempt to murder was committed.

Mutual infliction of injury.—Two accused in the course of a fight inflicted on each other injuries so serious that their dying depositions had to be taken in both cases. There was no eye-witness to the occurrence; and the evidence in each trial consisted of that of the complainant, the corroborative evidence of the wounds on the complainant and the admission of the accused that he was himself wounded in the occurrence. In separate trials, each was convicted of an offence under this section. It was held that as either of the accused would be entitled, in the event of the other dying of the wounds, to the benefit of a reasonable doubt and to plead that the case came within Exception 4 to s. 300, neither accused could be legally convicted under this section.¹⁵

Where the fight is accidental owing to a sudden quarrel a conviction under this section is not called for but the proper conviction would be one under s. 326.¹⁶

¹³ *John White*, (1910) 4 Cr. App. R. 257, 22 Cox 325.

¹⁴ *Khodabux Fakir*, (1868) 10 W. R. (Cr.) 52.

¹⁵ *Nga Po Thaik*, (1924) 2 Ran. 558.

¹⁶ *Ghaus Mohamud*, (1941) 43 P. L. R. 436, 43 Cr. L. J. 165, [1941] AIR (L) 322.

Poison.—Where the accused intentionally put arsenic into her husband's food in order to kill him and the husband died some time afterwards from inflammation of the brain, and there was no evidence that the poison was even a secondary cause of the deceased's death;¹⁷ and where the accused asked a doctor to supply her with medicine for the purpose of poisoning her son-in-law,¹⁸ it was held that an attempt to murder had not been committed. Where a woman administered *dhatura* to three members of her family, who did not die, it was held that an attempt to murder was committed as she must be presumed to have known that the administration of *dhatura* was likely to cause death, although she might not have administered it with that intention.¹⁹ But, where the object of administering *dhatura* was to commit robbery, and one of the persons to whom it was administered died and another taken seriously ill, it was held that in respect of the former the offence committed was that of grievous hurt and in respect of the latter the offence fell under s. 328.²⁰

Poison intended for one shared by others.—Where sweetmeat containing arsenic sent to A with the intention of causing her death was also shared by B and C, and none of them died, it was held that the accused was guilty of an attempt to murder not only A but also B and C.²¹

Attempt to cause death by suffocation.—The accused enticed into her house a boy aged nine years, used violence to him and removed several jewels from his person and, being unable to remove his anklets and earrings, tied his wrist and neck with a rope, put a cloth in his mouth, took him into a room and placed him sitting in a jar, which was only twenty-two inches deep, all night, and put a millstone on the mouth of it, through three holes in which there was a stinted supply of air. She did not give him food at night and before dawn lifted the millstone once and looked at the boy but replaced it. The boy untied the rope, and owing to the omission of the accused to watch the jar and the room, got out in the morning and ran home. It was held that the accused was rightly convicted under this section.²²

Attempt to cause death by drowning.—The accused in the course of a quarrel with her sister-in-law and in a fit of anger flung her child, three years old, into a pond four feet deep on the edge of which her house was situated and at the same time gave expression to a wish that the death of the child should rest as a curse on the woman with whom she was quarrelling. It was held that the circumstances gave rise to a presumption that the intention of the accused was to cause death of the child, and that she was, therefore, guilty of an offence under this section, although the child was picked up by a stander-by without loss of time.²³

Attempt to discharge loaded fire-arm.—B drew a loaded pistol from his pocket for the purpose of murdering S, but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand, and he was at once arrested. It was held that he had attempted to shoot.²⁴ On the trial of an indictment under 24 & 25 Vic., c. 100, s. 18, which enacts that whosoever shall unlawfully and maliciously, "by drawing a trigger or in any other manner," attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony, it was proved that the accused drew from his pocket a loaded revolver and pointed it towards his mother. His wrists were seized by by-standers as he was raising the pistol, and after a struggle it was taken from him. During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled. It was held that there was evidence upon which the accused could properly be convicted of an attempt to discharge the revolver within the meaning of the statute.²⁵ During an interview between the accused and the prosecutor, the former drew a loaded revolver from his coat pocket. The prosecutor immediately seized the accused and prevented him from raising his arm; a struggle ensued, in the course of which the accused nearly succeeded in getting his arm

¹⁷ *Venkatasami*, (1882) Weir, 3rd Edn., 187.

¹⁸ *Musst. Bakhtawar*, (1882) P. R. No. 24 of 1882.

¹⁹ *Tulsha*, (1897) 20 All 143.

²⁰ *Bhagwan Din v. Dibia*, (1908) 5 A. L. J. R. 137, 7 Cr. L. J. 297.

²¹ *Ladha Singh*, (1920) 3 U. P. L. R. (L) 12,

22 Cr. L. J. 194, [1921] AIR (L) 108.

²² *Mangavalli Ranganayakamma*, (1889) 1 Weir 328.

²³ *Nannhi Bahu*, (1909) 5 I. C. 138.

²⁴ *Brown*, (1883) 10 Q. B. D. 381.

²⁵ *Duckworth*, [1892] 2 Q. B. 83.

free, but after a few minutes the prosecutor wrested the revolver from him and he was taken into custody. During the struggle the accused several times said to the prosecutor, "You've got to die." It was held that the accused had attempted to discharge the revolver.¹

At a public meeting held in Calcutta a student pointed a five-chambered loaded revolver at Sir Andrew Fraser, Lieutenant-Governor of Bengal, and pulled the trigger twice, but owing to the damaged condition of the percussion cap the revolver did not go off. He was prosecuted and convicted under this section.² Where a young man of twenty-five and accustomed to shooting was found to have fired at a person at a distance only of some six paces, the cartridge containing shot of about No. 6 size, it was held that he must have known that his act was likely to cause death. If the person shot at had died, the accused would undoubtedly have been guilty of murder. The fact that the back of the chair on which the victim was seated intercepted a number of bullets and thus avoided a fatal result was held not to reduce the offence from one under this section to one under s. 324.³ Where the accused used a pistol with reckless disregard to consequences against a constable who was chasing him and the bullet struck the constable and remained inside the body, it was held that it must be presumed that the accused intended to cause death and that he was guilty under this section.⁴

PRACTICE.

Evidence.—Prove (1) that the death of a human being was attempted.

(2) That such death was attempted to be caused by, or in consequence of, the act of the accused.

(3) That such act was done with the intention of causing death ; or

that it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death ; or (b) was sufficient in the ordinary course of nature to cause death ; or

that the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

The Court can convict the accused of offences under this section read with s. 34 or 114, although he is charged only with offences under this section and ss. 148 and 149.⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or knowledge*), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of murder [and that you caused hurt to the said AB by the said Act,] and thereby committed an offence punishable under s. 307 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—The Frontier Crimes Regulation, 1901, ss. 6, 11 (3) (d), and 12 (2); the Burma Laws Act, 1898, s. 4 (3) (b); the Criminal Tribes Act, 1897, s. 6; the Bengal Criminal (Second Amendment) Act (Beng. Act XI of 1932), s. 3, apply to offences under this section.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Reduction of sentence.—Where the accused was labouring under a great mental strain as a result of punishment inflicted upon him his sentence was reduced.⁶

¹ *Linneker*, [1906] 2 K. B. 99.

² *J. Roy Chowdhury*, Unreported case, 1938, Criminal Sessions, Calcutta, decided on November 9, 1908.

³ *Abdul Rahaman*, (1908) 9 C. L. J. 432, 10 Cr. L. J. 57.

⁴ *Dhanwantri*, (1933) 14 Lah. 820.

⁵ *Ranchhod Sursang*, (1924) 26 Bom. L. R. 954, 49 Bom. 84.

⁶ *Bharat Dube*, [1940] P. W. N. 740, (1940) 22 P. L. T. 419, 42 Cr. L. J. 303, [1941] AIR (P) 51.

Similarly where the accused had committed a murderous attack on his brother but had subsequently made up his quarrel his sentence was reduced.⁷

Mental incapacity.—In awarding punishment the fact that the accused had contracted the habit of taking morphia and was a very fickle-minded person was taken into consideration although there was no indication of a plainly marked mental aberration.⁸

308. Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Attempt to commit culpable homicide.

ILLUSTRATION.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

COMMENT.

The wording of this section is the same as that of the preceding one except that it deals with an attempt to commit culpable homicide. The punishment provided is therefore not so severe.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.⁹

PRACTICE.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or knowledge*), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of culpable homicide not amounting to murder [and that you caused hurt to the said AB by the said Act], and thereby committed an offence punishable under s. 308 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—The Frontier Crimes Regulation, 1901, ss. 11 (3) (d) and 12 (2) and the Criminal Tribes Act, 1897, s. 6, apply to offences under this section.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

309. Whoever attempts to commit suicide¹ and does any act towards the commission of such offence,² shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Attempt to commit suicide.

COMMENT.

This is the only instance in which an attempt to commit an offence is punishable but where actual commission cannot be punished.

⁷ *Sona Raut*, (1942) 25 P. L. T. 43, 44 Cr. L. J. 336, [1944] AIR (P) 37.

⁶ of 1912, 13 Cr. L. J. 197.

⁸ *Mr. Alexander Ruffee*, (1912) P. R. No.

⁹ Stephen's Digest of Criminal Law, Art. 50.

1. 'Commit suicide.'—To 'commit suicide' is for a person voluntarily to do an act (or, as it is submitted, to refrain from taking bodily sustenance), for the purpose of destroying his own life, being conscious of that probable consequence, and having, at the time, 'sufficient mind to will the destruction of life.'¹⁰

2. 'Does any act towards the commission of such offence.'—Such act must be in the course of the attempt.

Where a woman with the intention of committing suicide by throwing herself in a well, actually ran towards it where she was seized by a person, it was held that she was not guilty of attempt to commit suicide, because she might have changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence.¹¹ Where the accused jumped into a well to avoid and escape from the police; and when rescued he came out of the well of his own accord, it was held that in the absence of evidence that he jumped into the well to commit suicide he could not be convicted of an offence under this section.¹² Where a woman who was in an advanced stage of pregnancy threw herself into a well being driven mad by pains of prolonged labour and in consequence of that the child was born dead, it was held that she could not be held guilty of attempting to voluntarily cause miscarriage but of attempting to commit suicide.¹³ A village woman was ill-treated by her husband. There was a quarrel between the two, and the husband had threatened that he would beat her. Late at night the woman, taking her six months old baby in her arms, slipped away from the house. After she had gone some distance she heard somebody coming up behind her, and when she turned round and saw her husband was pursuing her she got into a panic and jumped down a well nearby with the baby in her arms. The result was that the baby died and the woman recovered. She was charged with attempt to commit suicide. It was held that the accused could not be convicted under this section, for the word "attempt" connoted some conscious endeavour to accomplish the act, and the accused in jumping down the well was not thinking at all of taking her own life but only of escaping from her husband.¹⁴

The pounding of oleander roots with the intention to poison one's self with it was held not to constitute this offence.¹⁵ The act amounted merely to preparation to commit suicide. The Court has always to consider when the preparation had ended and attempt commenced. A person who emasculated himself was held to have committed no offence under this section, the act not being ordinarily likely to cause death.¹⁶

Modes of committing suicide.—"In India, of the various methods of committing suicide, drowning occupies the first position, and after it comes hanging. In England, hanging occupies the first position, then follows poisoning, cut-throat, and lastly drowning. In India, men resort to drowning and hanging as a means of self-destruction in about equal numbers, while six out of seven women who commit suicide prefer the water. In England four times as many males as females destroy themselves by hanging, and four times as many males as females by cut-throat, whilst the number of males and females who commit suicide by drowning and by poison is about equal. The number of suicides by lethal weapons is exceedingly small compared with that which exist in England. The most common causes of suicide in India are... jealousy, family discord, destitution, and physical suffering. Jealousy, with all the bitter feelings which it engenders, is the cause of a large number of female suicides."¹⁷

Attempts to commit suicide are of three classes :—

(1) Persons who are driven to attempt to commit suicide by real intense suffering either mental or physical. Every instance of this kind should be treated according to its peculiar features.

(2) Where suicide is attempted in a moment of passion, with little or no reflection, and no very definite motive, punishment, though not severe, should be inflicted.

¹⁰ *Clift v. Schwabe*, (1846) 3 C. B. 437.

¹¹ *Ramakka*, (1884) 1 Mad. 5.

¹² *Dwarka Poonja*, (1912) 14 Bom. L. R. 146, 13 Cr. L. J. 246.

¹³ *Musammal Mulia*, (1919) 17 A. L. J. R. 478, 20 Cr. L. J. 395, [1919] AIR (A) 376.

¹⁴ *Dhirajia*, [1940] All. 647.

¹⁵ *Tayee*, (1883) Unrep. Cr. C. 188.

¹⁶ *Madho Singh*, (1878) P. R. No. 22 of 1878.

¹⁷ Chevers's Medical Jurisprudence, 3rd Edn., p. 670.

(8) Where the suicide partakes of the nature of poison, severe punishment may be inflicted.

English law.—If two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will be guilty of the murder of the one who died.¹⁸

Amendment.—The words “or with fine, or with both” were substituted for the words, “and shall also be liable to fine” by the Indian Penal Code Amendment Act (VIII of 1882), s. 7.¹⁹

PRACTICE.

Evidence.—Prove (1) that the act of the accused amounted to an attempt.

(2) That the attempt was complete by doing an act towards the commission of suicide.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, attempted to commit suicide and did an act, to wit——, towards the commission of it, and you thereby committed an offence punishable under s. 309 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—This section requires the Court to pass a substantive sentence of imprisonment. A sentence of fine and of imprisonment in default of payment is an illegal sentence.²⁰ But severe sentences should not be passed in cases of attempt to commit suicide, where the accused suffers from a bodily affliction which is likely to cause him acute mental depression.²¹

It is not necessary to inflict a sentence of imprisonment upon a person who, on account of family discord, destitution, loss of a dear relation or other cause of a like nature, overcomes the instinct of self-preservation and decides to take his life. In such a case, the unfortunate person deserves indulgence, and should be either released on probation of good conduct, or sentenced to a fine if he is not too poor to pay the fine. These observations apply with greater force to the case of a woman who attempts to commit suicide in similar circumstances.²²

310. Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery¹ or child-stealing by means of or accompanied with murder,² is a thug.

COMMENT.

This and the following section incorporate the provisions of the Thuggee Act, 1836.

1. ‘Robbery.’—See s. 390, *infra*. 2. ‘Murder.’—See s. 300, *supra*.

311. Whoever is a thug, shall be punished with transportation for life, and shall also be liable to fine.

COMMENT.

Gangs of persons habitually associated for the purpose of inveigling and murdering travellers or others in order to take their property, etc., are called Thugs. Thugs are robbers and dacoits, but robbers and dacoits are not Thugs. Thugs committed

¹⁸ *Alison*, (1838) 8 C. & P. 418; *Dyson's Case*, (1823) Russ. & Ry. 523; *Jessop*, (1887) 16 Cox 204.

¹⁹ *Chanwiova kom Shidram Shetti*, (1863) 1 B. II. C. 4, is therefore overruled.

²⁰ *Weir*, 3rd Edn., 192.

²¹ *Appulsawmy*, (1904) 2 L. B. R. 209, 1 Cr. L. J. 477.

²² *Mussammat Barkat*, (1934) 15 Lah. 872, 874.

robbery or dacoity or kidnapping always accompanied with murder. Killing of the victim was the essential thing. Thugs have practically disappeared from the land, but the harrowing tales of their doings are extremely shocking. No lighter punishment could have terrorised them.

Under s. 310 any one who habitually associates with others for the purpose of committing robbery, etc., is a Thug. Actual commission of any act is not necessary.

The provisions of the Thugce Act with a slight alteration are incorporated in s. 310 and this section.

PRACTICE.

Evidence.—Prove (1) that the accused was associated with other person or persons.

(2) That he was so associated after the passing of this Code.

(3) That such persons, including the accused, were associated for the purpose of committing robbery, or child-stealing, by means of, or accompanied with, murder.

(4) That such persons were habitually associated for that purpose.²³

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, were a Thug, and that you thereby committed an offence punishable under s. 311 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—The Criminal Tribes Act, 1897, s. 6, applies to offences under this section.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Of the Causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.

312. Whoever voluntarily causes a woman with child to miscarry¹ shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman,² be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child,³ shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

COMMENT.

This section deals with the causing of miscarriage with the consent of the woman, while the next section deals with the causing of miscarriage without her consent.

The authors of the Code observe : “With respect to the law on the subject of abortion, we think it necessary to say only that we entertain strong apprehensions that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions, but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of procedure to lay down rules which may prevent such an abuse. Should we not be able

²³ *Pira*, (1881) P. R. No. 28 of 1881

to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty."²⁴ This offence is, therefore, taken out of the cognizance of the police.

Ingredients.—This section requires two essentials :—

1. Voluntarily causing a woman with child to miscarry.
2. Such miscarriage should not have been caused in good faith for the purpose of saving the life of the woman.

1. **'Whoever voluntarily causes a woman with child to miscarry.'**—The offender may be the woman herself or any other person.

'Voluntarily.'—See s. 39, *supra*.

'With child' means pregnant, and it is not necessary to show that 'quickening', that is, perception by the mother of the movements of the foetus has taken place or that the embryo has assumed a foetal form, the stage to which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial. Where a woman was acquitted on a charge of causing herself to miscarry on the ground that she had only been pregnant for one month and that there was nothing which could be called foetus or child, it was held that the acquittal was bad in law.²⁵

2. **'Such miscarriage be not caused in good faith for the purpose of saving the life of the woman.'**—Miscarriage is the premature expulsion of the child or foetus from the mother's womb at any period of pregnancy before the term of gestation is completed. Where a child was full-grown a conviction under this section was set aside and one under s. 511 for attempt to bring about miscarriage was maintained.¹ The offence defined in this section can only be committed when the woman is in fact pregnant.² For, although there may be a guilty intention and attempt to commit it on the person of a woman believed to be, but who really is not, pregnant, the offence, as here defined, seems to require that the woman should be with child. If it appears that the woman was not with child at all, the accused must be acquitted.³

If miscarriage be caused in good faith for saving the life of a pregnant woman no offence is committed. As to what is 'good faith', see s. 52.

A young girl, not quite fifteen years of age, was pregnant as the result of rape. A surgeon, of the highest skill, openly, in one of the London Hospitals, without fee, performed the operation of abortion. He was charged under the Offences against the Person Act, 1861, with unlawfully procuring the abortion of the girl. The jury were directed that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds, and with adequate knowledge, he was of the opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.⁴

3. **'Quick with child.'**—Quickening is the name applied to peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movements of the foetus. But quickening is not a constant, uniform, and well-marked distinction of the pregnant state.⁵ "Quick with child" is having conceived. 'With quick child' is when the child was quickened."⁶

It has been held under an English statute that the expression 'Quick with child' means when the woman has felt the child move within her.⁷

²⁴ Note M, p. 151.

²⁵ *Ademma*, (1886) 9 Mad. 369.

¹ *Arunja Bewa*, (1873) 19 W. R. (Cr.) 32.

² *Kabul Pathur*, (1871) 15 W. R. (Cr.) 4.

³ *Scudder*, (1828) 3 C. & P. 605.

⁴ *Bourne*, [1938] 3 A. E. R. 615.

⁵ M. & M. 278.

⁶ Per Gurney, B., in *Wycherley*, (1838) 8 C. & P. 262, 264.

⁷ *Anon.*, (1811) 3 Camp. 76. This case was decided under s. 1 of 43 Geo. III, c. 58, which is now repealed.

PRACTICE.

Evidence.—Prove (1) that the woman was with child : or (if under the second clause) that she was quick with child.

(2) That the accused did some act likely to cause a miscarriage.

(3) That she did so voluntarily.

(4) That such woman did miscarry in consequence.

(5) That such miscarriage was not caused in good faith in order to save the woman's life.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused (*name of the woman*) then being with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said——, and thereby committed an offence punishable under s. 312 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—In awarding punishment where a woman has caused herself to miscarry, it should not be forgotten that “the high caste young widow, who, to hide her shame, should, at the risk of life, cause herself to miscarry does not, under the peculiar circumstances in which she is placed by the institutions of society, commit an offence in any respect of like criminality with the seducer of a young girl, or married woman, who to cover her crime should cause such woman to miscarry.”⁸

313. Whoever commits the offence defined in the last preceding section without the consent¹ of the woman, whether the woman is quick with child² or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing miscarriage without woman's consent.

COMMENT.

When the consent of the woman is not taken the offence comes under this section. When the consent is taken then s. 312 applies. Again, under this section the person procuring the abortion is alone punished : under s. 312 such person as well as the woman who causes herself to miscarry are both punished.

1. ‘Consent.’—See s. 90, *supra*. 2. ‘Quick with child.’—See s. 312, *supra*.

PRACTICE.

Evidence.—Prove the same points as those required in s. 312 ; and further it must be established that the woman did not consent to such abortion.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused AB (the woman who miscarried) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence punishable under s. 313 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

⁸ Law Commissioners' 1st Rep., s. 349, p. 272.

314. Whoever, with intent to cause the miscarriage of a woman with child,¹ does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ;

Death caused by act done with intent to cause miscarriage.

and if the act is done without the consent² of the woman, shall be punished either with transportation for life, or with the punishment above mentioned.

If act done without woman's consent.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

COMMENT.

This section provides for the case where death has occurred in causing miscarriage. This species of homicide may be committed involuntarily, that is, in the language of the Code, by a person who does not intend to cause (or think it likely that he will cause) death by the act which he does. If A, intending only to cause miscarriage to Z, involuntarily does an act which causes her death, he is liable to punishment under this section. And he is thus liable whether he acts with caution in order to prevent risk to Z's life, or whether he acts rashly or negligently. Even if he takes such precautions that there is no reasonable probability that Z's death will be caused, and if the medicine is rendered deadly by some accident which no human sagacity could foresee or by some peculiarity in Z's constitution, such as there was no ground whatever to expect, A will be liable to punishment under this section for causing death by an act done with intent to cause miscarriage.⁹

1. '**Intent to cause the miscarriage of a woman with child.**'—The act of the accused must have been done with intent to cause the miscarriage of a woman with child. Where a poisonous drug was administered to a woman to procure miscarriage, and it was not proved that the accused knew that the drug was likely to cause death, it was held that they had committed an offence under this section.¹⁰

2. '**Consent.**'—The consent of the woman freely and intelligently given is allowed to mitigate the offence. If A kills Z by administering abortives to her with the knowledge that those abortives are likely to cause her death, he is guilty of culpable homicide, which will be culpable homicide, by consent, if Z agrees to run the risk, and murder, if Z did not so agree.

As to the definition of 'consent' see s. 90, *supra*.

PRACTICE.

Evidence.—Prove (1) that the woman was with child.

(2) That the accused did an act to cause miscarriage.

(3) That he did so with that intention.

(4) That such act caused the death of the woman.

(5) (If the case comes under the second clause) that such act was done by the accused without the consent of the woman.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, with intent to cause the miscarriage of (*name of the woman*) did a certain act, to wit—, which caused the death of the said—, and thereby committed an offence punishable under s. 314 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

⁹ M. & M. 280.

¹⁰ *Kalachand Gope*, (1868) 10 W. R. (Cr.) 59.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith¹ for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Act done with intent to prevent child being born alive or to cause it to die after birth.

COMMENT.

The offence which this section punishes is the injury to the child's life.

Any act done with the intention here mentioned which results in the destruction of the child's life, whether before or after its birth, is made punishable.

1. 'Good faith.'—See s. 52, *supra*.

English law.—If a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world; the person who by his misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it the less a murder.

PRACTICE.

Evidence.—Prove (1) that the woman was with child.

(2) That the accused did an act, before the child was born, calculated to prevent the child from being born alive, or to cause it to die after its birth.

(3) That such act was done by the accused with that intention.

(4) That such act was done, not in good faith, for the purpose of saving the mother's life.

(5) That the child was born dead, or died after its birth.

(6) That such death was caused by the above-mentioned act of the accused.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should describe the act by which the accused intended to prevent the child being born alive, and should also state that the act was not caused in good faith for the purpose of saving the mother.¹¹

Form.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, did an act, to wit ---, to XY before the birth of her child, with the intention of thereby preventing that child from being born alive (*or causing it to die after its birth*), and by that act did prevent that child from being born alive (*or caused it to die after its birth*) and the said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under s. 315 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

316. Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick¹ unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing death of quick unborn child by act amounting to culpable homicide.

¹¹ (1865) 3 W. R. (Cr. L.) 5.

ILLUSTRATION.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

COMMENT.

This section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening, and where the death is caused after the quickening and before the birth of the child. Any act or omission of such a nature and done under such circumstances as would amount to the offence of culpable homicide, if the sufferer were a living person, will, if done to a quick unborn child, whose death is caused by it, constitute the offence here punished. If a person strikes a pregnant woman and thereby causes the death of her quick unborn child, he will be guilty of the offence here defined, if the blow was intended by him to cause the woman's death or was one which he knew or had reason to believe to be likely to cause it.¹²

1. 'Quick.'—See s. 312, *supra*.

PRACTICE.

Evidence.—Prove (1) that the woman was quick with child.

(2) That the accused did an act to cause the death of such child.

(3) That the circumstances, under which such act was done, were such as to make the accused guilty of culpable homicide, if death had been caused. (See s. 300).

(4) That such act did cause the death of the quick unborn child.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, did an act, to wit—, under circumstances, to wit—, that if you thereby caused death, you will be guilty of culpable homicide, and did by such act cause the death of a quick unborn child of XY, and you thereby committed an offence punishable under s. 316 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

317. Whoever being the father or mother of a child under the age of twelve years, or having the care of such child,¹

Exposure and abandonment of child under twelve years, by parent or person having care of it.

shall expose or leave such child in any place with the intention of wholly abandoning such child,² shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine,

or with both.

Explanation.³—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.⁴

COMMENT.

Object.—This section is intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner that the children, not being able to take care of themselves, may run the risk of dying or being injured. It does not apply when children are left under the care of others.¹³

¹² M. & M. 282.

¹³ *Felani Hariani*, (1871) 16 W. R. (Cr.) 12; *Mussumat Khairo*, (1872) P. R. No. 33 of 1872;

Must. Bhuran, (1877) P. R. No. 5 of 1878; *Mussumat Bhagan*, (1878) P. R. No. 4 of 1879.

Scope.—This section applies where a child is exposed and no death supervenes; if, however, death follows, the conviction must be under s. 304.¹⁴ The offence is complete notwithstanding that no actual danger or risk of danger arises to the child's life.

Ingredients.—The section has three essentials :—

1. The person coming within its purview must be father or mother or must have the care of the child.
2. Such child must be under the age of twelve years.
3. The child must have been exposed or left in any place with the intention of wholly abandoning it.

1. **'Whoever being the father or mother . . . , or having the care of such child.'**—Both are equally bound by ties of duty, and this equally whether the child be born in wedlock or be illegitimate. An infant requiring nurture, or a child of tender years, will ordinarily be in the immediate charge of the mother, the father's duty being that of providing for both the mother and the offspring. The person who has the immediate care of the child is the person contemplated. A parent who is absent, but who has provided duly for the maintenance and protection of his child, would not be criminally answerable for its abandonment by the person in whose charge he had left it. The offence consists in the desertion of the child by a person who is bound by nature to support and protect it, or who has taken on himself that duty, whether by adopting the child, or by way of contract with the parent, or in some other way.¹⁵ Any person receiving an infant from its mother on the understanding that the mother never desired or wished to have it back again, must be regarded as a person having the care of it. The mother of a newly-born child, with a view to dispose of it, gave it to her sister who carried it by a train and left it in a compartment. The child was found wrapped up and a bottle of milk was left by its side. It was held that the mother was guilty under this section and s. 109, and her sister under this section only.¹⁶

'Age of twelve years.'—Twelve years is the period fixed during which a child is protected from abandonment by its father, mother or guardian.

2. **'Expose or leave such child in any place with the intention of wholly abandoning such child.'**—The word 'expose' 'literally means to physically put outside, so that such putting outside involves some physical risk to the person put out. Having reference to a child, it would mean putting it somewhere where it could not receive the protection necessary for its tender age; as, for instance, putting it outside the house, whereby it would be exposed to the risk of climate, wild beasts and the like. The exposure contemplated by the Act was one by which danger to life might immediately ensue."¹⁷ But the Madras High Court has held that it is not necessary that the exposure and abandonment must be under such circumstances as to endanger the life or the health of the child. The only intention required to complete the offence is an intention of wholly abandoning the child.¹⁸

'Leave.'—As this word "comes in immediate juxtaposition with the word 'expose' the word 'leaving' means leaving in a sense *ejusdem generis* as the exposure and indicates an offence only slightly distinguishable from exposing. It cannot... mean leaving in the large sense of abandonment, but must be construed in strict connection with the word 'exposure.' The narrower construction of the words 'expose or leave' is much strengthened by the insertion of those striking words 'in any place'.¹⁹ "In order to make the 'leaving' of a child an offence under section 317... the child must be left *without protection*. I think this is clear in the first place because the word 'leave' being coupled in that Section with the word 'expose', must on the principle '*noscitur ex sociis*' be considered as to some extent taking its colour from the word 'expose', and must be construed as meaning leave under circumstances more or less resembling those of an exposure. I think this is clear further from the intention which is expressly required by the Section to constitute the offence. There must be an intention wholly to *abandon* the child : now I think an intention wholly to abandon

¹⁴ *Banni*, (1879) 2 All. 349.

¹⁵ *M. & M.* 284.

¹⁶ *Cripps*, (1916) 18 Bom. L. R. 934, 41 Bom. 152.

¹⁷ Per Blair, J., in *Mirchia*, (1896) 18 All.

364, 366.

¹⁸ *Boya Sunkulamma*, (1890) 1 Weir 331; *Antakke*, (1901) 24 Mad. 662.

¹⁹ *Mirchia*, (1896) 18 All. 364, 366.

a child means something more than an intention to go away from it and never to return to it. The phrase to abandon a child in its ordinary acceptance means something more than merely to go away from it. In fact it seems to me that here again the idea of leaving *without protection* comes in.”²⁰

‘With the intention of wholly abandoning such child.’—The gist of the offence is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving and the consequences likely to ensue are not essential ingredients, though they may be taken into consideration in passing the sentence.²¹ The section does not apply to a case of mere neglect or temporary abandonment.²² The Legislature looks rather to the intention of the accused than to the consequences of the act done. Where a woman abandoned her newly-born child by leaving it in a place which was quite close to a village and near a public road, and the child was soon discovered, it was held that she was guilty of this offence.²³ A woman, mother of an illegitimate child, six months old, left it in charge of a blind woman saying she would soon return. She went away to another village and did not return; and apparently she never intended to return. It was held that she could not be convicted under this section.²⁴ The accused, a married woman, eloped leaving her child one and a half month old, in the house of her husband. It was held that this was not a ‘leaving with the intention of wholly abandoning the child.’²⁵

English cases.—A, the mother of a child five weeks old, and B put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool, and A, with the connivance of B, took the hamper to a railway station, paid for its carriage, and told the clerk to send it to G. She said nothing as to the contents of the hamper, which was delivered to the father of the child at G. The child died three weeks afterwards from causes not attributable to the conduct of A and B. It was held that they were guilty of abandoning and exposing the child.¹ A woman who was living apart from her husband, and who had the actual custody of their child, brought the child, and left it at the father’s door, telling him she had done so. He knowingly allowed it to remain from about 7 P.M., till 1 A.M., when it was removed by a constable, the child being then cold and stiff. It was held that though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered.²

3. Explanation.—The Explanation indicates “with much clearness the scope and purview of the section and the nature of the evil against which it sought to provide. That explanation provides for the case of injuries actually ensuing that the guilty person shall be punished for the injury so inflicted according to the circumstances under which the injury is done, i.e., for murder or culpable homicide, as the case may be.”³ Though the death of the child may not ensue the offence may amount to an attempt punishable under s. 307. See ill. (b) to that section.

4. ‘If the child die in consequence of the exposure.’—This expression means ‘dies from cold or other result of exposure.’ Hence, where a new-born child was exposed, and it died after, but not, except remotely, on account of its exposure, the mother was acquitted of murder and convicted under this section.⁴ Where a woman deserted her illegitimate child of ten days old, but under circumstances in which it could and, as a matter of fact, did, obtain food, and the child died after four days from natural causes, it was held that the mother could not be convicted under this section.⁵

²⁰ Per Fitzpatrick, J., in *Must. Bhuran*, (1877) P. R. No. 5 of 1878.

²¹ *Antakke*, (1901) 24 Mad. 602; *Musst. Nankee*, (1866) P. R. No. 23 of 1866; *Musst. Ram Dai*, (1870) P. R. No. 18 of 1870; *Mussamat Khairo*, (1872) P. R. No. 33 of 1872; *Mussamat Bhagan*, (1878) P. R. No. 4 of 1879; *Mi Mein Gale*, (1914) U. B. R. 5.

²² *Gitabai*, (1917) 21 Cr. L. J. 253, [1920] AIR (N) 181.

²³ *Kundan*, (1903) 23 A. W. N. 43.

²⁴ *Mirchia*, (1896) 18 All. 364.

²⁵ *Mussamat Bhuran*, (1877) P. R. No. 5 of 1878; *Mussamat Bhagan*, (1878) P. R. No. 4 of 1879.

¹ *Falkingham*, (1870) L. R. 1 C. C. R. 222.

² *White*, (1871) L. R. 1 C. C. R. 311.

³ Per Blair, J., in *Mirchia*, (1896) 18 All. 364, 366.

⁴ *Khodabux Fakir*, (1868) 10 W. R. (Cr.) 52.

⁵ *Jeoni*, (1893) 13 A. W. N. 100.

PRACTICE.

Evidence.—Prove (1) that the child is under twelve years of age.

(2) That the accused is the father or mother, or the person having the care of that child.

(3) That he exposed or left such child in the place in question.

(4) That he so exposed or left the child with the intention of wholly abandoning it.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, being the father (*or mother or having the care*) of a certain child under the age of twelve years, to wit—, of the age of—years, did expose or leave the said child in a certain place, to wit—, with the intention of wholly abandoning the said child, and thereby committed an offence punishable under s. 317 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child¹ whether such child die before or after or, during its birth,² intentionally conceals or endeavours to conceal the birth³ of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Concealment of
birth by secret dis-
posal of dead body.

COMMENT.

This section deals with the secret burial of a child. If it is a foetus only then ss. 312 and 511 of the Code will apply.

The facility with which the life of an infant at its birth is extinguished, and the temptation to take it away in cases of bastard children, justify such a provision.

Bentham says that this offence ought to be punished by branding it with disgrace. It is commonly the fear of shame which is its cause; it needs a greater shame to repress it.

Ingredients.—The section requires three essentials :—

1. Secret burying or otherwise disposing of the dead body of a child.
2. It is immaterial whether such child died before or after its birth.
3. Intention to conceal the birth of such child by such secret burying or disposal.

1. 'Secretly burying or otherwise disposing of the dead body of a child.'—This includes every possible mode of disposing of the body. It is sufficient if the body is temporarily concealed with the intention of removing it elsewhere when opportunity is offered.⁶

This section refers to the disposal of a dead body secretly⁷ and does not meet the case of a person depositing a child alive in any place which is punishable under the last section. There must be a secret disposition of the body and an offence under this section is not committed if the body is left in a public place.⁸ Leaving the dead body of a child in two boxes, but not locked or fastened, one being placed inside the other in a bed-room, but in such a position as to attract the attention of those who daily resorted to the room was held to be not a secret disposition of the body.⁹ It was held similarly where the dead body of a child was placed on a dung heap quite close to a public road.¹⁰ But where a woman threw a child down a privy;¹¹ and where a woman placed a living child in a place of concealment, and on subsequently re-visiting

⁶ *Mt. Sukhdehi*, (1900) 13 C. P. L. R. 188.

⁷ *Shailabala Dasee*, (1935) 62 Cal. 1127.

⁸ *Abbas Bi*, [1911] 2 M. W. N. 379, 12 Cr. L. J. 562.

⁹ *Jane George*, (1868) 11 Cox 41.

¹⁰ *Mussammatt Bakhtawari*, (1913) 14 P. L. R. 1096, 14 Cr. L. J. 525.

¹¹ *Cornwall's Case*, (1817) Russ. & Ry. 336; *Coxhead*, (1845) 1 C. & K. 623.

that place found the child dead and left it there,¹² it was held that this offence was committed.

It should be distinctly proved that the child was dead at the time of disposal. Where a woman, delivered of a child born alive, endeavoured to conceal the birth thereof, by depositing the child while alive in a corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner, it was held that she could not be convicted of secretly "disposing of the dead body of a child."¹³

No endeavour to conceal birth of child.—Where a woman having been delivered of a dead child left it at the place of birth which was in the compound of her house and told no one about it, she was held not guilty of this offence.¹⁴ The accused being pregnant with an illegitimate child, went to the village jungle for purposes of nature and there, in the presence of another woman, gave birth to a child which died immediately. The dead body was left on the spot where the birth took place and was there discovered two or three days afterwards. It was held that the mere leaving of the body where the birth took place did not constitute an offence under this section as it did not amount to a secret disposal.¹⁵ A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the Court directed an acquittal on a charge of endeavouring to conceal the birth.¹⁶

'Child.'—Under this section it is sufficient to show that a 'child' was born and that it was sufficiently developed to have lived if born alive.¹⁷

Concealment of the birth of a foetus four months old is no offence¹⁸; but if the foetus is six¹⁹ or seven²⁰ months old its concealment is an offence. "This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probability is that the child would not be born alive."²¹ But in a later case it has been laid down that the word 'child' is not to be limited to a child likely to live or likely to die, but that as soon as the foetus has the outward appearance of a child it is sufficient. A foetus not bigger than a man's finger, but having the shape of a child was, therefore, held to be a 'child.'²²

2. **'Whether such child die before or after...its birth.'**—The offence under this section is in respect of concealment of birth by a secret disposal of the dead body of a child. It is, therefore, not material when such child died.

3. **'Intentionally conceals or endeavours to conceal the birth.'**—The section applies only where one intentionally conceals the birth of a child from the world at large. Mere omission to publish the fact of the birth of concealment from a desire to escape individual observation or anger does not make the section applicable.²³ The offence becomes complete when the birth, i.e., the delivery of a child dead or living is concealed by any means.²⁴ The endeavour to conceal the birth of a child by a secret disposition of the dead body must be by putting it into some place where it is not

¹² *Hughes*, (1850) 4 Cox 447.

¹³ *Jane May*, (1867) 10 Cox 448.

¹⁴ *Amina*, (1892) Unrep. Cr. C. 607.

¹⁵ *Mt. Saraswati*, (1905) 1 N. L. R. 89, 2 Cr. L. J. 667; *Mt. Piara*, (1883) 5 C. P. L. R. (Cr.) 29, where it was held to the contrary, dissented from.

¹⁶ *Sarah Higley*, (1830) 4 C. & P. 366.

¹⁷ *Radhia*, (1899) 1 Bom. L. R. 155; *Mi Pyo Nyo*, (1905) 1 U. B. R. (P. C.) (1904-06) 27, 3 Cr. L. J. 432.

¹⁸ (1869) 4 M. H. C. (Appx.) 63, 1 Weir 334.

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¹⁹ *Kasai*, (1894) Cr. R. No. 55 of 1894, Unrep. Cr. C. 727; *Hewitt*, (1866) 4 F. & F. 1101.

²⁰ *Suma*, (1884) 1 Weir 234.

²¹ Per Erle, J., in *Berriman*, (1854) 6 Cox 388, 390; *Must. Bilnee*, (1887) 2 C. P. L. R. 153.

²² *Colmer*, (1864) 9 Cox 506.

²³ *Shailabala Dasee*, (1935) 62 Cal. 1127.

²⁴ *Lalbu*, (1898) Cr. R. No. 15 of 1898, Unrep. Cr. C. 961; *Mi Pyo Nyo*, (1905), 1 U. B. R. (P. C.) (1904-06) 27, 3 Cr. L. J. 432.

likely to be found. Placing it in an open box in the accused's bed-room, and afterwards, on inquiry by the medical man, informing him that the child was in the box where it was found, was held to be not a secret disposition.²⁵ The evidence of a secret disposition consists in the situation in which the body is placed.¹ If any concealment or disposition of the dead body of a child is made, it does not matter whether it be final or temporary.² Where, therefore, a woman placed the dead body of a child between a bed and a mattress,³ or placed it upon her bed and covered it over with a petticoat,⁴ it was held that this offence was not committed. If a woman causes the body of her child to be secretly buried with a view to conceal the birth, the offence is complete even though she may have previously allowed the birth to be known to some other persons.⁵

Abetment.—Where the accused gave her new-born illegitimate dead child to a woman with instructions to dispose of it secretly, and the latter carried out the instructions by throwing it into a river, it was held that the accused was not guilty of the substantive offence under this section, though the facts more appropriately came under the definition of abetment.⁶

PRACTICE.

Evidence.—Prove (1) the birth of the child.

(2) That the child died either before, during, or after, its birth.

(3) That the accused buried or otherwise disposed of the dead body.

The accused should have done some act of disposal of the body after the child was dead.⁷ The dead body must be found, and identified as that of the child of which she is alleged to have been delivered.⁸

(4) That such burial or disposal of the body was secretly done.

(5) That the accused thereby intentionally concealed, or endeavoured to conceal, the birth of such child.

Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth.⁹

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Unless there is clear evidence of murder against a person secretly disposing of the dead body of a child, which is found to have been killed after its birth, such person should not be charged and tried for murder but must be convicted under this section for concealing the birth of the child.¹⁰

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, by secretly burying (*if any other mode adopted specify that mode*) the dead body of a certain child, to wit—, the child of AB, intentionally concealed (*or endeavoured to conceal*) the birth of the said child, and thereby committed an offence punishable under s. 318 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)]*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Of Hurt.

319. Whoever causes bodily pain,¹ disease or infirmity² to any person³ is said to cause hurt.

COMMENT.

The authors of the Code say : “Many of the offences which fall under the head of hurt will also fall under the head of assault. A stab, a blow which fractures

²⁵ *Sleep*, (1864) 9 Cox 559.

¹ *Brown*, (1870) L. R. 1 C. C. R. 244.

² *Farnham*, (1845) 1 Cox 349.

³ *Goldthorpe*, (1841) Car. & M. 335, 2 Moody Cr. C. 244; *Jane Perry*, (1855) 6 Cox 531.

⁴ *Rosenberg*, (1906) 70 J. P. 264.

⁵ *Douglas's Case*, (1836) 1 Moody Cr. C. 480.

⁶ *Baji*, (1895) Cr. R. No. 40 of 1895, Unrep. Cr. C. 775.

⁷ *Turner*, (1839) 8 C. & P. 755.

⁸ *Williams*, (1871) 11 Cox 684.

⁹ *Bate*, (1871) 11 Cox 686.

¹⁰ *Subbalakshmi Ammal*, (1900) 1 Weir 334.

a limb, the flinging of boiling water over a person, are assaults, and are also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. A person, for example, who mixes a deleterious potion, and places it on the table of another; a person who conceals a scythe in the grass on which another is in the habit of walking; a person who digs a pit in a public path, intending that another may fall into it, may cause serious hurt, and may be justly punished for causing such hurt; but they cannot, without extreme violence to language, be said to have committed assault. We propose to designate all pain, disease and infirmity by the name of hurt."¹¹

"The definition of hurt...appears to contemplate the causing of pain, etc., by one person to another."¹² There is nothing in the definition of hurt to suggest that the hurt should be caused by direct physical contact between the accused and his victim. Where serious mental derangement is caused by some voluntary act, a hurt is caused. Where the accused suddenly confronted the complainant's wife at night time in the dark and uttered a piercing shout and extended his arm pointing a pistol at her and the woman collapsed from nervous shock, it was held that the accused must be presumed to have intended to cause hurt or to have known it likely that hurt would be caused. The duration of the state of mental infirmity would be immaterial.¹³

Acts neither intended nor likely to cause death amount to hurt or grievous hurt according to the nature of injury caused even though death has resulted therefrom.

1. '**Bodily pain.**'—Harm so slight, that no person of ordinary sense and temper would complain of it, is excluded by s. 95. Severe bodily pain will fall within the definition, no matter whatever may be the duration of such pain. Where a bailiff proceeded to a house, and on the occupant's wife refusing to vacate it, pulled or dragged her out of the house, and the force used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries, it was held that he was legally justified in the employment of such amount of force and could not be convicted therefor under s. 323.¹⁴ The accused went with the Naib Nazir of a Court to execute a decree for ejectment from a house which they had obtained against their sister's husband. Delivery of possession was resisted by the accused's sister, the complainant, on the ground that the house belonged to her and she was not a party to the decree. The accused forcibly dragged the complainant out of the house. It was held that as she was no party to the decree for ejectment the accused were guilty under s. 323.¹⁵ The accused quarrelled with his wife and caused hurt to her by giving a blow with a stick. The Sessions Judge acquitted him on the ground that the husband had the right to beat his wife for impudence or impertinence, but the High Court held that no such right was recognised by the Penal Code.¹⁶

2. '**Infirmity.**'—This term has been defined as "inability of an organ to perform its normal function which may either be temporary or permanent."¹⁷

Infirmity denotes an unsound or unhealthy state of the body or mind. A state of temporary impairment or hysteria or terror would constitute infirmity.¹⁸

3. '**To any person.**'—That is, any other person but himself.¹⁹

Act neither intended nor likely to cause death is hurt even though death is caused.—Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of hurt only if the injury caused was not serious. Where the accused with a view to chastising her daughter, eight or ten years old, for impertinence, gave her a kick on the back and two slaps on the face, the result of which was death,²⁰ where the accused, taking offence at an insult offered him by his companion in a drunken brawl, threw him down upon the ground, and stamped his feet upon him, which caused

¹¹ Note M, p. 151.

¹² *Madho Singh*, (1878) P. R. No. 22 of 1878.

¹³ *Jashanmal v. Brahmanand*, (1943) 45 Cr. L. J. 247, [1944] AIR (S) 19.

¹⁴ *Meredith v. Sanjibani Dasi*, (1914) 42 Cal. 313.

¹⁵ *Abdul Sattar v. Sm. Moti Bibi*, (1930) 34 C. W. N. 583, 31 Cr. L. J. 1223, [1930] AIR (C)

720.

¹⁶ *Subbia Goundan*, (1936) 44 L. W. 348, [1936] M. W. N. 895, 37 Cr. L. J. 1153, [1936] AIR (M) 788.

¹⁷ *Anis Beg*, (1923) 46 All. 77, 79.

¹⁸ *Jashanmal v. Brahmanand*, (1943) 45 Cr. L. J. 247, 249, [1944] AIR (S) 19

¹⁹ *Madho Singh*, (1878) P. R. No. 22 of 1878.

²⁰ *Beshor Bewa*, (1872) 18 W. R. (Cr.) 29.

his death within twenty days;²¹ and where the accused threw his stick at the deceased with such force that it hit the deceased on the head and made a punctured wound which caused his death,²² it was held that the offence committed amounted to voluntarily causing hurt. Where an accused person had struck a man one blow on the head with a bamboo yoke and the injured man died afterwards in a hospital principally from excessive use of opium surreptitiously administered by his friends, it was held that the offence committed was that of voluntarily causing hurt as there was no intention to cause death and the blow in itself was not of such a nature as was likely to cause death.²³ The accused, after a trivial domestic quarrel, beat his wife with a light stick, with the result that she fell down and expired. The medical evidence showed that the deceased was a thin and poorly developed woman; that her brain was anæmic, but otherwise all the internal organs were healthy and uninjured; no bones were broken; but there were many bruises on the body, and death had been due to shock. It was held that as all the physical injuries sustained by the deceased were simple hurts, the accused should be convicted of an offence under this section as he could not have known that his wife's brain was anæmic, or that the shock of a severe beating would prove fatal to her.²⁴ Where in a sudden fight between G, S and M on one side, and D, R and I on the other, for which G on his side and D on the other side were chiefly to blame and in which blows of ordinary sticks and of fists were exchanged and one of the latter party took up a heavy piece of wood close by and gave a severe blow on the head of G which fractured his skull bone and ultimately resulted in his death; but it was neither proved who gave the blow nor was there any indication that any member of that party intended or knew it to be likely that any such serious injury would be caused, it was held that the members of the latter party were only responsible for simple hurt under s. 323.²⁵ Where the deceased was dragged from his house and kicked by the accused and death was due to asphyxia as the result of strangulation and there was no motive, or prior enmity between the parties and the intention was found to be only to cause hurt, it was held that the accused could not be convicted under s. 304 but were guilty under s. 323.¹ Where, on K being assaulted by B, a number of persons rushed to the scene and a fracas occurred in which B was killed, and K and the other persons forming the assembly were convicted under s. 147 and some of them under s. 323, it was held that the convictions under s. 147 were not sustainable, the common object of the crowd being to rescue K and not to assault B; that in so far as excessive force had been used by some members of the assembly the users of such force were liable to be punished for the assaults committed by them, and not the other members of the assembly; and that in the absence of proof as to who actually dealt the fatal blow to B no member of the assembly was punishable in respect of that blow.²

For further cases in which the act of the accused amounted to grievous hurt see p. 808.

C A S E S .

Poisoning.—The accused, a boy of about sixteen years of age, being in love with a girl some three or four years younger, and apparently intending to administer to her something in the nature of a love philtre, induced another boy younger than himself to give the girl some *peras* (sweetmeat). The girl and some of the other members of her family ate the *peras* and all the persons who partook of them were seized with more or less violent symptoms of *dhatūra* poisoning, though none of them died. There was no evidence to show that the boy who actually handed over the *peras* knew that they contained anything harmful. It was held that the accused was guilty of hurt.³

Spleen cases.—Where a woman died from a chance kick in the spleen, not known to be diseased, inflicted by her husband on provocation, and the husband had no

²¹ *Radkia*, (1872) Cr. R. Oct. 1871, Unrep. Cr. C. 67.

²² *Keegan*, (1893) Cr. R. No. 38 of 1893, Unrep. Cr. C. 673.

²³ *Nga Shwe Po*, [1883] S. J. L. B. 179; *Nga Moe*, [1941] Ran. 138.

²⁴ *Muhammad Ali*, (1909) 14 P. L. R. 533, 537.

²⁵ *Dhani Ram*, (1912) 14 P. L. R. 549, 14 Cr. L. J. 104; *Nachal*, (1941) 54 L. W. 62, [1941] M. W. N. 528, (1941) 42 Cr. L. J. 638, [1941] AIR (M) 746.

¹ *Ilayaperumal Nadar*, [1934] M. W. N. 691.

² *Ambika Singh*, (1921) 1 Pat. 212.

³ *Anis Beg*, (1923) 46 All. 77.

intention or knowledge that the act was likely to cause hurt, endangering human life, it was held that he was guilty of an offence under this section and s. 321.⁴ Where the accused beat and kicked the deceased whereby the deceased's spleen, which was in a diseased condition, was ruptured and he died;⁵ where the accused kicked a punkha-puller who had an enlarged spleen which was not known to the accused, and death ensued;⁶ and where the accused caused the death of another person by throwing a piece of brick at him which struck him in the region of the spleen and ruptured it, the spleen being diseased,⁷ it was held that as the accused had not the intention to cause death, or to cause such bodily injury as was likely to cause death, the offence committed was that of voluntarily causing hurt.

Death due to weak condition.—The injury inflicted with a *dah* by the accused on the deceased was not such as to entail serious consequences to a person in normal health. The injured person died from an abscess in the brain, not from the injury, which had only a remote connection with the abscess. Unknown to the accused, the deceased suffered from chronic malaria which had lowered his power of resistance to infection and he had left a hospital against medical advice. It was held that the accused was guilty of simple hurt and not of culpable homicide.⁸

Cerebral hæmorrhage.—Where the accused gave a blow on the chest of the deceased, who was sixty-five years old, in the course of a quarrel, and the deceased died of cerebral hæmorrhage probably brought about by the excitement during the quarrel, the accused was found guilty of hurt and not of culpable homicide not amounting to murder.⁹

Kicking.—The accused demanded one anna from the deceased which the latter owed him. The deceased promised to pay later and the accused thereupon kicked him twice on the abdomen and the deceased collapsed and died. It was held that it could not be said that the accused intended or knew that kicking on the abdomen was likely to endanger life and that he was guilty of causing hurt.¹⁰

Hair-pulling.—Pulling of a woman by the hair was held to amount to this offence.¹¹

Stone-throwing.—Where the accused who had a quarrel with his debtor over non-discharge of a loan, pelted brick-bats at his house knowing that there were occupants in it, and hurt one of them who was under medical treatment for ten days, it was held that he was guilty of causing hurt.¹²

320. The following kinds of hurt only are designated as “grievous hurt.” :

First.—Emasculation.¹

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration² of the head or face.

Seventhly.—Fracture or dislocation of a bone³ or tooth.

Eighthly.—Any hurt which endangers life⁴ or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.⁵

⁴ *Bysagoo Noshyo*, (1867) 8 W. R. (Cr.) 29; *Punchamun Tantee*, (1866) 5 W. R. (Cr.) 97; *Phimmi Ramudu*, (1881) Weir, 3rd Edn., 162; *Nga Kyin*, (1893) 1 U. B. R. (1892-1896) 217; *Bhajan Das*, (1922) 24 Cr. L. J. 421, [1924] AIR (L) 218.

⁵ *Bawaji*, (1872) Unrep. Cr. C. 63, Cr. R. of 1872; *Suberali Sarkar*, (1921) 21 Cr. L. J. 666, [1920] AIR (C) 401.

⁶ *Fox*, (1879) 2 All. 522; *Ramdayal*, (1891) 5 C. P. L. R. 69.

⁷ *Randhir Singh*, (1881) 3 All. 597.

⁸ *Nga Moe*, [1941] Ran. 138.

⁹ *Ranganayakulu Naidu*, [1935] M. W. N. 812.

¹⁰ *Marana Goundan*, [1941] 1 M. L. J. 364, [1941] M. W. N. 220, (1940) 53 L. W. 363, 42 Cr. L. J. 707, [1941] AIR (M) 560.

¹¹ (1883) Weir, 3rd Edn., 196.

¹² *Maung Po Nyan*, (1916) 17 Cr. L. J. 465, [1916] AIR (LB) 98; *Subramanya Goundan*, [1941] M. W. N. 815.

COMMENT.

The authors of the Code observe : "We have found it very difficult to draw a line between those bodily hurts which are serious and those which are slight. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences some of which approach in enormity to murder, while others are little more than frolics which a good-natured man would hardly resent, should be classed together.

"We have, therefore, designated certain kinds of hurt as *grievous*.

"We have given this name to emasculation,...to the fracture and to the dislocation of bones. Thus far we proceed on sure ground. But a more difficult task remains. Some hurts which are not, like those kinds of hurt which we have just mentioned, distinguished by a broad and obvious line from slight hurts, may nevertheless be most serious. A wound, for example, which neither emasculates the sufferer, nor blinds him, nor destroys his hearing, nor deprives him of a member or a joint, nor permanently deprives him of the use of a member or a joint, nor disfigures his countenance, nor breaks his bones, nor dislocates them, may yet cause intense pain, prolonged disease, lasting injury to the constitution. It is evidently desirable that the law should make a distinction between such a wound, and a scratch which is healed with a little sticking plaster. A beating, again, which does not maim the sufferer or break his bones, may be so cruel as to bring him to the point of death. Such a beating, it is clear, ought not to be confounded with a bruise, which requires only to be bathed with vinegar, and of which the traces disappear in a day."¹³

This section enumerates eight kinds of hurt as grievous. The term "main" in the English criminal law will include 'hurt.'

To make out the offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in this section.¹⁴ Where a person forcibly thrust a *lathi* into the rectum of another and caused serious injuries, he was held guilty of causing grievous hurt.¹⁵

1. '**Emasculation.**'—The term 'emasculation' means the depriving a person of masculine vigour, castration. Injury to the scrotum would render a man impotent. A person emasculating himself cannot be convicted under this section or under s. 309.¹⁶ A person causing grievous hurt upon his own self does not come within the purview of this section.

2. '**Disfiguration.**'—The word 'disfigure' in this section means to do a man some external injury which detracts from his personal appearance, but does not weaken him as the cutting off of a man's nose or ears.¹⁷ Where a girl's cheeks were branded with a red-hot iron, which left scars of a permanent character, it was held that the disfigurement contemplated by this section was caused.¹⁸

3. '**Fracture or dislocation of a bone.**'—The fracture or dislocation of a bone is considered grievous because it causes great pain and suffering to the injured person. The bone fractured may be re-joined or the bone dislocated may be re-set, but this is immaterial so far as the offence is concerned. The primary meaning of the word "fracture" is "breaking", though it is not necessary in the case of a fracture of the skull bone that it be divided into two separate parts because it may consist merely of a crack; but if it is a crack, it must be a crack which extends from the outer surface of the skull to the inner surface.¹⁹ Where there is evidence that a bone has been cut but there is nothing whatever to indicate the extent of the cut, whether deep or a mere scratch upon the surface, it is not correct to infer from that evidence alone that grievous hurt has been caused.²⁰

Where the accused threw his wife from a window about six feet high, but the fall was broken by a weather-board fixed just below it and resulted in the fracture of the knee pan and in several small wounds, it was held that the offence committed was grievous hurt.²¹ Where the result of a joint attack by several persons on one

¹³ Note M, pp. 151, 152.

¹⁴ *Budri Roy*, (1875) 23 W. R. (Cr.) 65.

¹⁵ *Sital*, [1935] O. W. N. 902, (1935) 36 Cr. L. J. 1151, [1935] AIR (O) 468.

¹⁶ *Madho Singh*, (1878) P. R. No. 22 of 1878.

¹⁷ Law Commissioners' 1st Rep., s. 373.

¹⁸ *Anta bin Dadoba*, (1863) 1 B. H. C. 101.

¹⁹ *Maung Po Yi*, (1937) 38 Cr. L. J. 960, [1937] AIR (R) 253.

²⁰ *Matukdhari Singh*, (1942) 23 P. L. T. 633, [1942] P. W. N. 106, (1942) 43 Cr. L. J. 511, [1942] AIR (P) 376.

²¹ *Jiva*, (1891) Unrep. Cr. C. 558.

party was a fracture of the arm of the party assaulted, the offence committed was grievous hurt and not assault.²² The accused assaulted the deceased and though they had the latter entirely at their mercy inflicted only a severe beating breaking the bones of his arms and hands. There was no evidence to prove that the accused had any intention to kill, but blood poisoning took place owing to toxic absorption from the blood and the victim died two months after the beating. It was held that the accused were guilty of causing grievous hurt.²³

4. **'Any hurt which endangers life.'**—These words cannot apply to cases in which life was not merely endangered but actually taken away.²⁴ The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other the injuries must be such as endanger life.²⁵ A wound on the neck inflicted with a sharp-edged weapon must be considered "dangerous to life."¹ Where in the course of an altercation the accused stabbed the deceased with a knife on the left forearm, piercing the radial artery and the deceased died of hæmorrhage soon after, it was held that the accused was guilty of causing grievous hurt and, as the forearm was not a vital part of the body, he could not be found guilty of culpable homicide.²

5. **'Causes the sufferer to be during the space of twenty days in severe bodily pain, etc.'**—The authors of the Code say: "After long consideration we have determined to give the name of grievous bodily hurt to all hurt which causes the sufferer to be in pain, diseased or unable to pursue his ordinary avocations, during the space of twenty days...It appears to us that the length of time during which a sufferer is in pain, diseased or incapacitated from pursuing his ordinary avocations though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety, be employed not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the setting of traps, the digging of pit-falls, the placing of ropes across a road ... In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender."³

The Law Commissioners observe: "We cannot but think that there is reason in the exceptions taken to estimating the severity of a hurt by the time during which the sufferer is unable to follow his ordinary pursuits, as a rule which will operate unequally. The man who lives by daily labour suffers far more by being kept from his work for twenty days, than he who has independent means, and whose ordinary pursuits may be intermitted for that time without causing him any material privation. Again an injury to the right hand may in the case of a clerk keep him from his work for twenty days, which if it happened to the left hand would be of no consequence. An injury to the foot may prevent one man from following his business, in which walking is necessary, which if it happened to another man in a sedentary employment would not interrupt him at all. The proposed criterion is therefore unsatisfactory, but some criterion is necessary and it will be difficult to devise a better."⁴

The mere fact that a man has been in hospital for twenty days is not sufficient, it must be proved that during that time he was unable to follow his ordinary pursuits.⁵ An injured man may be quite capable of following his ordinary pursuits long before twenty days are over, and yet for the sake of permanent recovery or greater ease or comfort be willing to remain as a convalescent in a hospital, especially if he is fed at the public expense.⁶ A disability for twenty days constitutes grievous hurt: if it continues for fifteen days, then the offence is hurt.⁷ Where a man was so much injured that he had to go to a hospital, but left it perfectly cured on the twentieth day, it was held that that day would count as one of the twenty days during which he was unable to follow his ordinary pursuits.⁸ Where the accused caused hurt to a

²² *Ramtohl Sing*, (1866) 5 W. R. (Cr.) 12.

²³ *Bhure Khan*, (1927) 2 Luck. 433.

²⁴ *Marimuthu*, [1923] M. W. N. 796, 18 L. W. 188, 24 Cr. L. J. 721, [1924] AIR (M) 41.

²⁵ *Government of Bombay v. Abdul Wahab*, (1945) 47 Bom. L. R. 998, 47 Cr. L. J. 378, F.B. [1946] AIR (B) 38.

¹ *Muhammad Rafi*, (1929) 31 P. L. R. 289, 31 Cr. L. J. 77, [1930] AIR (L) 305.

² *Kottengodan Alavi*, [1938] M. W. N. 1274,

[1939] 1 M. L. J. 133, 40 Cr. L. J. 308, [1939] AIR (M) 269.

³ Note M, pp. 152, 153.

⁴ First Rep., s. 374, p. 277.

⁵ *Vasta Chela*, (1894) 19 Bom. 247; *Nga Ya Baw*, (1902) 1 L. B. R. 221.

⁶ *Vasta Chela*, (1894) 19 Bom. 247.

⁷ *Bishmooram Surma*, (1864) 1 W. R. (Cr.) 9.

⁸ *Sheikh Bahadur*, (1862) 2nd Mad. Sess.

woman, who remained in a hospital only for seventeen days, out of which she was in danger for three days, it was held that he had caused grievous hurt.⁹

Acts neither intended nor likely to cause death may amount to grievous hurt even though death is caused.—Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of grievous hurt if the injury caused is of a serious nature, but not of culpable homicide.¹⁰ If the common intention of the accused and his associates by committing an assault was not to cause injury known to be likely to cause death, but to cause grievous hurt, though the combined effect of the injuries actually caused was likely to cause death, the accused is guilty of the offence of causing grievous hurt and not of culpable homicide not amounting to murder.¹¹ The accused who was beaten by the deceased on the previous day came across the deceased by chance and gave him a blow on the back of the head with a hockey stick which he had in his hand at the time and ran away. The blow did not fell the deceased. It was held that the offence committed by the accused was grievous hurt because it would not be safe to hold that he intended to do more than cause grievous hurt.¹² Where the accused threw a stone and caused death in a sudden and unpremeditated fight,¹³ where during the course of a drunken brawl the accused gave the deceased only one blow which ultimately resulted in his death,¹⁴ it was held that the offence of grievous hurt was committed.

Three men armed with sticks attacked an unarmed man and inflicted injuries which resulted shortly afterwards in his death. The accused intended to give a thrashing to the deceased but did not intend to cause death or to cause such bodily injury as they knew was likely to cause death. It was held that they were guilty of an offence under s. 326.¹⁶ Where B, C and D came up after A had knocked the deceased down with a fatal blow on the head fracturing the skull, and B, C and D thrust a *lathi* into the deceased's anus and the consequent injury to the rectum was not the cause of death but that it created shock which contributed to the cause of death, it was held that B, C and D were guilty of grievous hurt under s. 325 and not of culpable homicide under s. 304.¹⁷

Where a man received only one blow on the head and died, and there was no evidence to show which of the two persons attacking him gave that blow, it was held that neither of the two could be convicted under s. 304 but both of them could be convicted of an offence under s. 325.¹⁸ Where three persons attacked a fourth with clubs, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow, and there was no common intention to cause death or grievous hurt, it was held that the offence of which the three assailants were

⁹ *Basson Rannah*, (1865) 2 W. R. (Cr.) 29.

¹⁰ *Agra*, (1914) P. R. No. 37 of 1914, 16 Cr. L. J. 209, [1914] AIR (L) 579; *Jahana*, (1916) 17 P. L. R. 278, 17 Cr. L. J. 451, [1916] AIR (L) 251; *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 19 Cr. L. J. 93, [1918] AIR (B) 247; *Jhandu*, (1924) 26 Cr. L. J. 653, [1924] AIR (L) 555; *Datta Ram*, (1924) 26 Cr. L. J. 381, [1924] AIR (L) 654; *Dalip Singh*, (1924) 26 Cr. L. J. 757, [1925] AIR (L) 318; *Gama*, (1938) 86 P. L. R. 313, 35 Cr. L. J. 1848, [1934] AIR (L) 335.

¹¹ *Sulaiman*, [1941] Ran. 258.

¹² *Ghulam Jilani*, (1925) 26 P. L. R. 430, 26 Cr. L. J. 1118, [1925] AIR (L) 559; *Mehr Shah*, (1927) 29 Cr. L. J. 24; *Khewna*, (1928) 30 Cr. L. J. 378, [1929] AIR (L) 37; *Kottengodan Alavi*, [1939] 1 M. L. J. 123, [1938] M. W. N. 1274, 40 Cr. L. J. 308, [1938] AIR (M.) 269.

¹³ *Shan*, (1933) 35 P. L. R. 301, 35 Cr. L. J. 1456, [1934] AIR (L) 111; *Palaniswami*

Goundan, [1940] M. W. N. 538, (1940) 51 L. W. 590, 41 Cr. L. J. 923, [1940] AIR (M) 586.

¹⁴ *Gokal Chand*, (1933) 36 P. L. R. 88, 35 Cr. L. J. 1407, [1934] AIR (L) 477.

¹⁵ *Ramza*, (1922) 6 L. L. J. 533; *Bhure Khan*, (1927) 2 Luck. 433; *Mohan Singh*, (1933) 35 Cr. L. J. 1355, [1934] AIR (L) 486.

¹⁷ *Makka*, (1933) 11 O. W. N. 32, 35 Cr. L. J. 467, [1934] AIR (O) 87; *Sital*, [1935] O. W. N. 902, 36 Cr. L. J. 1151, [1935] AIR (O) 468.

¹⁸ *Agra*, (1914) P. R. No. 37 of 1914, 16 Cr. L. J. 209, [1914] AIR (L) 579; *Jahana*, (1916) 17 P. L. R. 278, 17 Cr. L. J. 451, [1916] AIR (L) 251; *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 19 Cr. L. J. 93, [1918] AIR (B) 247; *Jhandu*, (1924) 26 Cr. L. J. 653, [1924] AIR (L) 555; *Datta Ram*, (1924) 26 Cr. L. J. 381, [1924] AIR (L) 654; *Dalip Singh*, (1924) 26 Cr. L. J. 757, [1925] AIR (L) 318; *Sennimalai Goundan*, [1935] M. W. N. 54; *Zahid Khan*, (1938) 14 Luck. 378.

guilty was grievous hurt rather than culpable homicide not amounting to murder.¹⁹ Where three accused persons assaulted the deceased, and gave him a beating, in the course of which one of the accused struck the deceased a blow on the head, which resulted in death, it was held that, in the absence of proof that the accused had the common intention to inflict injury likely to cause death, they could not be convicted of murder.²⁰ But if two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege that his individual act did not cause death, and that by his individual act he cannot be held to have intended death.²¹ Where the accused could not have known that they were inflicting such injuries as would be likely to cause death, and the injuries were not directly responsible for the death, but death was caused by blood poisoning,²² or hæmorrhage²³ it was held that the accused were guilty under s. 325 and not s. 304.

In connection with the marriage of the accused with one I, a certain ceremony was to be performed on a certain date. On the day so fixed, the accused found N taking I away from her village and when he remonstrated with her she told him that the ceremony would not take place on that day and abused him. The accused thereupon attacked the woman with a pen-knife and inflicted one injury on each of them in the abdomen, as the result of which N died but I survived. It was held that there was a very strong presumption that the accused neither intended to cause death nor such bodily injury as he knew to be likely to cause death, but that he intended to cause grievous hurt to the woman, and was therefore guilty of an offence under s. 326.²⁴

The accused beat the deceased to death by *lathi* blows. Individually none of the injuries was a fatal one and the deceased had died of the shock from multiple injuries which included a fracture of five ribs. Upon the evidence on record it was not possible to attribute any particular injury to any individual assailant: nor was it possible to say that any particular injury was the direct cause of his death. It was held that it was not safe to convict the accused of an offence under s. 302, and only a conviction of grievous hurt was possible.²⁵ There was an exchange of words between the accused, seven in number, and the deceased. The accused attacked the deceased with the intention of beating him. The deceased received two incised trivial wounds and three contused wounds. There was no medical evidence as to the cause of the death. It was held that the accused could not be convicted of culpable homicide but were guilty of grievous hurt.¹ Where the common intention of a party of men was to give a beating with *lathis* to another and one of them actually committed murder, though the act of murder might have been done with the aid of the other members of the party it could not be said as a probable consequence of the abetment on their part and they were guilty only of abetment of an offence under section 325, and not murder.² Where the only intention of the accused who was convicted for the offence of murder was to steal the jewels of the deceased and the only violence which he committed, viz., cutting the nostrils of the deceased, was necessary in order to facilitate the theft and the death of the deceased was entirely unexpected, it was held that the conviction of the accused for the offence of murder could not be sustained and that he was guilty of the offence of causing grievous hurt.³

For further cases in which the act of the accused was held to be simple hurt, see Comment on s. 319, p. 803.

¹⁹ *Bhola Singh*, (1907) 29 All. 282. See *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 19 Cr. L. J. 93, [1918] AIR (B) 247; *Waryam Singh*, (1922) 24 Cr. L. J. 451; *Jhandu*, (1924) 26 Cr. L. J. 653, [1924] AIR (L) 555; *Indar Singh*, (1923) 26 Cr. L. J. 598, [1923] AIR (L) 326; *Har Prasad Singh*, (1925) 2 O. W. N. 465, 26 Cr. L. J. 1160, [1925] AIR (O) 482; *Dial Singh*, (1926) 27 Cr. L. J. 547, [1926] AIR (L) 419; *Nathoo*, (1942) 44 Cr. L. J. 110, [1942] AIR (A) 400; *Gajraj Singh*, (1946) 21 Luck. 527.

²⁰ *Duma Baidya*, (1896) 19 Mad. 483; *Dalip Singh*, (1924) 26 Cr. L. J. 757, (1925) AIR (L) 318.

²¹ *Nga Po Sein*, (1902) 1 L. B. R. 233; *Jhamman*, (1920) 21 Cr. L. J. 862, [1920] AIR (A) 276.

²² *Bhure Khan*, (1927) 2 Luck. 433.

²³ *Kottengodan Alavi*, [1938] M. W. N. 1274, [1939] 1 M. L. J. 123, 40 Cr. L. J. 308, [1939] AIR (M) 269.

²⁴ *Allah Din*, (1923) 24 Cr. L. J. 663, [1924] AIR (L) 234.

²⁵ *Yara*, (1929) 30 P. L. R. 171, 30 Cr. L. J. 368, [1929] AIR (L) 456.

¹ *Sohan Singh*, (1928) 30 Cr. L. J. 917, [1929] AIR (L) 178.

² *Raja Ram*, (1938) 14 Luck. 328.

³ *Guruvulu*, [1944] Mad. 73.

Diseased spleen or heart.—Where the accused pulling the deceased out of a cot, kicked him, and struck him on the side or on the ribs with a stick, whereby the deceased, whose spleen was diseased, died, it was held that he had committed the offence of voluntarily causing grievous hurt.⁴ Where the accused in order to rescue his cattle which were impounded by the deceased gave him a sound beating for his refusal to surrender the cattle and the deceased, an old man of sixty, who was suffering from an enlarged heart, succumbed, it was held that the accused having no knowledge of the condition of the deceased was guilty of causing grievous hurt only.⁵

Blow aimed at one person falling upon another.—The accused struck a woman, carrying an infant in her arms, violently over her head and shoulders. One of the blows fell on the child's head, causing death. It was held that the accused committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.⁶ In the course of an affray severe injuries were inflicted and suffered by both sides. On the side of the complainants there was a girl of tender years who was sitting very close to her father and she received a severe blow on the head which subsequently resulted in her death. It was held that the accused were guilty of causing grievous hurt.⁷ In the course of an altercation between the accused and the complainant on a dark night, the former aimed a blow with his stick at the head of the latter. To ward off the blow, the complainant's wife, who had a child on her arm, intervened. The blow missed its aim, but fell on the head of the child causing severe injuries, from the effects of which it died. The accused was convicted of causing grievous hurt. It was held that, inasmuch as the blow, if it had reached the complainant, would have caused simple hurt, the accused was guilty of simple hurt only.⁸ The accused attempted to enter a house in order to beat the owner of the house. The latter's wife, who was carrying her infant in her arms, tried to bar accused's passage by shutting the door. The accused forced open the door and aimed a blow with a club at her but it struck the child and killed it. It was too dark for the accused to have perceived that the woman was carrying a child. It was held that the accused could only be convicted of the offence of striking the woman and that inasmuch as the accused used a club and struck the blow with some force he intended to cause grievous hurt.⁹

Death caused in course of mutual stone-throwing.—As the result of a long-standing enmity and after a fresh altercation, two parties encountered and hurled stones at each other. A member of one of the parties was struck by a stone of considerable weight and thrown with a good deal of violence, which ruptured his liver and immediately caused his death. As he fell down and lay on the ground, the accused, a man from the other party, caused a serious wound in his leg with a sword. It was held that the accused was not guilty of murder, as there could be no intention to kill, for the stone-throwing by his party was resorted to by way of defence to a similar act by the other party and the causing of death in stone-throwing was an unusual incident which could not be regarded as likely to result in injuries which caused death in the ordinary course of nature and that in causing the wound by a sword the accused was guilty of inflicting grievous hurt.¹⁰

Abetment of grievous hurt.—D was killed by one blow on his head with a sharp weapon. It was found that the accused B and M with others armed with weapons had invaded the compound where D was sleeping, that they had immediately assaulted D and that M had struck him on the head and killed him. The intention of the accused was to insult and disgrace one Mussammat K. M was held guilty under s. 302; but as both the accused had armed themselves with deadly weapons B must have known that in case of opposition the weapons would be used and in all probability grievous hurt would be caused. He was, therefore, held guilty of abetment of grievous hurt.¹¹

⁴ *O'Brien*, (1880) 2 All. 706; *Idu Beg*, (1881) 3 All. 776; *Mahabir*, (1921) 19 A. L. J. R. 295.

⁵ *Bharat Singh*, (1932) 9 O. W. N. 655, 34 Cr. L. J. 99, [1932] AIR (O) 279; *Lal Baksh*, (1944) 46 Cr. L. J. 736, 46 P. L. R. 379, [1945] AIR (L) 43.

⁶ *Sahae Rae*, (1878) 3 Cal. 623; *Jageshar*, (1923) 24 Cr. L. J. 789.

⁷ *Kure*, (1918) 16 A. L. J. R. 615, 20 Cr. L. J. 517, [1919] AIR (A) 379.

⁸ *Chatur Natha*, (1919) 21 Bom. L. R. 1101, 21 Cr. L. J. 85, (1920) AIR (B) 224.

⁹ *Dayal Singh*, (1922) 24 Cr. L. J. 4, [1924] AIR (L) 47.

¹⁰ *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 19 Cr. L. J. 93, [1918] AIR (B) 247.

¹¹ *Bahal Singh*, (1919) P. R. No. 24 of 1919, 20 Cr. L. J. 711, [1919] AIR (L) 375. See *Khuda Dad*, (1931) 34 P. L. R. 699, 34 Cr. L. J. 724, [1933] AIR (L) 313.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said “voluntarily to cause hurt”.

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said “voluntarily to cause grievous hurt”.

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

ILLUSTRATION.

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

COMMENT.

The Law Commissioners observe : The Judge “is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act, taking him to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur, when he did what everybody knows is likely to cause grievous hurt, and the more certainly drawing this conclusion where there is evidence of previous enmity against the party who has suffered. If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it, then although grievous hurt may unexpectedly have ensued, it would be his duty to convict the offender of simple hurt only.... judging that grievous hurt was not in his contemplation; for according to Clause 317 (this section) a person can be convicted of grievous hurt only when the result and the intention correspond, or when grievous hurt has been suffered from an act which was intended to cause grievous hurt, though it may be of a different kind.”¹²

The provisions of this section are very precise and incapable of misconstruction. A Magistrate dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has not been caused but if it has been caused whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under s. 325.¹³

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt,¹ shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This is a general section for the punishment of voluntarily causing hurt. Sections 324, 327, 328, 329 and 330 deal with the same offence committed under certain aggravating circumstances; and ss. 334, 336 and 337 provide for punishment when there are certain mitigating circumstances.

¹² First Rep., s. 377, p. 278.

¹³ *Nga Tun E*, (1914) U. B. R. 35, 16 Cr.

L. J. 431, [1914] AIR (UB) 26.

1. 'Voluntarily causes hurt.'—See s. 321 as to the meaning of this expression.

Death of complainant whether ends complaint.—The former Chief Court of the Punjab had held that an action under this section was a personal one and came to an end on complainant's death and the right to carry on the prosecution did not survive to the legal representatives of the deceased.¹⁴ But the Lahore High Court has dissented from this view and has laid down that criminal proceedings once legally instituted, whether upon a complaint or otherwise, do not terminate or abate merely by reason of the death of the complainant or the person injured. Section 89 of the Probate and Administration Act, 1881 (corresponding with s. 306 of the Indian Succession Act, 1925), has no application to a criminal prosecution and there is nothing in the Criminal Procedure Code in support of the proposition that the death of the person injured or of the complainant, of itself, causes the proceedings to abate. It is a mistake to speak of an offence as a purely personal one.¹⁵ The Madras and the Allahabad High Courts have also held that a criminal prosecution does not abate by reason of the death of the person injured.¹⁶ The Madras High Court has laid down that where a complainant in a summons-case dies during the pendency of the case, the Magistrate should, under s. 247 of the Criminal Procedure Code, dismiss the complaint; it would be illegal for the Magistrate under the circumstances to grant an adjournment to enable the deceased complainant's son to come on the record and to proceed further with the inquiry.¹⁷

PRACTICE.

Evidence.—Prove (1) that the accused by his act caused bodily pain, disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt, etc.

The intent to cause hurt may be presumed from the nature of the hurt caused and the circumstances under which it was caused.¹⁸

Unless the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the accused, no conviction under this section and s. 325 can be arrived at on the ground of enmity and fight and serious injuries caused in the fight.¹⁹

Autrefois acquit.—A person tried and acquitted on a charge of using criminal force under s. 352 (which includes the offence of battery) cannot be tried, in respect of the same criminal matter, on a charge of hurt.²⁰

Private defence.—In cases of hurt or grievous hurt, the question should be considered as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence.²¹

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

A conviction under s. 160 on a prosecution initiated by the police is no bar to a subsequent trial under this section on a complaint laid by the party injured.²²

Committal.—Where death is caused, Magistrates should be careful not to take upon themselves to absolve accused from the grave charges of murder or culpable homicide and convict for hurt or grievous hurt, unless it is quite clear that there is no sufficient evidence to justify a commitment.²³

Punishment.—The act for which an accused person must be punished is the hurt which he intended to cause, or might be reasonably held likely to cause, by the

¹⁴ *Rama Nand*, (1917) P. R. No. 26 of 1917, 18 Cr. L. J. 688; *Lobhu*, (1919) P. R. No. 25 of 1919, 20 Cr. L. J. 17.

¹⁵ *Hazara Singh*, (1920) 2 Lah. 27, *Ishar Das*, (1908) P. R. No. 10 of 1908, 7 Cr. L. J. 290, overruled.

¹⁶ *Muhammad Ibrahim Sahib v. Shaik Dawood*, (1920) 44 Mad. 417; *Musa*, (1924) 22 A. L. J. 520, 25 Cr. L. J. 1007, [1924] AIR (A) 666.

¹⁷ *Appala Naidu*, (1927) 51 Mad. 339.

¹⁸ *Nga Ba Gyaw*, (1911) 1 U. B. R. 105, 13 Cr. L. J. 471.

¹⁹ *Dani*, (1920) 3 U. P. L. R. (L) 11, 22 Cr. L. J. 199.

²⁰ *Kaplan v. G. M. Smith*, (1871) 16 W. R. (Cr.) 3, 7 Beng. L. R. (Appx.) 25.

²¹ *Sohn*, (1865) 2 W. R. (Cr.) 59.

²² *Ram Sukh*, (1924) 47 All. 284.

²³ (1869) 12 W. R. (Cr. Cir.) 7.

act done, and not an unfortunate and entirely unforeseen result of that act.²⁴ Where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the Court to impose separate and accumulative sentences.²⁵

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, voluntarily caused hurt to AB, and thereby committed an offence punishable under s. 323 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

324. Whoever, except in the case provided for by section 334, voluntarily¹ causes hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon² of offence, is likely to cause death,³ or by means of fire or any heated substance, or by means of any poison⁴ or any corrosive substance,⁵ or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal,⁶ shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT

Object.—The object of this section is to make simple hurt more grave and liable to a more severe punishment where it has the ‘differentia’ of one of the modes of infliction described in the section.¹

The authors of the Code say : “Bodily hurt may be inflicted by means the use of which generally indicates great malignity. A blow with the fist may cause as much pain, and produce as lasting injury, as laceration with a knife, or branding with a hot iron. But it will scarcely be disputed that, in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of society than he who has only used his fist. It appears to us that many hurts which would not, according to our classification, be designated as grievous, ought yet, on account of the mode in which they are inflicted, to be punished more severely than many grievous hurts.”²

1. ‘Voluntarily.’—See s. 39, *supra*.

2. ‘Weapon.’—It is not necessary that the manner of use of the weapon must be such as is likely to cause death. Such an element would compose a crime of a wholly different character.³ It is merely the nature of the instrument that should be taken into consideration.⁴ Where the injury caused is simple but is caused with a cutting weapon, this section applies.⁵ Where the accused fired a loaded pistol into a group of persons among whom was A, without aiming at A or anyone in particular, but intending generally to do grievous bodily harm, and wounded A, it was held that he had committed this offence.⁶

3. ‘Likely to cause death.’—The instrument must be one, not which is ‘liable’ but which is ‘likely’ to cause death. It must be one of which one can predicate that the probable result of its use will be by virtue of its very nature, death. It must be inherent in the nature of the instrument used that death is likely to ensue. Where the injury results from a blow with a bamboo stick, s. 323 applies.⁷

²⁴ *C. Kelly*, (1897) P. R. No. 11 of 1897.

²⁵ *Bateshar*, (1915) 37 All. 628.

¹ (1872) 7 M. H. C. (Appx.) 11, 1 Weir 335.

² Note M, pp. 153, 154.

³ (1872) 7 M. H. C. (Appx.) 11, 1 Weir 335.

⁴ *Nga Po Thit*, (1899) 1 U. B. R. (1897-1901)

311.

⁵ *Faltch Khan*, (1930) 32 Cr. L. J. 342, (1930) AIR (L) 950.

⁶ *Fretwell*, (1864) 9 Cox 471.

⁷ *Nga Po Nyan*, (1936) 38 Cr. L. J. 299, [1937] AIR (R) 8; *Nataraja Goundan*, [1939] 1 M. L. J. 886, 49 L. W. 553, [1939] M. W. N. 414, 40 Cr. L. J. 827, [1939] AIR (M) 567.

4. **'Poison.'**—Poison is "that which when administered is injurious to health or life."⁸ "If the thing administered is a recognised poison the offence may be committed, though the quantity given is so small as to be incapable of doing harm."⁹ A person who administers that which is a poison is guilty, although by ignorance or mistake he happens to administer it in a form which renders it innocuous. Where, therefore, the accused, with intent to kill, administered to a child nine weeks old, two poisonous berries but the child did not die because the poisonous property of the berries resided in the kernel which was enclosed in a pod so hard that it could not be digested by a child of that age, it was held that he was guilty of the offence of administering poison with intent to kill.¹⁰ Under the Code this will amount to attempt to murder.

5. **'Corrosive substance.'**—The term "corrosive substance" means any substance which irritates the system, e.g., sulphuric acid, corrosive sublimate, etc.

6. **'Animal.'**—See s. 47, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused by his act bodily pain, disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt, etc.

(3) That it was unprovoked.

(4) That the accused caused it by means of an instrument for shooting, stabbing or cutting; or by an instrument, used as a weapon likely to cause death; or by means of fire, etc.; or by means of any poison, etc.; or by means of any substance which is deleterious to the human body to inhale, etc., or by means of any animal.

Where the accused had caused hurt in exercise of the right of private defence the burden is on him to show that he had such a right.¹¹

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Alternative charge.—Where the accused were charged under s. 148 of rioting armed with deadly weapons, and also under s. 324 of voluntarily causing hurt by dangerous weapons, it was held that they should have been sentenced only under one or other of these sections, the charges being, properly speaking, only alternative charges¹²

Punishment.—On a conviction for offences under ss. 324, 325 and 326, it is improper to give one sentence for all the offences, but if the cumulative sentence passed is such that it could be passed by the Magistrate in respect of any of the offences, there is no ground for interference in revision.¹³

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Lower Burma Rule.—Deterrent sentences must be passed in cases in which hurt is caused by a knife or other deadly weapon.¹⁴

See the Frontier Crimes Regulation,¹⁵ ss. 6, 11 (3) (d) and 12 (2); and the Criminal Tribes Act,¹⁶ s. 23.

Charge.—The charge should state that the weapon used was one of the kinds mentioned in the section.¹⁷ Merely describing it as a 'dangerous weapon' is not sufficient.¹⁸

The charge should run as follows:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

⁸ Per Lord Coleridge, C. J., in *Cramp*, (1880) 5 Q. B. D. 307, 309.

⁹ Per Field, J., in *ibid.*, pp. 309, 310.

¹⁰ *Cluderay*, (1850) 4 Cox 84.

¹¹ *Mooka Nadar*, [1943] 1 M. L. J. 352, [1943] 1 M. W. N. 275, (1942) 56 L. W. 329, 44 Cr. L. J. 733, [1943] AIR (M) 590.

¹² *Dina Sheikh*, (1868) 10 W. R. (Cr.) 63, 3 Beng. L. R. (A. Cr. J.) 15, F.N.

¹³ *Debi Dayal*, [1942] O. W. N. 440, (1942) 43 Cr. L. J. 781, [1942] AIR (O) 444.

¹⁴ L. B. C. M., Vol. 1, s. 327, p. 89.

¹⁵ Reg. III of 1901.

¹⁶ Act VI of 1924.

¹⁷ (1865) 3 W. R. (Cr. L.) 15.

¹⁸ (1865) 2 W. R. (Cr. L.) 20; (1867) 8 W. R. (Cr. L.) 15.

That you, on or about the—day of—, at—, voluntarily caused hurt to XY by means of—which is an instrument for shooting (*or* stabbing, etc.,) and thereby committed an offence punishable under s. 324 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt,¹ shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for voluntarily causing grievous hurt.

COMMENT.

1. 'Voluntarily causes grievous hurt.'—See s. 322 as to the meaning of this expression.

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt of any of the kinds described in s. 320.¹⁹

(2) That the accused intended, or knew that he was likely, to cause grievous hurt of any kind so described.²⁰

(3) That the accused did so voluntarily.²¹

In cases of hurt, it is the duty of the Magistrate to come to a finding of his own as to whether the hurt was grievous or simple, and for this purpose to examine the medical officer to ascertain whether the injuries are of any of the kinds specified in s. 320. It is not the business of the medical officer to classify a hurt as grievous or simple, but to describe facts, from which the Magistrate will decide whether the hurt is grievous or not.²²

It is not necessary to prove that the accused struck the complainant so severely as to endanger the latter's life.²³ But a violent blow inflicted upon the body would indicate an intention of causing grievous hurt.²⁴

Where there is no evidence to indicate as to which of the accused persons actually caused the grievous hurt none of them could be convicted under this section. It may be presumed from the conduct of several persons striking another with *lathis* that each of them intended to cause grievous hurt but such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused unless it is further shown that the accused actually caused grievous hurt.²⁵

In the course of a disturbance two injuries were caused to a person, one of them grievous, and it was not possible to say which of the accused caused that injury. It was held that neither of them could be convicted under this section and both of them should be convicted only under s. 323.¹

Private defence.—In cases of grievous hurt, the question should be considered as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence,² and it would lie on the accused to show that he did not exceed that right.³

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Committal.—Where death is caused by the accused's violence, the Magistrate is bound to send the case to the Sessions Court.⁴

¹⁹ *Vasta Chela*, (1894) 19 Bom. 247; *Kaminee Dossee*, (1869) 12 W. R. (Cr.) 25; *Budri Roy*, (1875) 23 W. R. (Cr.) 65.

²⁰ *Mangal Kurmi*, (1940) 44 C. W. N. 453.

²¹ *Haji*, (1889) P. R. No. 21 of 1889.

²² *Po Maung*, (1906) 3 L. B. R. 196, 4 Cr. L. J. 202.

²³ *Purmanund Dhulia*, (1872) 18 W. R. (Cr.) 22.

²⁴ *Narayan Pasi*, (1875) 24 W. R. (Cr.) 24.

²⁵ *Dipa*, [1947] A. L. J. 268, 48 Cr. L. J. 858, dissenting from *Bishwamath*, [1945] A. L. J. 533.

¹ *Palaniswami Goundan*, [1940] M. W. N. 538, (1940) 51 L. W. 590, 41 Cr. L. J. 923, [1940] AIR (M) 586.

² *Sohnu*, (1865) 2 W. R. (Cr.) 59.

³ *Asiruddin Ahmed*, (1904) 8 C. W. N. 714, 1 Cr. L. J. 708.

⁴ *Narayan Pasi*, (1865) 24 W. R. (Cr.) 24.

Charge.—The charge should state that the hurt was caused 'voluntarily', and not 'willingly'.⁵

The charge should run as follows :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused grievous hurt to——, and thereby committed an offence punishable under s. 325 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.⁶

Punishment.—Where a person is convicted under this section of causing grievous hurt there must be a sentence of imprisonment whether a fine is imposed or not.⁷ For a case of a petty character under this section, a sentence of fine without any term of imprisonment, though irregular, is adequate punishment. And the High Court will not interfere in revision notwithstanding the irregularity of the sentence, as the revisional powers are intended for the redress of genuine grievances and not a mere formal defect.⁸ See the Whipping (Burma Amendment) Act (Burma Act VIII of 1927), s. 3, as to punishment to be inflicted by Courts in Burma.

Where the grievous injury is of a minor nature, e.g., fracture of a metacarpal bone in the right hand and is detected only four or five days after its infliction a severe sentence is not called for.⁹

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

326. Whoever, except in the case provided for by section 335.

Voluntarily causing grievous hurt by dangerous weapons or means.

voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section applies only to the person who does a substantive act himself, namely, inflicts a blow which causes grievous hurt as defined in the Code.¹⁰ The weapon used must be a deadly one and the hurt intended or known to be likely to be caused should be grievous. Where A urged B to attack C, and B stabbed C with a knife, but there was no proof that B had the knife in his hand at the time of A's urging him on, or that A knew in any other way that B would be likely to use a knife, it was held that A could not be convicted of abetting an offence under this section but only of abetting an assault.¹¹ Where the injury attributable to the blow caused by an accused was not serious and grievous hurt was caused as the result of the cumulative injuries inflicted by all the assailants, it was held that the accused could not be held guilty under this section.¹²

⁵ (1865) 2 W. R. (Cr. L.) 20.

⁶ Criminal Procedure Code, Sch. V, form xxviii.

⁷ *Venkata Subbayya*, [1942] 1 M. L. J. 595, [1942] M. W. N. 377, (1942) 35 L. W. 354 (1), 44 Cr. L. J. 65, [1942] AIR (M) 550.

⁸ *Ramchander Rai v. Ram Belas Tewari*, (1932) 14 P. L. T. 71, 34 Cr. L. J. 407, [1933] AIR (P) 179; *Ghani Sham*, (1935) 38 P. L. R.

229, 38 Cr. L. J. 180, [1937] AIR (L) 131; *Abdul Majith Sahib*, [1937] M. W. N. 575.

⁹ *Ataf Hussain Shah*, (1932) 34 P. L. R. 68, 35 Cr. L. J. 605, [1933] AIR (L) 311.

¹⁰ *Ram Sarup Rai*, (1901) 6 C. W. N. 98.

¹¹ *Tha Miga*, (1903) 4 L. R. R. 271, 8 Cr. L. J. 472.

¹² *Sanna Reddi*, (1928) 30 Cr. L. J. 167.

The relationship between this section and the preceding one is the same as that between s. 324 and s. 323. Where several accused struck the deceased blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under this section and not under s. 302.¹³ Four persons assembled together, three of them armed with spears, with the intention of attacking another party of men. One of them gave only one blow with a spear on a fleshy part of the body of one of his opponents. It was held that such injury was not necessarily fatal and he was guilty of an offence under this section.¹⁴ The accused struck one blow with a *takwa* on the head of the deceased from whom provocation had proceeded. No further advantage was taken of the fallen man. The injury was not by itself dangerous to life. The deceased died of septicaemia long after the wound was inflicted. It was held that the offence fell under this section.¹⁵ The accused fired a gun at point-blank range at the upper portion of the thigh of his victim causing a serious injury. The deceased was not killed outright but dysentery and festering of the wound supervened and he died after a couple of months. It was held that the offence committed fell under this section.¹⁶ The accused was attacked by father and son and he in return attacked both the father and son causing injuries which in the case of the father proved fatal. The doctor's opinion was that timely medical aid would have prevented the father's death. It was held that the offence of the accused fell under this section and sentence of one year's rigorous imprisonment was sufficient.¹⁷ The accused were hillmen and three of them were devil dancers who attempted, at one C's request or at any rate with his consent, to dispossess C's wife of a devil by applying a hot ladle to her mouth and throat and to various parts of her body, with the result that she died. C subsequently became frightened and buried the body of his wife. It was held that this section and not s. 304A applied, and that the hurt was grievous because it endangered life.¹⁸ A fight took place between the accused and another person on one side and two other persons on the other. The deceased came and intervened. The accused had a spear in his hand and by accident he stabbed the deceased while he was separating the persons who were fighting with one another. It was held that he was guilty under this section and not under s. 304A.¹⁹

PRACTICE.

Evidence.—Prove (1) the causing of grievous hurt by the accused.²⁰

(2) That it was caused voluntarily.²¹

(3) That the accused received no provocation for the same.

(4) That such grievous hurt was caused by means of an instrument for shooting, etc., or by means of any instrument which, used as a weapon of offence, is likely to cause death; or by means of fire, etc., or by means of any poison, etc., or by means of any substance which it is deleterious to the human body to inhale, etc., or by means of any animal.

Procedure.—Cognizable—Summons—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge under ss. 326 and 149, but conviction under s. 326.—A full bench of the Madras High Court has held, differing from the Calcutta High Court, that when a charge has been framed under ss. 326 and 149, a conviction under s. 326 is not necessarily bad. Whether the conviction is bad or not depends upon whether the accused has or has not been materially prejudiced by the form of the charge.²²

¹³ *Gouridas Namasudra*, (1908) 36 Cal. 659.

¹⁴ *Fatleh Khan*, (1930) 32 Cr. L. J. 342, [1930] AIR (L) 950.

¹⁵ *Gajjan Singh*, (1930) 33 Cr. L. J. 183, [1931] AIR (L) 163.

¹⁶ *Zora Singh*, (1928) 31 Cr. L. J. 44, [1929] AIR (L) 433.

¹⁷ *Teja Singh*, (1933) 34 P. L. R. 961, 35 Cr. L. J. 90, [1933] AIR (L) 733.

¹⁸ *Pan Singh*, (1934) 36 Cr. L. J. 346, [1935] AIR (A) 282.

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¹⁹ *Chhallu*, [1941] All. 441.

²⁰ *Vide* s. 325, sup.

²¹ *Khudiram Dass*, (1906) 12 C. W. N. 530, 7 Cr. L. J. 362, F.B.

²² *Theethumalai Gounder*, (1924) 47 Mad. 746, F.B. See *Bhodu Das*, (1928) 7 Pat. 758, where the accused were charged and convicted by a Magistrate under ss. 326 and 149, but on appeal the conviction was altered to one under ss. 326 and 34.

Evidence of medical man necessary.—In all cases of voluntarily causing grievous hurt the evidence of the medical officer who examined and attended on the person to whom the hurt was caused should, if obtainable without unreasonable expense or delay, invariably be taken.²³

Punishment for nose-cutting.—The accused was tried by a Presidency Magistrate on a charge of voluntarily causing grievous hurt by cutting off with a penknife the whole of the soft part of a woman's nose and a portion of her upper lip, and sentenced to rigorous imprisonment for two years. The High Court, quashing the conviction and sentence, held that the offence of which the accused was convicted being one punishable with transportation for life, or rigorous imprisonment for ten years, the Magistrate ought to have committed the accused for trial to the High Court. The case was afterwards committed to the Court of Session and the accused was sentenced to eight years' rigorous imprisonment.²⁴ The amount of punishment for cutting off a wife's nose for intriguing with another man depends on the time of the commission of the grievous hurt, whether at the instant, or long after the husband found himself dishonoured.²⁵ Where the accused was convicted of cutting his wife's nose under grave and sudden provocation and was sentenced to rigorous imprisonment for four months, the High Court enhanced the sentence to two years' rigorous imprisonment as there was a deliberate design on the part of the accused.¹ Where the accused suspecting his wife of immorality cut off her nose with an axe, and she straightaway went to a well and ended her life by jumping into it, the sentence of four months' rigorous imprisonment was enhanced to two years.² Where a mistress refused to accompany her paramour, who got enraged and bit off the tip of her nose and dislocated one of her teeth, a sentence of two months' rigorous imprisonment was enhanced to one of fourteen months.³ Where the accused suspecting his wife of immorality abandoned her, and later finding her in a field the accused's brother pulled her down and sat upon her and the accused cut off her nose with a sickle, the sentence was enhanced from one year's rigorous imprisonment to two years.⁴ Beaumont, C. J., observed: "Offences of this nature against women are to be severely discouraged." The Chief Court of Sind in a nose-cutting case enhanced the sentence of one year's imprisonment to two years even after the accused had undergone the imprisonment of one year and was released, he was sent back to prison.⁵ Cases of nose-cutting involve an act which imports deliberate design of a particularly brutal and cruel character, and therefore they must be adequately dealt with.⁶ See the Burma Laws Act, 1898, s. 1.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Burma circular (1).—The attention of Magistrates is called to the advisability of passing really deterrent sentences in cases in which hurt is caused by a knife or other deadly weapon. The use of knives on the slightest provocation, and often without any provocation at all, is far too frequent in this province. The most likely method of suppressing this dangerous practice is to make the punishment severe and certain. Many cases of this kind have come to the notice of the Hon'ble Judges in which inadequate sentences have been passed.⁷

(2) Where an accused is sent up for trial under s. 326, Indian Penal Code, for causing grievous hurt with a deadly weapon, a reference should always be made to the District Magistrate, in order that he may, if he thinks fit, try the case in exercise of his special powers or transfer it to a Special Power Magistrate for trial. Many cases of this kind are hardly distinguishable from attempts to murder, punishable under s. 307 of the Penal Code. Magistrates, other than the District Magistrate or a

²³ *Nga Chet*, (1884) S. J. L. B. 292.

²⁴ *Abdul Rahiman*, (1891) 16 Bom. 580.

²⁵ *Sulamut Russoo*, (1865) 4 W. R. (Cr.) 17.

¹ *Bhagwan Chhagan*, (1914) 17 Bom. L. R. 68, 16 Cr. L. J. 168, [1915] AIR (B) 120; *Ismail Umar*, (1938) 40 Bom. L. R. 832, 39 Cr. L. J. 928, [1938] AIR (B) 430.

² *Mahadeo Balappa Shivapurdawar*, (1941) Criminal Revision No. 330 of 1941, decided by Broomfield and Wassoodew, JJ., on September 24, 1941 (Unrep. Bom.).

³ *Mallappa Gwappa*, (1942) Criminal

Revision Application No. 477 of 1941, decided by Beaumont, C. J., and Sen, J., on January 27, 1942 (Unrep. Bom.).

⁴ *Ramappa Yemanappa*, (1942) Criminal Reference No. 62 of 1942, decided by Beaumont, C. J., and Wassoodew, J., on September 7, 1942 (Unrep. Bom.).

⁵ *Bhano*, [1944] Kar. 103.

⁶ *Ismail Umar*, (1938) 40 Bom. L. R. 832, 39 Cr. L. J. 928, [1938] AIR (B) 430.

⁷ B. C. M., s. 721, p. 295.

Magistrate specially empowered under s. 30, can rarely impose a sufficiently severe sentence in these cases.⁸

Charge.—See the remarks under the heading ‘Charge’ in s. 324, *supra*.

327. Whoever voluntarily¹ causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer,² any property or valuable security,³ or of constraining⁴ the sufferer or any person interested in such sufferer to do anything which is illegal,⁵ or which may facilitate the commission of an offence⁶, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section applies not only in cases of execrable cruelties which are committed by robbers, dacoits, etc., for the purpose of extorting property, or information relating to property, but to all cases in which the hurt is caused for the purpose of extorting, or compelling, against the sufferer’s consent, the delivery of property, notwithstanding that the offender may have a valid claim or title to such property.

1. ‘Voluntarily.’—See s. 39, *supra*.

2. ‘Person interested in the sufferer.’—Any tie of blood relationship, marriage, service, or even friendship, seems sufficient. The Court must ascertain for what purpose the suffering was caused, whether it was directed wholly at the sufferer or at another through him.⁹

3. ‘Valuable security.’—See s. 30, *supra*.

4. ‘Constraining.’—This word seems to have been inserted with a view to make this section applicable to all cases where, if ‘extortion’ could not be proved, a compelling or constraining against the sufferer’s consent would equally be an offence.

5. ‘Illegal.’—See s. 44, *supra*.

6. ‘Offence.’—The word ‘offence’ here denotes a thing punishable under this Code or under any special or local law (s. 40).

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt.¹⁰

(2) That the accused caused such hurt in order to extort from the sufferer, or person interested in him, some property or valuable security; or

that the accused caused such hurt in order to constrain the sufferer, or a person interested in him, to do something illegal, or to facilitate the commission of an offence.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, voluntarily caused hurt to AB for the purpose of extorting from the said AB [*or from a certain person interested in the said AB*], to wit—, a certain property, to wit—, and thereby committed an offence punishable under s. 327 of the Indian Penal Code, and within the cognizance of the Court of Session [*or the High Court*].

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—See the Criminal Tribes Act (II of 1897), s. 6, and the Burma Laws Act, 1898, s. 4.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

⁸ B. C. M., s. 328, p. 89.

⁹ M. & M. 294.

¹⁰ *Vide* s. 323, *sup*.

328. Whoever administers to or causes to be taken by¹ any person² any poison or any stupefying, intoxicating or unwholesome drug, or other thing³ with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence⁴ or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing hurt by means of poison, etc., with intent to commit an offence.

COMMENT.

This section is merely an extension of the provisions of s. 324. Under s. 324 actual causing of hurt is essential.

The offence under this section is complete even if no hurt is caused to the person to whom the poison or any other stupefying, intoxicating, or unwholesome drug is administered.

1. 'Administers to or causes to be taken by'.—The word 'administers' and the expression 'causes to be taken' are used to include every possible case of taking an unwholesome drug. Mere procuring or supplying a poisonous drug at the instigation of a person who wishes to take it does not amount to the offence of administering it.¹¹ At the same time to constitute administering, it is not necessary that the poison should be delivered by the hand of the party.¹² If a servant put poison into a coffee-pot which contains coffee, and, when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her breakfast, and the mistress drinks the poisoned coffee, this will amount to 'administering' poison.

Putting poison in a place where it is likely to be found and taken is an attempt to administer the poison. Where the accused purchased some "salts of sorrel" and put it in the complainant's sugar-basin, mixing it with the sugar, and the complainant subsequently put some of the mixture into his tea, but on tasting it, discovered that there was something wrong, and on investigation poison was discovered, it was held that this constituted an attempt to administer poison.¹³

One E being pregnant applied to the accused to get her something to procure miscarriage, and the accused procured a drug and gave it to the deceased. The drug was taken by E but not in the presence of the accused, and it procured miscarriage. It was held that the accused was guilty of administering and causing to be taken certain poison with intent to procure miscarriage.¹⁴

Where a deleterious drug is administered, an offence is committed under this section although life is not endangered.¹⁵ Thus, where a man administered the juice of some leaves to some villagers by way of ordeal and some of them showed symptoms of poison,¹⁶ and where the accused administered powder of *dhatūra* to a woman and robbed her of her jewellery while she was senseless,¹⁷ this offence was held to have been committed. Where, for the purpose of facilitating robbery, *dhatūra* was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, it was held that, in respect of the traveller who died, the offence committed was that punishable under s. 325, and, in respect of the travellers who did not die, the offence committed was that under this section.¹⁸ But in a subsequent case the same High Court, where *dhatūra* was administered with the object of facilitating robbery in such quantity that the person to whom it was given died in the course of a few hours, convicted the accused of murder under s. 302.¹⁹ The Bombay High Court has held likewise.²⁰

Where the death of the victim was due not to *dhatūra* poison found to have been administered by the accused but to pneumonia consequent upon exposure occu-

¹¹ *Fretwell's Case*, (1862) L. & C. 161, 31 L. J. (M. C.) 145.

¹² *Harley*, (1880) 4 C. & P. 269.

¹³ *Dale*, (1852) 6 Cox 14.

¹⁴ *Wilson's Case*, (1856) Dears & Bell 127; *Farrow's Case*, (1857) Dears. & Bell 164.

¹⁵ *Joygopal*, (1865) 4 W. R. (Cr.) 4.

¹⁶ *Dasi Pitchigadu*, (1883) 1 Weir 335.

¹⁷ *Nanjundappa*, Weir, 3rd Edn., 197.

¹⁸ *Bhagwan Din*, (1908) 30 All. 568.

¹⁹ *Gutali*, (1908) 31 All. 148; *Gauri Shankar*, (1918) 40 All. 360; *Nanku*, (1923) 45 All. 557.

²⁰ *Shetya*, (1926) 28 Bom. L. R. 1003, 27 Cr. L. J. 1134, [1926] AIR (B) 518.

sioned by coma or unconsciousness produced by the poison and in fact the victim died of pneumonia after recovering from *dhatura* poisoning, it was held that the accused ought to be convicted not under s. 302 but under this section.²¹

As *dhatura* can both be and is in practice frequently used by robbers without fatal results, it is necessary to show against a person accused of a purpose to commit robbery with murder something more than that he proposed to administer, or did on a particular occasion administer, *dhatura* in order to effect his purpose of robbery, though it may not be absolutely necessary to show that on any occasion culpable homicide amounting to murder was in fact committed.²²

Where the accused administered a drug to a female to excite her sexual passion and desire, in order that he may have sexual connection with her, it was held that he had administered an unwholesome drug.²³

2. 'Any person.'—It is not necessary that the hurt should be caused to any particular person intended, or that the person injured or likely to be injured should have been previously known. Where the accused mixed milk bush juice in his toddy pots, knowing that if drunk by a person it would cause injury, with the intention of detecting an unknown thief who was always in the habit of stealing his toddy, and the toddy was drunk by some soldiers, who purchased it from an unknown vendor, it was held that he was guilty under this section.²⁴

3. 'Or other thing.'—These words must be referred to the preceding words and be taken to mean "unwholesome or other thing" and not "other thing" simply.²⁵

4. 'With intent to cause hurt...or to facilitate the commission of an offence.'—The word 'offence' here denotes a thing punishable under this Code or under any special or local law (s. 40). If the poison or unwholesome drug is administered not with the intention of causing hurt or to commit an offence, the accused cannot be convicted under this section. Accused, a boy of sixteen years of age, having become infatuated with a girl of thirteen, persuaded another boy younger than him to make the girl eat some sweets containing *dhatura*, which accused wrongly believed would act as a love philtre. Evidently there was no intention on the accused's part to cause hurt to any person, but, as a result of the administration of the drug, the girl was thrown into a delirium for some time with the possible risk of falling into a coma. It was held that the offence did not fall within this section but the accused must be deemed to have had knowledge that the administering of the drug was likely to cause hurt within the meaning of s. 319.¹ Where a boy of twenty years administered *dhatura* to three persons at the instance of another person and the three persons suffered from the effects of the poison, but were saved by prompt measures taken by their neighbours, the Court convicted him owing to his youth under this section instead of under s. 307 on the ground that there was a probability of his becoming a fit member of society.² Where a wife, not knowing the dangerous properties of aconite powder, administered it to her husband, by mixing it with his food and in consequence the husband died, it was held that she could not be found guilty of murder, but, inasmuch as her intention was to cause bodily infirmity to her husband by depriving him of his will power and so bringing him completely under her domination, she had committed an offence under this section.³

PRACTICE.

Evidence.—Prove (1) that the substance in question is a poison, or any stupefying, intoxicating, or unwholesome drug, etc.

(2) That the accused administered or caused the complainant to take such substance.

(3) That he did as above with intent to cause hurt or knowing it to be likely that he would thereby cause hurt or that the accused intended to commit or facilitate the commission of an offence.⁴

²¹ *Venkatachalam Chetty*, [1941] 2 M. L. J. 461, [1941] M. W. N. 1038, (1941) 43 Cr. L. J. 320, [1942] AIR (M) 100.

²² *Pira*, (1881) P. R. No. 28 of 1881.

²³ *Wilkins*, (1861) 31 L. J. (M. C.) 72, 9 Cox 20.

²⁴ *Dhanja Daji*, (1868) 5 B. H. C. (Cr. C.) 59.

²⁵ *Jotee Ghoraee*, (1864) 1 W. R. (Cr.) 7.

¹ *Anis Beg*, (1923) 46 All. 77.

² *Israil Mahto*, (1931) 32 Cr. L. J. 1228, [1931] AIR (P) 346, s.b.

³ *Hanumakka*, [1943] Mad. 679.

⁴ *Muruga Goundan*, (1914) 15 Cr. L. J. 599.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, administered to (*or caused to be taken by*) AB a certain poison (*or a certain stupefying, intoxicating or unwholesome drug*), to wit—, with intent to cause (*or knowing it to be likely that you will thereby cause*) hurt to the said AB (*or with intent to commit or facilitate the commission of the offence of—upon the said AB*), and thereby committed an offence punishable under s. 328 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—See the Criminal Tribes Act, 1897, s. 6; the Frontier Crimes Regulation, 1901, ss. 11 (3) (d) and 12(2).

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

329. Whoever voluntarily causes grievous hurt for the purpose

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

of extorting from the sufferer, or from any person interested in the sufferer any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

See Comment on s. 327, *supra*. This section is similar to that section, the only difference being that the hurt caused under it is grievous.

PRACTICE.

Evidence.—Prove (1) that the accused caused grievous hurt.⁵

(2) That the accused caused such grievous hurt in order to extort from the sufferer, or a person interested in him, some property or valuable security; or that the accused caused such grievous hurt in order to constrain the sufferer, or a person interested in him, to do something illegal, or to facilitate the commission of an offence.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should be in the same form as that under s. 327, except that the expression 'grievous hurt' should be substituted for 'hurt.'

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

330. Whoever voluntarily¹ causes hurt, for the purpose of ex-

Voluntarily causing hurt to extort confession, or to compel restoration of property.

torting from the sufferer, or from any person interested in the sufferer,² any confession or any information which may lead to the detection of an offence³ or misconduct, or for the purpose of constraining⁴ the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security⁵ or to satisfy any claim or demand,⁶ or to give information which may lead to the restoration of any property or valuable security,

⁵ Vide s. 325, *sup*.

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

ILLUSTRATIONS.

(a) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(b) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(d) A, a zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

COMMENT.

The offence which this section intends to describe is that of inducing a person by hurt to make a statement, or a confession, having reference to an offence or misconduct; and whether that offence or misconduct has been committed is wholly immaterial.⁶ The principal object of this section is to prevent torture by the police. But the section covers every kind of torture for whatever purpose it may be intended.

The information sought for may be required for the advancement of justice—nay more, it may be such information as cannot be withheld without offending against public justice—the property, the extortion of which is sought, may be property which the sufferer has borrowed from the offender and which he illegally refuses to give back—the claim or demand may be a just claim—but the law will not tolerate the employment of such means as are here made punishable, even when for an honest end.⁷

1. 'Voluntarily.'—See s. 39, *supra*.

2. 'Person interested in the sufferer.'—See s. 327, *supra*.

3. 'Offence.'—The word 'offence' here denotes a thing punishable under this Code, or under any special or local law (s. 40). It must be proved that the hurt to the complainant was caused with intent to extort a confession of some offence or misconduct punishable under the Code. The accused seized three women, took them to the house of one of them, and there tortured the woman by pouring hot oil over them, and otherwise ill-treating them. One of these women subsequently threw herself down a well and died. It was alleged that cholera was prevalent in the village and that the accused believing that these women practised witchcraft, tortured them for the purpose of extorting a confession that they were witches. It was held that the accused could not legally be convicted under this section, but they were guilty of hurt.⁸

Police torture.—Where the accused, a constable, during an inquiry into a theft case, violently beat the deceased, who died about nine days afterwards from the effects of the beating, it was held that he was guilty under this section.⁹ Under similar circumstances when death resulted from injuries which were of the nature of grievous hurt the accused was convicted under the next section.¹⁰

4. 'Constraining.'—See s. 327, *supra*.

5. 'Valuable security.'—See s. 30, *supra*.

6. 'Demand.'—Under this section the 'demand' must be one with respect to property. Hence, where the accused, in order to constrain his wife to return to his house, caused hurt to her, s. 324, and not this section, was held to apply.¹¹

Abetment.—Where a policeman stood by and acquiesced in an assault on a prisoner committed by another policeman for the purpose of extorting a confession, it was held that he was guilty of abetment of an offence under this section.¹²

⁶ *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41, 44.

⁷ M. & M. 297.

⁸ *Baboo Moondu*, (1870) 13 W. R. (Cr.) 23.

⁹ *Mecah Mahomed*, (1866) P. R. No. 86 of 1866. See *Mehar Ali*, (1885) 11 Cal. 530.

¹⁰ *Miran Baksh*, (1916) 18 Cr. L. J. 710, [1917] AIR (L) 342.

¹¹ *Ella Boyan*, (1887) 11 Mad. 257; *Maula Bakhsh*, (1923) 24 Cr. L. J. 576, [1924] AIR (L) 167.

¹² *Latifkhan*, (1895) 20 Bom. 394; *Dinanath*, [1940] Nag. 232. *Parmanand*, [1941] Nag. 110, omits this point from the judgment but it appears in [1940] N. L. J. 459.

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt.¹³

(2) That the accused caused such hurt in order to extort from the sufferer, or a person interested in him, a confession, or some information.¹⁴

(3) That such confession or information was required, as possibly leading to the detection of an offence, or of some misconduct.

Or prove—

(1) As above.

(2) That the accused caused such hurt in order to constrain the sufferer, or a person interested in him, to restore or to cause the restoration of some property, or valuable security, etc.

There must be immediate connection between the assault and the restoration of property. The intention of the person causing the assault must be proved to be to obtain from the person assaulted a confession of the restoration of property.¹⁵

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, voluntarily caused hurt to AB for the purpose of extorting from the said AB (*or from a certain person interested in the said AB, to wit—*) a certain confession (*or information*) to wit—, which might lead to the detection of the offence of—(*specify the person in respect of whom, and the place where, the offence was committed*), and thereby committed an offence punishable under s. 330 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—The law draws a great distinction between simple hurt caused in the ordinary way and simple hurt caused for the purpose of extorting a confession or making an accused person recover any property. The causing of hurt by a responsible police-officer engaged in the investigation of a crime is one of the most serious offences known to law and deterrent punishment should be inflicted on the offender.¹⁶

331. Whoever voluntarily causes grievous hurt for the purpose

Voluntarily causing grievous hurt to extort confession, or to compel restoration of property.

of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

See Comment on the preceding section. This section is similar to the preceding section except that the hurt caused under it should be 'grievous.'

PRACTICE.

Evidence.—Prove the same points as those required for s. 330, showing that the hurt caused was grievous hurt.¹⁷

¹³ *Vide*, s. 323, sup.

¹⁴ *Baboo Moondu*, (1870) 18 W. R. (Cr.) 23.

¹⁵ *Satyaj Deva Swami*, (1918) 19 Cr. L. J. 740, [1918] AIR (P) 643.

¹⁶ *Lal Muhammad*, (1935) 38 P. L. R. 689, 37 Cr. L. J. 811, [1936] AIR (L) 471.

¹⁷ *Vide*, s. 325, sup.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 330. In the charge as given under that section substitute 'grievous hurt' for 'hurt.'

332. Whoever voluntarily¹ causes hurt to any person being a public servant² in the discharge of his duty as such public servant,³ or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The protection given by this section is not confined to public servants, but will also extend to persons acting in good faith under their directions. The public servant must be acting in the discharge of his duty as such public servant. If he was acting for his own private work no offence would be committed.¹⁸

This section resembles s. 353. Under it there is causing of hurt to the public servant: under s. 353 there is assault or criminal force for the same purpose.

1. 'Voluntarily.'—See s. 39, *supra*. 2. 'Public servant.'—See s. 21, *supra*.

3. 'In the discharge of his duty as such public servant.'—This expression means in the discharge of a duty imposed by law on such public servant in the particular case, and does not cover an act done by him in good faith under colour of his office.¹⁹ A person cannot be said to be discharging official duties merely because he is in official garb.²⁰ No official can seek the shelter of this section, where the accused has tried to resist an illegal act on his part.²¹ "A warrant", for example, "is handed to a Police-officer for the arrest of a particular person. That warrant on the face of it does not direct him to break open premises, for instance, in order to effect the arrest, and yet it may be necessary for the officer in discharge of his duty in arresting the accused under the warrant to break into the accused's house, or to do some other act without the doing of which the warrant could not be executed. Such acts would be properly described as done or attempted to be done by the Police-officer in the lawful discharge of his duty. If it was unnecessary to do such an act and yet it was done, the act would not be done by the Police-officer in the lawful discharge of his duty, and therefore would not be covered by the concluding portion of s. 332."²² Where a constable has no warrant of arrest in his possession at the time of the assault nor has he been entrusted with the duty of arresting the accused at the time when the assault was made upon him, he cannot be said to have been acting in the discharge of his duty even if he intended or wanted to arrest the accused.²³

A warrant was issued by a Magistrate for the arrest of D under s. 114 of the Criminal Procedure Code. The warrant was sent to a *thana* to be executed. It was there, after being copied into a book kept for that purpose at the *thana*, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the *thana*, it was discovered that D was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the *thana* made a copy from the book at the *thana*; endorsed on the back the names of one N and some other constables, and having signed the endorsement sent N and the others out with this paper to arrest D. N and his companions arrested D; but, as they were returning with him in custody, some of D's friends, aided by D himself, attacked them, rescued D, and caused hurt to the police. It was held that the police-

¹⁸ *Hardit Singh*, (1911) 12 P. L. R. 588, 12 Cr. L. J. 236.

¹⁹ *Dalip*, (1896) 18 All. 246; *Madho*, (1917) 40 All. 28.

²⁰ *Appareemai Goundan*, [1936] M. W. N. 892.

²¹ *Nurn*, (1932) 33 P. L. R. 1065, 34 Cr. L.

J. 460, [1933] AIR (L) 162.

²² Per Edge, C. J., in *Dalip*, (1896) 18 All. 246, 250, 251; *Madar Sahib*, (1929) 53 Mad. 508; *Gaya Din*, (1934) 9 Luck. 517.

²³ *Raghubar*, [1941] O. W. N. 602, 42 Cr. L. J. 501, [1941] AIR (O) 385.

officers concerned in arresting D under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of this section so as to render the accused liable to conviction under it; but inasmuch as they were acting in good faith under colour of their office, s. 99 applied, and D and his associates might properly be convicted under ss. 147 and 323.²⁴ An Excise Inspector, in searching the house of a person, under the suspicion that he would find cocaine there, committed many irregularities. He had no warrant authorizing him to make the search, he had brought only one search witness and he had directed a constable to scale the outer wall of the house. The accused assaulted and beat him. It was held that the Inspector and the constables were not acting in the discharge of their duties as public servants and the accused were not guilty of an offence under this section, but were guilty of an offence punishable under s. 323.²⁵ Where a person is arrested for an offence not really under a warrant, the mere fact that a warrant had been issued for his arrest, which warrant had been executed against other persons who have since been convicted, can hardly be put forward as a justification for the arrest.¹ Where an order issued by a Magistrate had ceased to have effect, a constable in carrying out the order could not be said to have been acting in the discharge of a duty imposed by law on him, and no conviction could take place under this section.² If hurt is caused the accused may be convicted under s. 323. Playing cards in a street is no offence under s. 34 of the Police Act and a constable prohibiting people from playing cards in a street is not acting in the discharge of his duty. Players assaulting the constable are not guilty of an offence under this section but under s. 323.³

A police constable investigating a charge of burglary under s. 457 is empowered, under s. 54 of the Criminal Procedure Code, to arrest, without an order from a Magistrate or his superior officer, persons against whom a reasonable suspicion of having been concerned in the burglary exists, and if any of such persons resists the wish of the constable by force he is guilty of an offence under this section, if he causes hurt; or under s. 353, if an assault is simply committed and he is not protected under s. 99. But in the case of a scuffle merely a small fine is quite sufficient to meet the ends of justice.⁴ A police-officer authorized to investigate a charge of theft has a right to make a search, which is incidental to his right to investigate. In conducting the search, however, if he ignores the provisions of s. 103 of the Criminal Procedure Code and the accused offer resistance they are not guilty of an offence under this section, for the officer so resisted would not be at the time acting in the discharge of his duty.⁵ While a very evenly contested wrestling match was going on, one of the constables, who had been invited by the organizers of the show to keep peace and order and who was a backer of one of the contestants, interfered with the wrestling, with the result that a scuffle followed in which some of the policemen were hustled by the accused and their uniform torn, it was held that it was very difficult to resist rushing to the arena when a constable who was also a backer was interfering, but that, however, would not justify the action of the accused.⁶ Where the accused offered resistance and caused hurt to certain police-officers who in execution of a warrant under s. 88 of the Criminal Procedure Code attempted to dig walls to remove doors and door-frames, it was held that the police-officers were not acting legally and therefore no offence under this section was committed.⁷ On receiving information that the accused were in possession of illicit liquor, an Excise Inspector searched the house of the accused. Two constables who had been posted near the house prevented the accused from entering into the house saying that they should enter it after the search was over. On a scuffle which ensued the accused and constables received injuries. The accused were convicted under this section. It was held that the constables acted not in the dis-

²⁴ *Dalip*, (1896) 18 All. 246; *Nand Kishore*, (1891) 12 A. W. N. 1, though not expressly overruled by this case, yet it is considered to have laid down bad law.

²⁵ *Mukhtar Ahmad*, (1915) 37 All. 353; *Mir Shah Nawaz Khan*, (1913) 8 S. L. R. 1, 16 Cr. L. J. 15.

¹ *Abdool Karim*, (1905) 4 C. L. J. 92, 4 Cr. L. J. 71. See *Chunder Coomar Sen*, (1899) 3 C. W. N. 605.

² *Madho*, (1917) 40 All. 28.

³ *Mul Chand*, (1926) 27 P. L. R. 74, 27 Cr. L. J. 377, [1926] AIR (L) 250.

⁴ *Yusuf*, (1910) P. R. No. 18 of 1910, 11 Cr. L. J. 423. See *Mahomed Yakob*, (1910) 11 Cr. L. J. 221.

⁵ *Nirmal Singh*, (1919) 42 All. 67.

⁶ *Miran*, (1925) 23 A. L. J. R. 1027, 27 Cr. L. J. 240 [1926] AIR (A) 168.

⁷ *Ramji Ahir*, (1930) 11 P. L. T. 878, 31 Cr. L. J. 937, [1930] AIR (P) 387.

charge of their duty, which was to allow the accused to enter into the house and be present at the time of the search, but in contravention of the mandatory provisions of s. 103, Criminal Procedure Code, and were not justified in offering physical resistance when the accused attempted to go into their house and therefore this section did not apply.⁸

A police-officer helping another outside his own jurisdiction but in the same district is to be deemed to be doing his duty as a public servant, and a person obstructing such officer is punishable under this section, because under s. 11, Sch. B, of the Bombay District Police Act, 1890, police-officers of every grade are appointed to the entire district in which they have to serve, and under s. 32 of the Act a police-officer is to be deemed to be always on duty in the area to which he is appointed.⁹ But where a police constable who was not on duty went to a show and was assaulted and injured by the accused, it was held that the accused was guilty under s. 323 and not under this section.¹⁰

Where a village official was dragged to a house, was asked to make certain entries in his papers, and was beaten by the accused when he refused to do so, and it was held that the accused intended to prevent or deter the village official from discharging his duties as a public servant and were guilty under this section.¹¹ In the investigation of a case under s. 363 a Sub-Inspector went to the House of the accused and asked them to produce the kidnapped girl, and one R, who was said to have kidnapped her. The accused denied the presence of these two persons in their house, whereupon the Sub-Inspector said that he would search the house. The accused then dragged the Sub-Inspector inside the house and assaulted him. The Sub-Inspector had no warrant under s. 100, Criminal Procedure Code. It was held that the accused were guilty under this section as the Sub-Inspector was empowered under ss. 47, 48, 54 and 165. Criminal Procedure Code, to act as he did.¹²

Blow with umbrella amounts to 'hurt.'—Where a blow was struck by the accused with an umbrella to a public servant it was held that this offence was committed.¹³

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt.¹⁴

(2) That the person so hurt was a public servant.

(3) That such public servant was then discharging his duty as such.¹⁵

Or prove—

(1) and (2) as above, and further

(3) That the accused did so, with intent to prevent or deter such public servant or any other public servant, from discharging his duty;¹⁶ or that he did so in consequence of something done, or attempted to be done, by such public servant, in the lawful discharge of his duty.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (name and office of Magistrate, etc.) hereby charge you (name of accused) as follows :—

That you, on or about the——day of——, at——, voluntarily caused hurt to one AB, a public servant, in the discharge of his duty as such public servant, and thereby committed an offence punishable under s. 332 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—See the Criminal Tribes Act (II of 1897), s. 6.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

⁸ *Bhikugir*, [1932] A. L. J. R. 530, 34 Cr. L. J. 439, [1932] AIR (A) 449.

⁹ *Khairo*, (1924) 18 S. L. R. 221, 25 Cr. L. J. 1377, [1925] AIR (S) 204.

¹⁰ *Megharaj*, (1935) 37 Cr. L. J. 375.

¹¹ *Gaya Prasad*, [1941] O. W. N. 82, (1941) 42 Cr. L. J. 321, [1941] AIR (O) 267.

¹² *Luchuman Singh*, (1941) 43 Cr. L. J. 279, [1942] AIR (P) 281.

¹³ *Government of Bengal v. Sheo Gholam Lalla*, (1875) 24 W. R. (Cr.) 67.

¹⁴ *Idem* s. 323, sup.

¹⁵ *Sampat*, (1917) 15 A. L. J. R. 565, 18 Cr. L. J. 803, [1917] AIR (A) 54; *Ranjha Mal*, (1927) 29 P. L. R. 284, 28 Cr. L. J. 993, [1927] AIR (L) 706.

¹⁶ *Kishen Lal*, (1924) 22 A. L. J. R. 501, 26 Cr. L. J. 501, [1924] AIR (A) 645.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section provides for the aggravated form of the offence which the preceding section deals with. The hurt caused under it must be grievous. The section contemplates three categories. First, when grievous hurt is caused while the public servant is in the discharge of his duty as such public servant : in this case motive and object are irrelevant. Secondly, when a public servant is prevented or deterred from discharging his duty as such public servant : in this case it is necessary that the object of the accused should be to deter the public servant from discharging his duty but it is not necessary to prove any motive. Thirdly, when the public servant is assaulted in consequence of anything done or attempted to be done by that public servant in the discharge of his duty : in this case it is not necessary that the public servant should be discharging his duty at the time of the assault. The object, too, is irrelevant. The only thing that has got to be seen is the motive.¹⁷

See Comment on the preceding section.

Public servant must be acting in discharge of his legal duties.—Two village watchmen arrested one F on suspicion that he was in possession of stolen property. While he was being taken to the police-station he was rescued from the custody of the watchmen by certain persons. It was held that the watchmen were not members of the police force, and had no authority to arrest F on mere suspicion inasmuch as the statute whereunder they had been appointed was repealed; and that F could not be convicted under this section because it was necessary to make out that F and the actual rescuers were acting in pursuance of a common intention within the meaning of s. 34.¹⁸

PRACTICE.

Evidence.—Prove the same points as those for s. 332, showing that the hurt caused was grievous hurt.¹⁹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 332.

Punishment.—See the Criminal Tribes Act (II of 1897), s. 6; the Burma Laws Act (1898), s. 4.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

334 Whoever voluntarily causes hurt on grave and sudden provocation,¹ if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Voluntarily causing hurt on provocation.

¹⁷ *Bandhoo Ahir*, (1935) 36 Cr. L. J. 964, 965, [1935] AIR (A) 563.

²⁸ *Jafar*, (1916) 14 A. L. J. R. 789, 17 Cr. L. J.

529, [1916] AIR (A) 253; *Gamun*, (1929) 31 P. L. R. 285, 31 Cr. L. J. 294, [1930] AIR (L) 348.

¹⁹ *Vide* s. 325, sup.

COMMENT.

This section serves as a proviso to ss. 323 and 324.

Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under this section, and not under s. 324.²⁰

1. 'Grave and sudden provocation.'—See Comment on s. 300, Exception 1.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.

(2) That it was caused when he was under grave and sudden provocation.

(3) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The burden of proving sudden provocation, and that the accused neither intended nor knew that he was likely to cause hurt to any person other than the person giving the provocation, would lie on the accused.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation,¹ if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300.

COMMENT.

This section serves as a proviso to ss. 325 and 326.

1. 'Grave and sudden provocation.'—See Comment on s. 300, Exception 1. The provocation and its effects must be sudden as well as grave: and the deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation.²¹ If the particular act of which the accused is found guilty is one which imports deliberate design, the plea of grave and sudden provocation has not the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be. Thus, where the accused cut the nose of his wife with deliberate design, the High Court enhanced the sentence to two years' rigorous imprisonment though there was grave provocation.²²

Cases.—**Sudden provocation.**—A person who, by a single blow with a deadly weapon, killed another, entering at dead of night into a dark room where he and his wife were sleeping separately, for the purpose of having criminal intercourse with her, was held guilty of causing grievous hurt on grave and sudden provocation.²³ Where the accused gave a blow on the back of another person who was abusing the accused after he had made overtures to a woman who was related to the accused and his enlarged spleen got ruptured and he died, it was held that the accused was guilty of an offence under this section.²⁴

Not sudden provocation.—A husband, suspecting his wife of infidelity, hid himself so as to see her with her paramour, and, having seen an improper act being committed, he came out and caused grievous hurt to the wife. It was held that assuming the provocation to be 'grave' it was not 'sudden' within the meaning of this section.²⁵

²⁰ *Bhala Chula*, (1868) 1 B. H. C. 17.

²¹ *Bechoo Saout*, (1873) 19 W. R. (Cr.) 85.

²² *Bhagwan Chhagan*, (1914) 17 Bom. L. R. 68, 16 Cr. L. J. 168, [1915] AIR (B) 120.

²³ *Chullundee Poramanick*, (1865) 3 W. R.

(Cr.) 55.

²⁴ *Lal Baksh*, (1944) 46 P. L. R. 379, 46 Cr. L. J. 736, [1945] AIR (L) 43.

²⁵ *Ramzani*, (1889) 9 A. W. N. 9.

Amendment.—The word ‘voluntarily’ was inserted by the Indian Penal Code Amendment Act (VIII of 1882), s. 8. As to the meaning of this word see s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.

(2) That he did so with the intention or knowledge of causing grievous hurt.

(3) That it was caused when he was under grave and sudden provocation.

(4) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The onus of proving sudden provocation, etc., would, as in s. 334, lie on the accused.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, voluntarily caused grievous hurt to XY on grave and sudden provocation given to you by the said XY [*or if the person hurt is another say so*] on grave and sudden provocation given to you by AB and not intending to (*or knowing it to be likely that you would thereby*) cause hurt to XY], and thereby committed an offence punishable under s. 335 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

Punishment.—The Lahore High Court has expressed the opinion that an offence under this section should not be leniently treated and a mere sentence of fine would not meet the ends of justice. Accused, believing his wife unfaithful to him, completely severed her one ear with a razor and a portion of the other ear. He was fined Rs. 1,000. It was held that the act of the accused in deliberately taking a razor and mutilating his wife in the way he did constituted as grave a case as could well occur under this section, and a mere sentence of fine with no imprisonment especially when the accused was poor was inadequate.¹

Cases of nose-cutting involve an act which imports deliberate design of a particularly brutal and cruel character, and therefore they must be adequately dealt with.²

336. Whoever does any act¹ so rashly or negligently² as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

Act endangering
life or personal
safety of others.

COMMENT.

Rash and negligent acts, which endanger human life or the personal safety of others, are punishable under this section even though no harm follows. They are additionally punishable under ss. 337 and 338 if they cause hurt or grievous hurt.

Many specific acts of rashness or negligence likely to endanger life or to cause hurt or injury are made punishable by Chapter XIV.

Object.—The provisions of this section are intended to meet cases where acts which are in themselves lawful are done so rashly or negligently as to endanger human life or the personal safety of others.

The offence punishable by this and the following two sections is the doing of an act so rashly or negligently as to put in peril the lives and safety of others, but with-

¹ *Ghulam Nabi*, (1931) 33 P. L. R. 72, 33 Cr. L. J. 368, [1932] AIR (L) 194.

² *Ismail Umar*, (1938) 40 Bom. L. R. 832 39 Cr. L. J. 928, [1938] AIR (B) 430.

cut an intention of causing hurt or any knowledge that hurt is likely to be thereby caused.³

1. 'Act.'—See s. 52, *supra*. The words "any act" are not limited to the meaning of "any legal act."⁴

In order to determine whether an act was done rashly or negligently, no distinction ought to be drawn between the act itself and the instrument with which it is done. The accused, of whom four were Dharmakartas of a temple, were charged with having drawn a car which was not in a good condition and to have thereby done an act so rashly or negligently as to endanger human life. The Magistrate acquitted them on the ground that the rashness or negligence must relate to the act to bring it within the meaning of the section and not to the article or thing in respect of or in connection with which the act is done, because the rashness or negligence is the quality of the agent that does the act and not that of the subject of the action. The High Court disagreed with the opinion of the Magistrate and held that the real question for decision was whether the Dharmakartas had put the car into repair so as to satisfy themselves that it would be safely drawn.⁵

2. 'Rashly or negligently.'—See s. 304A, *supra*. The accused's house was being stoned and he fired his gun in all directions merely to frighten and prevent the persons who were throwing stones from doing so. It was held that the firing of the gun was not a rash or negligent act but a deliberate act, and, therefore, this section did not apply; and as the gun was fired to scare off the people who were throwing stones and not with the object of hitting them, no offence was committed.⁶

Act endangering personal safety of others should have been knowingly done.—A person, having a license to conduct swinging during a Hindu festival, was held not to render himself liable for this offence by allowing persons, in his absence, to swing by hooks inserted in the flesh, instead of by being attached to the pole by cloth, unless it was shown that he knew of it.⁷

The accused was the lessee of a certain temple. It appeared that on a certain day in the year pilgrims and others in large numbers visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform $1\frac{1}{2}$ to 2 feet high and the ring or the parapet of the well stood again about one foot above the platform. Early at night on the day of the congregation of pilgrims, an accident having occurred, the accused at the instance of the police-officer in charge had a light placed on or near the one-foot parapet, but at a later hour the accused had the light removed and thereafter between 1 and 2 A.M., while the people were again entering into the inner temple, a boy, who had no previous knowledge of the well and in the darkness could not see it, fell into it, it was held that the accused was guilty under this section.⁸ The accused, a taxi-cab driver, was licensed to drive, but owing to his defective eyesight, was asked to wear spectacles at the time of driving. One night, whilst he was driving without spectacles, his car collided with another; but it appeared that he was not to blame for the accident. Medical evidence showed that the defect in the eyesight of the accused was not very much and that it would not appreciably interfere with his efficiency as a driver. He was charged under s. 279 with driving his car in a manner so rash or negligent as to endanger human life. The trying Magistrate convicted him under this section of doing an act so rashly or negligently as to endanger human life. The High Court held that the accused had committed no offence under this section, inasmuch as it was not made out that if he drove his car without wearing spectacles he would be acting so rashly or negligently as to endanger human life or the personal safety of others.⁹

When riots were taking place in different parts of a town a man possessing a gun fired shots just to indicate to would-be mischief-makers that there were arms

³ *Chhallu*, [1941] All. 441.

⁴ *Mahadeo Pandey*, [1932] A. L. J. R. 224, 33 Cr. L. J. 889, [1932] AIR (A) 322.

⁵ *Tippana Gangi Reddi*, (1890) 1 Weir 337.

⁶ *Maung Ba Kyi*, (1937) 38 Cr. L. J. 897, [1937] AIR (R) 273.

⁷ *Gopi Nath Mahlo v. Mansaram Koomar*,

(1900) 5 C. W. N. 376.

⁸ *Narsing Charan Mahapatra*, (1914) 18 C. W. N. 1176, 16 Cr. L. J. 131, [1915] AIR (C) 295.

⁹ *Abas Mirza*, (1918) 20 Bom. L. R. 376, 42 Bom. 396.

of defence in the house and that anybody who might be mischievously inclined might take care of his safety. It was held that such an act did not amount to an offence under this section.¹⁰

Engine-driver letting off steam near thoroughfare.—An engine-driver was taking an engine which was letting off steam, along a public thoroughfare, at a time when the traffic was exceptionally heavy and within a few yards of a large number of horses and carriages which had been parked together, in spite of warnings from the police that to do so would endanger the public safety. It was held that he was guilty of this offence though he might have believed that no danger would in fact be caused.¹¹

Throwing of stones.—The mere throwing of stones on the roof of a person's house does not amount to a criminal offence, unless it is done rashly or negligently so as to endanger human life or the personal safety of others.¹² But if a person intentionally throws a stone at a house or on a house under such circumstances that, although he does not intend to cause hurt, and does not in fact cause hurt, yet he must know that he is likely to cause hurt, he commits an offence punishable under this section.¹³ Where a priest left his temple at night and then from outside deliberately threw bricks at the temple, hoping that the Hindus of the locality would believe that the bricks came from the Mahomedan quarters, and that this would lead to a riot between the two communities, it was held that the act was a deliberate one and not a rash or negligent act.¹⁴

PRACTICE.

Evidence.—Prove (1) that the accused did the act in question.

(2) That it was done rashly or negligently.

(3) That it was such as to endanger the life or personal safety of others.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

The Calcutta High Court has expressed the view that cases relating to motor car accidents must be tried without delay. It is improper to try such a case months after the incident when the accused and his witnesses might be entirely unable to reconstruct their recollection as to what had happened.¹⁵

337. Whoever causes hurt to any person by doing any act¹ so rashly or negligently² as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

"Hurt may be caused involuntarily, yet culpably. There may have been no design to cause hurt, no expectation that hurt would be caused; yet there may have been a want of due care not to cause hurt."¹⁶

A party shall not be deemed to be culpable in respect of any hurt, damage or other evil consequence resulting from his act, although he did not use the utmost degree of caution that was possible, provided he used such a reasonable degree of caution for the exclusion of mischief as was appropriate to the nature of the act and the probability of danger in the particular case.¹⁷

Scope.—This section applies only to acts done without any criminal intent, apart from rashness or negligence which is its essential ingredient.¹⁸ Personal injury intentionally caused is neither a rash nor a negligent act.¹⁹

¹⁰ *Babu Ram*, (1925) 47 All. 636.

¹¹ *George Loveday*, (1887) 1 Weir 337.

¹² *Nga Tha Ku*, (1879) S. J. L. B. 91.

¹³ *Nga Myat Thin*, (1898) P. J. L. B. 426;

Mahadeo Pandey, [1932] A. L. J. 224, 33 Cr.

L. J. 889, [1932] AIR (A) 322.

¹⁴ *Gaya Prasad*, (1928) 51 All. 465.

¹⁵ *Sirajaddin Kazi v. Sergeant H. Jenner*, (1929) 31 Cr. L. J. 614, [1929] AIR (C) 776.

¹⁶ Note M, p. 154.

¹⁷ 7th Parl. R., 23.

¹⁸ *Chhallu*, [1941] All. 441.

¹⁹ *Nga Shwe Lu*, (1904) U. B. R. (P. C.) 6, 1 Cr. L. J. 557.

1. 'Act.'—See s. 33, *supra*. 2. 'Rashly or negligently.'—See s. 304A, *supra*.

CASES.

Negligence with reference to gun.—The causing of hurt by negligence in the use of a gun falls within the purview of this section rather than of s. 286. But where all the evidence against the accused was that he went out shooting in the month of July when people were likely to be about in the fields, and that a single pellet from his gun struck a man who was sitting in a field, it was held that this was not sufficient evidence of rashness or negligence to support a conviction under this section.²⁰ Where a man fired blindly in the dark with a shot gun in the direction from which he had heard sounds coming from a distance, it was held that he could not be convicted under s. 307 but under this section.²¹

Negligence with reference to poisonous drug.—A wife administered to her husband a love potion in his food to save her from the quarrelsome tongue of her husband. The husband took ill on eating the food but subsequently recovered. The potion was prepared from *dhatūra* seeds by accused No. 2 who was her lover and by accused No. 3 who was his friend. It was held that the wife was guilty under this section as she administered to her husband without any care or caution a powder which she received from her lover who was at enmity with her husband; that accused No. 2 was guilty of an offence under ss. 307 and 109; and that accused No. 3 was guilty under ss. 328 and 109.²²

Rash operation.—The accused performed an operation with a pair of scissors on the lid of the complainant's eye, and stitched the wound with ordinary thread and needle. The operation was needless and performed in a primitive way without any precaution. The complainant's eyesight was damaged permanently to a certain extent. It was held that the accused was guilty under this section.²³

Negligent driving.—A person who caused hurt to the occupants of a motor car by rash or negligent driving was held liable under this section.²⁴

PRACTICE.

Evidence.—Prove points, (1), (2) and (3) as those for s. 336; and further (4) that hurt was actually caused.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

338. Whoever causes grievous hurt to any person by doing any act¹ so rashly or negligently² as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

COMMENT

This section deals with grievous hurt engendered by an act done so rashly or negligently as to endanger human life or the personal safety of others. Otherwise this section is similar in terms to the last section.

1. 'Act.'—See s. 33, *supra*.

2. 'Rashly or negligently.'—See s. 304A, *supra*. Where an accident was due mainly, if not entirely, to the rashness of the accused in driving a motor car while drunk and getting on to the wrong side of the road, while there were vehicles in front, or otherwise to his negligence in not seeing a tonga in front of him and not properly

²⁰ *Abdus Sattar*, (1906) 28 All. 464.

²¹ *Mohammed Cassim*, (1937) 39 Cr. L. J. 692, [1938] AIR (R) 220.

²² *Bhagawa*, (1916) 19 Bom. L. R. 54, 18 Cr. L. J. 443, [1916] AIR (B) 98.

L. C.—53—

²³ *Gulam Hyder Punjabi*, (1915) 39 Bom. 523, 17 Bom. L. R. 384.

²⁴ *Mahomed Jamal*, (1929) 30 Cr. L. J. 1077, [1930] AIR (S) 64.

controlling the motor car so as to avoid collision, the accused was held guilty of both rashness and negligence by which the accident was caused.²⁵ Failure to sound the horn by a person driving a motor vehicle is not necessarily negligence and to sound a horn does not necessarily negative rashness or negligence in driving. Each case must be decided on its own facts. From the mere fact that a motorist strikes a person walking on the road, the presumption cannot be drawn that the accident was caused by the motorist's carelessness. Such a presumption is ill-founded as a great many such occurrences are due to accidents. If the car was being driven at an excessive speed, that in itself would be evidence to show that there was negligence. But where the car was being driven at about twenty to twenty-five miles an hour, such a speed cannot be said to argue *ipso facto* that there was negligence¹. Where the accused having taken his car in court-precincts reversed it and moved forward and while doing so the left rear wheel of his car ran over the shoulder of a person who was sleeping under a tree and he was convicted of an offence under this section read with s. 279 although he had sounded the horn as a warning, it was held that the accused could not be held to be negligent. What a prudent man is likely to assume is that people sitting there were awake and that they would respond to the sound warning of the approach of the car. Only because it was conceivable that there would be some one sleeping at the time and place, no man can reasonably be held culpable if he failed to foresee such an exceptional circumstance.²

CASES.

Sexual intercourse causing injury to wife.—Under no law is it a rule that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her. Hence, where a husband had sexual intercourse with his wife, aged eleven years, and she died from the injuries thereof, he was held guilty of causing grievous hurt by doing a rash act under this section.³ This case led to the passing of Act IV of 1891. See s. 375, *infra*.

Death caused by allowing cart to go unattended.—Where a person, by allowing his cart to proceed unattended along a road, ran over a boy who was sleeping on the road, it was held that he had committed an offence under s. 337 or under this section although the boy might have contributed to his own injury by going to sleep on the side of the road.⁴

Running over by carriage.—Where the accused's carriage, which was driven at an ordinary pace, on a dark night, knocked down an old deaf man and killed him, it was held that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently or rashly directed by the accused. If there was no such evidence the accused could not be convicted.⁵ It was held similarly where a boy was run over by a motor lorry which was driven at a moderate speed on the correct side of the road.⁶

Negligence in discharging gun.—The accused, who owned a paddy field, discharged a gun in the direction of a footpath, close to his field, through which the complainant was passing. The complainant was wounded in his leg and had to be treated in the hospital and his leg amputated. The accused knew that the footpath was generally used by the public. It was held that the accused was guilty of culpable negligence and was guilty under this section.⁷

Allowing unlicensed person to drive a car recklessly.—A motor truck was being driven by A who had no license for driving. B, who was the driver of the truck and had a driving license was sitting nearby. The truck, while being thus driven, struck a telegraph pole and hit a passerby one of whose legs got crushed and had to be amputated to save his life. A was convicted under this section. As to the liability of B it was

²⁵ *Chaudhari*, (1933) 10 O. W. N. 1211, 35 Cr. L. J. 296, [1933] AIR (O) 568.

¹ *Nga Ohn Saing*, (1930) 40 Cr. L. J. 701, [1939] AIR (R) 209.

² *Devadas*, [1938] N. L. J. 226.

³ *Hurree Mohun Mythee*, (1890) 18 Cal. 49. In a similar case in the Central Provinces the husband was punished under s. 325: *Mohammad Miyan*, (1898) 12 C. P. L. R. (Cr.) 11; in Sind

he was punished under s. 304A: *Shahu*, (1917) 11 S. L. R. 76, 18 Cr. L. J. 1003, [1917] AIR (S) 42. See *Shambhu Khatri*, (1924) 3 Pat. 410.

⁴ *Malkaji*, (1884) Unrep. Cr. C. 198.

⁵ (1871) 6 M. H. C. (Appx.) 31, 1 Weir 322.

⁶ *Pulin Behary Nandi*, (1928) 32 C. W. N. 612, 30 Cr. L. J. 402.

⁷ *Chandu*, (1912) 18 Cr. L. J. 703.

held that he could be convicted for abetment. B, who was in charge of the motor truck, placed it under the control of A with actual knowledge that he had no license to drive a motor vehicle, and constructive knowledge that he was not trained to drive any motor vehicle. But for the fact that B permitted him to drive the truck, A could not have committed the offence that he did. B must be presumed to have known that A who had no license to drive could not be trusted with the control of the truck in motion without grave peril to the persons using the public road and that an accident was highly probable. B was guilty of negligence.⁸

PRACTICE.

Evidence.—Prove points (1), (2), (3) as those for s. 336, and further (4) that such act caused grievous hurt.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Where a motor driver is being prosecuted for an offence under this section it cannot be said that the car has been used by the accused for the commission of the offence within the meaning of s. 516A, Criminal Procedure Code, and it is illegal for a Magistrate to detain the motor car pending conclusion of the trial.⁹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, caused grievous hurt to AB by doing an act, to wit—, so rashly or negligently as to endanger human life or the personal safety of others, and thereby committed an offence punishable under s. 338 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Wrongful Restraint and Wrongful Confinement.

The provisions under this head are for the punishment of offences, in which the offender, although he may have no design against human life, and no intention to inflict bodily hurt, either wholly deprives the injured person of his freedom or in some degree abridges his personal liberty. The personal restraint or confinement may, in some cases, be so slight as to deserve little more than a nominal punishment; but the arbitrary imprisonment of a person, which is often a quiet and convenient mode of persecuting him, is a most serious offence, deserving of exemplary punishment.¹⁰

339. Whoever voluntarily obstructs any person¹ so as to prevent that person from proceeding in any direction in which that person has a right to proceed,² is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

ILLUSTRATION.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

COMMENT.

Wrongful restraint means the keeping of a man out of a place where he wishes to be, and has a right to be.¹¹ 'Restraint' implies abridgment of the liberty of a person against his will. Where he is deprived of his will-power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint.¹²

⁸ *Prov. Govt. C. P. & Berar, v. Saidu*, (1946)

47 Cr. L. J. 968, [1946] N. L. J. 540.

⁹ *Phula Singh*, (1931) 33 P. L. R. 386, 33 Cr. L. J. 347, [1931] AIR (L) 565.

¹⁰ M. & M. 300.

¹¹ Note M, p. 154.

¹² *Fateh Muhammad*, (1927) 29 P. L. R. 90, 29 Cr. L. J. 602, [1928] AIR (L) 445.

The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go, provided he does so in a lawful manner, cannot be justified, and is punishable under this section.¹³

The following illustrations, given in the original Draft Penal Code,¹⁴ elucidate the meaning of this section :—

(a) A builds a wall across a path along which Z has a right to pass. Z is thereby prevented from passing. A wrongfully restrains Z.

(b) A illegally omits to take proper order with a furious buffalo which is in his possession, and thus voluntarily deters Z from passing along a road along which Z has a right to pass. A wrongfully restrains Z.

(c) A threatens to set a savage dog at Z, if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path. A wrongfully restrains Z.

(d) In the last illustration, if the dog is not really savage, but if A voluntarily causes Z to think that it is savage, and thereby prevents Z from going along the path, A wrongfully restrains Z.

From these illustrations it will appear that a person may obstruct another by causing it to appear to that other impossible, difficult, or dangerous to proceed, as well as by causing it actually to be impossible, difficult, or dangerous for that other to proceed.

These illustrations were subsequently dropped as they were severely criticised but they indicate that the obstruction mentioned in the section does not mean physical obstruction alone but may mean show of force or threat which will induce a man to change his course. Thus, where the accused removed a ladder and thereby detained a person on the roof of a house, he was held to have committed 'wrongful restraint.'¹⁵

Ingredients.—The section requires two essentials :—

1. Voluntary obstruction of a person.

2. The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

1. '**Voluntarily obstructs any person.**'—This section relates to voluntary obstruction by a person and not to obstructions which are not voluntarily continued by the persons accused of the obstruction throughout the time the obstruction lasts.¹⁶ See s. 39 as to the meaning of 'voluntarily.'

A verbal prohibition or remonstrance does not amount to such obstruction.¹⁷ Mere direction or demonstration will not constitute wrongful restraint.¹⁸ But physical presence is not necessary. Where, therefore, the complainant and his wife and daughter occupied a house and during their temporary absence the accused put a lock on the outer door and thereby obstructed them from getting into the house, it was held that the accused was guilty of wrongful restraint.¹⁹ Merely ploughing up a path over which a person has a right to pass will not amount to obstruction.²⁰

'**Person.**'—The obstruction should be to any person. Obstruction of a vehicle alone (when no men are obstructed) cannot amount to wrongful restraint. Where the complaint against the accused was that they prevented certain carts from proceeding along the public road and there was no evidence to show that the owners of the carts or the carters or any one else were themselves prevented from proceeding along the public road or wherever else they might have wished to go, it was held that the action of the accused did not come within the mischief of s. 341 inasmuch as that section is to be found in Chap. XVI of the Code which deals with offences affecting the human body, and it expressly makes punishable wrongful restraint of any person and not of any vehicle or anything of that sort.²¹ The Madras High Court has, however, held that voluntary obstruction of a vehicle in which persons are travelling would amount to the offence of wrongful restraint of the person in the vehicle. The fact that the person or persons may get down and then be left at liberty to proceed on their way unmolested

¹³ *Saminada Pillai*, (1882) 1 Weir 339.

¹⁴ Page 59.

¹⁵ *Telapodu Subbadu*, (1884) 1 Weir 340.

¹⁶ *Abdul Satar Ilahibax*, (1906) 9 Bom. L. R. 30, 5 Cr. L. J. 97.

¹⁷ *Karaturu Nagamma*, (1882) 1 Weir 339.

¹⁸ *Subba Row*, (1908) 8 Cr. L. J. 212.

¹⁹ *Arumuga Nadar*, [1910] M. W. N. 727, 11

Cr. L. J. 708.

²⁰ *Rama Reddi*, (1915) 16 Cr. L. J. 701 (1), 2 L. W. 1035.

²¹ *Durgapada Chatterji v. Nilmoni Ghosh*, (1934) 60 C. L. J. 472, 39 C. W. N. 143, 36 Cr. L. J. 740, [1935] AIR (C) 252; *Rama Lala* (1912) 15 Bom. L. R. 103, 14 Cr. L. J. 177.

is immaterial. If the person is prevented from proceeding at the moment of restraint, the terms of this section are satisfied.²²

2. 'Prevent that person from proceeding in any direction in which that person has a right to proceed.'—The section requires that the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. The wrong here defined is a wrong against the person, and is not completed where the person is at liberty to go in any direction he pleases. Thus, where the complainant driving a bullock-cart was obstructed from taking his cart through the passage, but there was no obstruction to the complainant passing through the passage alone without the cart, it was held that there could be no conviction for wrongful restraint for though the complainant was hindered from driving his cart through the passage, he himself was unobstructed.²³ Where the accused took away the licenses from the complainants (boatmen) with the result that they were not permitted by the authorities to ply their boats beyond a certain stage in the channel, it was held that it did not amount to wrongful restraint. The Court said: "What section 339, Indian Penal Code, contemplates is that there must be obstruction attributable directly to the person charged, and the legislature apparently did not intend to include within the scope of the section an act which in its remote and indirect consequence might obstruct the free movement of a person."²⁴

'Proceeding.'—The word "proceed" in this section and s. 340 is not confined to the case of a person who can walk on his own legs or can move by physical means within his own power. It includes the case of proceeding by outside agency, which in the case of a baby means the agency of its natural protector or guardian. If a baby is kept shut up, so that its natural protector cannot get at it, it is a case of wrongful confinement.²⁵

Public streets.—All members of the public have equal rights in public streets and no one section of the community can interdict another section of it from the lawful use of such streets. Where the accused, a Brahmin, stopped the complainant, a convert to Arya Samaj, in a street and took him to task for passing along that street, it was held that he was guilty of wrongful restraint.¹ Restraining a horse on which a person is riding so as to prevent him from proceeding at the moment of restraint is wrongful restraint.² A conviction for obstructing a person in proceeding along a path lying over the accused's private land in the exercise of the former's right as a villager can only be sustained when a customary right of way residing in the villagers in respect of the path in question has been proved. Such a right is not sufficiently proved by the oral testimony of two or three persons who are only able to say that the path has been used by the villagers for over twenty years and in view of the Exception to s. 339 which excepts cases of good faith in the obstructor, no offence is established merely by such evidence.³

Bona fide claim.—If an act is done in good faith under a belief that it is justified by law, a conviction under this section will not stand.⁴ Voluntarily obstructing any person from entering upon land in possession of another under *bona fide* colour of title and possession is not such an obstruction which can be made the subject of a criminal prosecution under this section.⁵ A person cannot be convicted of wrongful restraint, if he locks up a house under a bona fide claim to the same.⁶ The accused, one of the joint-owners of a shop, put her lock on the shop, which was let out by the other joint-owner without her consent. The tenant charged the accused with the offence of wrongful restraint in that he was prevented by the lock from entering the shop.

²² *Gopala Reddi v. Lakshmi Reddi*, [1947] Mad. 555.

²³ *Rama Lala*, (1912) 15 Bom. L. R. 108, 14 Cr. L. J. 177. But, see *Lahanu Manaji*, (1925) 27 Bom. L. R. 1419, 27 Cr. L. J. 139, [1926] AIR (B) 118.

²⁴ *Venkataramiah*, (1908) 11 Cr. L. J. 192.

²⁵ *Mahendranath Chakrabarti*, (1934) 62 Cal. 629.

¹ *Sundareshwara Srauthigal*, (1927) 50 Mad. 678.

² *Peria Ponnuswami Goundan*, (1926) 28 Cr. L. J. 320, [1927] AIR (M) 506.

³ *Prannath Kundu*, (1929) 57 Cal. 526.

⁴ *Kanai Lal Gowala*, (1897) 24 Cal. 885; *Pramatha Nath Bharat v. P. C. Lahiri*, (1920) 47 Cal. 818; *Kalidas Raha v. Deodhari Mistri*, (1925) 30 C. W. N. 192, 41 C. L. J. 683.

⁵ *Sheo Nath*, (1913) 15 Cr. L. J. 532, P. L. R. No. 34 of 1914.

⁶ *Howana*, (1889) Cr. R. No. 10 of 1889, Unrep. Cr. C. 451.

It was held that the accused had committed no offence, inasmuch as she had affixed her lock to a house of which she was the joint-owner and the complainant was no tenant of hers.⁷

Exception.—It is not an offence to erect a wall against one's premises to prevent other persons from passing over it.⁸ If the accused has acted bona fide then no conviction could be made.⁹

CASES.

Wrongful restraint.—Where the complainant was taken to a police-station, registered as a suspect, and passed on in charge of policemen from one police-beat to another;¹⁰ where a police-officer refused to let a person go home until he gave bail;¹¹ where the accused prevented the complainants from proceeding in a certain direction with their carts and exacted from them a sum of money on a false plea;¹² where the accused stopped the complainant by force, catching hold of his bandy bull;¹³ and where the accused prevented the complainant from proceeding in his turn on a road and assaulted him,¹⁴ this offence was held to have been committed.

Where a person either was or pretended to be an intending emigrant and went to a depot and was there treated as such, receiving meals and an advance of money, it was held that these facts did not confer either on the emigration agent or his watchman power to prevent him from leaving the depot when he desired to do so, and a person who restrained him from going out of the depot was guilty of wrongful restraint.¹⁵ The accused, a landlord, prevented a tenant of his, who was holding over, from entering the room which the tenant had rented from the accused. It was held that he was guilty of wrongful restraint, for a tenant holding over had a position recognized by the law, and he had a right to retain possession of the premises he occupied as even against the landlord himself until dispossessed in course of law.¹⁶ The accused, who were co-owners of a well, obstructed another co-owner (complainant) from using the *mot* to which he had yoked his bullocks on the slope to the well on the ground that he had not paid his share of expenses on the well. It was held that the accused were guilty of wrongful restraint inasmuch as they had obstructed the complainant from proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks.¹⁷

No wrongful restraint.—Where the accused prevented the building of a party-wall between two adjoining backyards;¹⁸ where toll was demanded of cartmen in good faith, and they went away with their bullocks leaving the carts;¹⁹ where the complainant had, for the purpose of removal, placed certain goods upon a cart, and the accused came and turned the cart upside down, and the things fell to the ground, upon which the complainant went away;²⁰ where the accused placed an obstruction in a road over which the complainant had a right of passage for men and cattle, thereby preventing cattle from passing but leaving a portion of the way in such a condition as to be passable by human beings;²¹ where A invited B to his house in order to be ready to give evidence in a judicial proceeding, and A used neither physical coercion nor threat of any kind to detain B in the house, but B from a mere general dislike or dread of giving offence to A remained there;²² where the accused caused Pariahs to stand in a public street in the vicinity of a temple with the object of preventing the complainant from conducting a religious procession from fear of pollution;²³ and where the accused put

⁷ *Bai Samrath*, (1917) 20 Bom. L. R. 106, 19 Cr. L. J. 351, [1918] AIR (B) 256.

⁸ *Haveli*, (1886) P. R. No. 25 of 1886.

⁹ *Natha Singh*, (1910) P. R. No. 22 of 1910, 11 Cr. L. J. 495; *Kalidas Raha v. Deodhari Mistri*, (1925) 30 C. W. N. 192, 41 C. L. J. 638.

¹⁰ *Saminada Pillai*, (1882) 1 Weir 339.

¹¹ *Sheo Surun Sahai v. Mohamed Fazil Khan*, (1868) 10 W. R. (Cr.) 20.

¹² *Jowahir Shah v. Girdharee Chowdhry*, (1868) 10 W. R. (Cr.) 35.

¹³ *Muhammad Uusuf Sahib*, [1938] 2 M. L. J. 583, (1938) 48 L. W. 379, [1938] M. W. N. 1010.

¹⁴ *Mangal Singh*, (1941) 42 Cr. L. J. 526, [1941] AIR (P) 384.

¹⁵ *The Public Prosecutor v. Sheikh Ahmed*, (1911) 21 M. L. J. 439, [1911] 1 M. W. N. 369,

12 Cr. L. J. 212.

¹⁶ *Haji Gulam Mahomed*, (1918) 43 Bom. 531, 21 Bom. L. R. 261.

¹⁷ *Lahanu Manaji*, (1925) 27 Bom. L. R. 1419, 27 Cr. L. J. 139, [1926] AIR (B) 118; but see *Rama Lala*, (1912) 15 Bom. L. R. 103, 14 Cr. L. J. 177.

¹⁸ *Venkatachalam Pillai*, (1881) 1 Weir 339.

¹⁹ *Padati Chenchu Reddi*, (1883) Weir (3rd. Edn.) 258.

²⁰ *Juggeshwar Dass v. Koylash Chumder Chatterjee*, (1885) 12 Cal. 55.

²¹ (1899) 1 Weir 340.

²² *Lakshman Kalyan*, (1875) Cr. R. for 1875, Unrep. Cr. C. 89.

²³ *Venkata Subba Reddy*, [1910] M. W. N. 72, 11 Cr. L. J. 268.

up a tin projection over the complainant's compound wall so as to hang over his paved courtyard at a height of six feet ten inches above the ground and the projection did not prevent any one moving below it;²⁴ it was held that the act of the accused did not amount to an obstruction within the meaning of this section.

340. Whoever wrongfully restrains any person¹ in such a manner as to prevent that person from proceeding beyond certain circumscribing limits,² is said "wrongfully to confine" that person.

ILLUSTRATIONS.

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

COMMENT.

Ingredients.—The section requires two essentials :—

1. Wrongful restraint of a person.
2. Such restraint must prevent that person from proceeding beyond certain circumscribing limits.

1. '**Whoever wrongfully restrains any person.**'—Wrongful confinement, which is a form of wrongful restraint, is the keeping of a man within limits out of which he wishes to go, and has a right to go.²⁵ A decree-holder is guilty of wrongful confinement, if he causes arrest of the judgment-debtor while he is returning from Court under circumstances mentioned in s. 135 of the Civil Procedure Code, and the Court officer who arrests or makes over the warrant of arrest to his subordinate for compliance is also guilty of this offence.¹

2. '**Prevent that person from proceeding beyond certain circumscribing limits.**'—There must be a total restraint, not a partial one. If one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he cannot be said thereby to imprison him. Imprisonment is a total restraint on the liberty of the person, for however short a time and not a partial obstruction of his will, whatever inconvenience it may bring on him.² A Sub-Inspector conducting an investigation is within the law when he sends for a person to the police-station who can in his opinion give information about a crime and a constable and a watchman, who do no more than bring such a person to the Sub-Inspector and tell him to sit down until the Sub-Inspector sees him, are committing no offence whatever. They are merely obeying the lawful order of their superior officer and cannot be charged with wrongful confinement under s. 342.³

"Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. It must, in each case, be proved that there was at least such an impression produced in the mind of the person detained as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if attempted to do so. The mere threat of some future harm in case of departure would not suffice if he knew that it was open to him to go away and refrained from doing so lest he should suffer such harm. But if the circumstances were such as to justify and to create the belief that he could not depart without being seized immediately, then it would be proper to hold that he was obstructed and confined."⁴

'Prevent that person from proceeding.'—There can be no wrongful confinement when a desire to proceed has never existed, nor can a confinement be wrongful if it

²⁴ *Chhagan Vithal*, (1927) 29 Bom. L. R. 494, 28 Cr. L. J. 1023, [1927] AIR (B) 369.

²⁵ Note M, p. 154.

¹ *Ram Lal*, (1916) P. L. R. No. 121 of 1916, 17 Cr. L. J. 525, [1916] AIR (L) 318 (2).

² *Bird v. Jones*, (1845) 7 Q. B. 742, 751, 752.

³ *Abdul Karim*, (1930) 6 Luck. 358.

⁴ *Shamlal Jairam*, (1902) 4 Bom. L. R. 79, 82.

was consented to by the person affected,⁵ or if an escape is open to a person if he wished to avail himself of it.⁶ The retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will.⁷ The accused, a District Traffic Superintendent, being under the bona fide impression that the complainant had admitted that he had travelled without a ticket, seized the hand of the complainant and dragged him to the ticket collector and ordered the ticket collector to realize the full fare. It was held that the accused was guilty of wrongful confinement.⁸

'Certain circumscribing limits.'—"A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom : it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."⁹ "If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it."¹⁰

Every confinement of a person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in public streets.¹¹

Moral force.—Detention through the exercise of moral force, without the accompaniment of physical force or actual conflict, is sufficient to constitute this offence.¹²

Malice.—Malice is not an essential ingredient in the offence of wrongful confinement.¹³

Period of confinement.—The time during which a person is kept in wrongful confinement is immaterial, except with reference to the extent of punishment.¹⁴

Arrest by third persons at direction of police-officer.—If a police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody.¹⁵

Difference between malicious prosecution and false imprisonment.—It becomes necessary here to consider the difference between s. 211 and this section, i.e. between malicious prosecution and false imprisonment. "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is

⁵ *Muhammad Din*, (1893) P. R. No. 36 of 1894.

⁶ *Ramdaï*, (1900) 4 C. W. N. cv.

⁷ *P. N. Pantulu v. Captain R. A. C. Stuart*, (1865) 2 M. H. C. 396, 398.

⁸ *S. A. Hamid v. Sudhirmohan Ghosh*, (1929) 57 Cal. 102.

⁹ Per Coleridge, J., in *Bird v. Jones*, (1845) 7 Q. B. 742, 744.

¹⁰ *Ibid.*, p. 746.

¹¹ Blackstone, Vol. III, 4th Edn., p. 121.

¹² *The Acting Government Pleader v. Venkatachala Mudali*, (1881) 1 Weir 341.

¹³ *Dhanias v. F. L. Clifford*, (1888) 13 Bom. 376.

¹⁴ *Suprosunno Ghosaul*, (1866) 6 W. R. (Cr.) 88.

¹⁵ *Beharry Singh*, (1867) 7 W. R. (Cr.) 3.

severable from the other, until you find some inseparable connection between them."¹⁶ Thus, the question is, does the defendant set a ministerial or a judicial officer in motion? If the former, he may be liable for false imprisonment. If the latter, for malicious prosecution.

C A S E S .

Wrongful confinement.—Where the accused refused to obey an order in writing improperly issued by a police-officer, and the police thereupon took her into custody;¹⁷ where a Superintendent of Police illegally wrote a letter to a person, who was accused of an offence for which he could not be arrested without a warrant, directing him to present himself before a Magistrate, and sent two constables to accompany him, and prevented him from speaking to anyone;¹⁸ where a person discharged by a Magistrate was subsequently re-arrested on the same charge;¹⁹ where a police-officer arrested, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India;²⁰ where a Village Magistrate maliciously ordered a certain person, who had resisted the detention of pigs found trespassing, to be arrested;²¹ where a Jail Doctor confined an offender, who was already undergoing imprisonment, in a cell within the jail for the purpose of administering enema against his will;²² where an Abkari Inspector detained a man all night to prevent his being tampered with;²³ where a person living in a town, where medical assistance was available, kept in heavy chains his own brother who was subject to insanity of an intermittent kind and who was found to be sane by the District Judge who ordered his production before the Court;²⁴ where the accused got the complainant who was their debtor arrested and taken to jail by a bailiff during the subsistence of a protection order in his favour;²⁵ and where a person acting under a bona fide belief that another person had abducted a minor girl arrested him and kept him in his own custody instead of taking him to a police-station,¹ the offence of wrongful confinement was held to have been committed.

The accused, a police constable, detained some persons as suspects for several days. They were not fettered, but they were made to stay in a circumscribed limit. Their meals were brought to them, or police or village servants were sent with them to their houses for their meals and they were brought back. It was held that the accused was guilty of wrongful confinement.² Where two police-officers arrested without a warrant a person who was drunk and creating disturbance in a public street, and confined him in the police-station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property, it was held that the arrest having been made by the police-officer without a warrant, for a non-cognizable offence, their action amounted to wrongful confinement, unless it was justified under the provisions of the Code relating to the right of private defence or under s. 81,³ as was, in fact, held by the Court. Accused No. 1 brought a woman, who was his kept mistress, from Kolhapur and kept her with accused No. 2, a brothel-house-keeper in Bombay. On previous occasions too he had supplied women to accused No. 2 to be used as prostitutes. The woman was made to live as a prostitute in the house, the entrance to which was guarded, and a watch was kept over her movements. Occasionally she was allowed to go out under surveillance. It was held that both the accused were guilty of wrongfully confining the woman.⁴

Mistaken exercise of power by police-officer.—Where a person went to a police-station to lodge a complaint, and the police-officer, in consequence of something, restrained the person until he consulted his superior, and then discharged him

¹⁶ Per Willes, J., in *Austin v. Dowling*, (1870) L. R. 5 C. P. 534, 540.

¹⁷ *Lakshmiagadu*, (1886) 2 Weir 121.

¹⁸ *P. N. Pantulu v. Captain R. A. C. Stuart*, (1865) 2 M. H. C. 396.

¹⁹ *Ramdass Sadhoo v. Anund Chunder Roy*, (1873) 19 W. R. (Cr.) 27.

²⁰ *Mukund Babu Vethe*, (1894) 19 Bom. 72. See *Bhawoo Jivaji v. Mulji Dayal*, (1888) 12 Bom. 377.

²¹ (1870) 5 M. H. C. (Appx.) 24, 1 Weir 338.

²² *Baistab Charan Shaha*, (1902) 30 Cal. 95.

²³ *Dhanias v. F. L. Clifford*, (1888) 13 Bom. 376.

²⁴ *Shimbu Narain*, (1923) 45 All. 495.

²⁵ *Thiruvangadachariar v. Chockalingam Chetty*, (1923) 18 L. W. 167, 25 Cr. L. J. 138, [1924] AIR (M) 31.

¹ *Anant Prasad Ray*, (1925) 8 P. L. T. 204, 27 Cr. L. J. 1378.

² *Shamlal Jairam*, (1902) 4 Bom. L. R. 79.

³ *Gopal Naidu*, (1922) 46 Mad. 695, F.B.

⁴ *Bandu Ebrahim*, (1917) 20 Bom. L. R. 79, 42 Bom. 181.

on his own recognizance, he was held to have committed no offence.⁵ The accused, a police-officer, came down to Bombay from up-country with a warrant to arrest a person. After reasonable inquiries and on well-founded suspicion he arrested the complainant under the warrant believing in good faith that he was the person to be arrested. The complainant having proceeded against the accused for wrongful confinement, it was held that the accused had committed no offence since he was protected by s. 76.⁶

No wrongful confinement.—Under Government orders the ex-Maharaja of Nabha was restricted in his movements to the municipal limits of Kodaikanal. The Maharani of Nabha was to leave Kodaikanal for Madras in a motor car, but the Superintendent of Police, Madura, was wrongly informed that the ex-Maharaja was going with his family to Madras. He telephoned to a Sub-Inspector of Police to prevent the ex-Maharaja from leaving Kodaikanal. The Sub-Inspector misunderstood the message and took it to be a direction to prevent the Maharani from leaving Kodaikanal. When the Maharani came with her daughter by car to the Kodaikanal railway station to leave for Madras by train, the Sub-Inspector requested her not to board the train which had arrived and posted two constables near the railway compound to prevent her car being taken out of the compound. In a suit for damages by the Maharani and her daughter alleging that the acts of the police-officer were irregular and without justification, it was held that no wrongful confinement could be said to have taken place. The offences of wrongful restraint and wrongful confinement are offences affecting the human body and cannot be said to have been committed if a person is not himself restrained or confined but the liberty of going in the conveyance in which he wishes to go or of taking the articles which he wishes to carry and without which he is not willing to proceed is denied to him.⁷

Legal arrest.—Where the arrest is legal, the police-officer making the arrest cannot be successfully proceeded against on a charge under this section.⁸ An officer arresting a judgment-debtor under a warrant which directs him to produce the judgment-debtor when arrested before the Court with all convenient speed, is not guilty of wrongful confinement if, having effected the arrest when the Court is not sitting, he confines him in the house of the judgment-creditor till the next sitting of the Court.⁹ If a debtor arrested in execution of a civil process protests to the peon arresting him that he has been attending a trial going on at the time as a party and is, as such, exempt from arrest under s. 135 (2) of the Civil Procedure Code, the peon does not commit an offence under s. 342, nor any other offence, if he makes no investigation as to the truth of the plea but arrests the judgment-debtor and produces him before the Court. The decree-holder on whose identification the judgment-debtor is arrested in such circumstances does not commit an offence under s. 342 read with s. 109 inasmuch as the peon commits no offence. Where a judgment-debtor arrested in execution of a civil process was taken forthwith to the Court which had issued the warrant but could not be produced till two hours later because the Munsiff was engaged in hearing a case, it was held that there was no wrongful detention during the interval.¹⁰

341. Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Punishment for
wrongful restraint.

PRACTICE.

Evidence.—Prove (1) that the accused obstructed a person.

(2) That such obstruction prevented the person from proceeding in a direction in which he had a right to proceed.¹¹

(3) That the accused caused such obstruction voluntarily.¹²

⁵ *Budrool Hossein*, (1875) 24 W. R. (Cr.) 51.
See *Griffin v. Coleman*, (1859) 4 H. & N. 265.

⁶ *Gopalai Kallaiya*, (1923) 26 Bom. L. R. 138, 25 Cr. L. J. 797, [1924] AIR (B) 333.

⁷ *Maharani of Nabha v. Province of Madras*, [1942] Mad. 696.

⁸ *Amarsang Jettha*, (1885) 10 Bom. 506.

⁹ *Samuel*, (1906) 30 Mad. 179.

¹⁰ *Kadamali*, (1934) 39 C. W. N. 318, 36 Cr. L. J. 1252, [1935] AIR (C) 551.

¹¹ *Ghuraram Kahar*, (1930) 34 C. W. N. 582, 31 Cr. L. J. 1226, [1930] AIR (C) 760.

¹² *Vide* s. 39, *supra*.

The obstructor must intend or know or have reason to believe it to be likely that the means adopted would cause the obstruction of the complainant.¹³

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

It is not advisable to try summarily public servants whose whole career might depend upon the result.¹⁴

Magistrate cannot order removal of obstruction.—A Magistrate, while convicting an accused person for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction, cannot pass an order, under this section, that the hut or other means of obstruction should be removed. An order for the removal of the hut could be passed under s. 522 of the Criminal Procedure Code.¹⁵

Punishment.—“The offence of wrongful restraint, when it does not amount to wrongful confinement, and when it is not accompanied with violence, or with the causing of bodily hurt, is seldom a serious offence, and we propose, therefore, to visit it with a light punishment.”¹⁶

342. Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Punishment for wrongful confinement.

PRACTICE.

Evidence.—Prove (1) that the accused obstructed the complainant.

(2) That such obstruction was voluntary.

(3) That the effect of such obstruction was to restrain that person from proceeding beyond a certain limit.

(4) That the restraint was wrongful.

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Separate sentences.—Where the accused were convicted under this section and s. 352, and sentenced separately for each of the offences, the acts found against them being that they seized, dragged, and pushed the complainant to a certain place in order to punish him, it was held that what the accused had been punished for was the whole series of acts, and that series of acts came within the definition both of wrongful confinement and using of criminal force, and accordingly the case fell within the second para. of s. 71.¹⁷ Where wrongful confinement was the common object of an unlawful assembly, and that was the essential ingredient in the constitution of an offence under s. 147, it was held that, having regard to the provisions of s. 71, a separate sentence for wrongful confinement was illegal.¹⁸

Charge.—The charge should run thus :—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, wrongfully confined AB, and thereby committed an offence punishable under s. 342 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

343. Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Wrongful confinement for three or more days.

¹³ *Arumuga Nadar*, [1910] M. W. N. 727, 11 Cr. L. J. 708.

¹⁴ *D'Souza v. Sheregara*, [1932] M. W. N. 478.

¹⁵ *Mohini Mohan Chowdhury v. Harendra Chandra Chowdhury*, (1904) 31 Cal. 691, F.B., overruling *Debendra Chandra Chowdhury v. Mohini Mohan Chowdhury*, (1901) 5 C. W.

N. 432.

¹⁶ Note M, p. 154.

¹⁷ *Fakira Khan*, (1905) 4 C. L. J. 90, 4 Cr. L. J. 69.

¹⁸ *Alim Sheikh v. Shahazada Singh Burkundaz*, (1904) 8 C. W. N. 483, 1 Cr. L. J. 365.

COMMENT.

The period of three days will be counted from the time that the complainant is illegally confined.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342; and further (5) that such restraint⁺ was for a period of three or more days.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—See the form of charge for s. 342. In that form for “confined AB” substitute “confined AB for—days.”

344. Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement for ten or more days.

COMMENT.

Object.—The authors of the Code say : “One aggravating circumstance is the duration of the confinement. Confinement for a quarter of an hour may sometimes be a mere frolic, which would deserve only a nominal punishment, which, indeed, might be so harmless as not to amount to an offence... But wrongful confinement continued during many days will always be a most serious offence. We have attempted to frame the law on this subject in such a manner as to give the offender a strong motive for abridging the detention of his prisoner.”¹⁹ The Law Commissioners observe: “One cannot conceive of a wrongful confinement continued for ten days or more without deliberation and reflection and a special regard to the penal consequences, and when a man sees that by persisting in his offence he is every day becoming liable to a certain additional punishment, the motive to set his prisoner free will grow stronger daily.”²⁰

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342; and further (5) that such restraint was for a period of ten or more days.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—See the form of charge for s. 342. In that form for “confined AB” substitute “confined AB for—days.”

Punishment.—Fine alone is not a legal sentence for a prisoner convicted under this section.²¹

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Wrongful confinement of person for whose liberation writ has been issued.

COMMENT.

There must be knowledge on the part of the accused that a writ of liberation has been issued. Mere belief is not sufficient; ‘knowledge’ is a much stronger word than ‘belief’ as the latter is stronger than ‘suspect.’²²

PRACTICE.

Evidence.—Prove (1) that the accused kept a person in confinement.
(2) That such confinement was wrongful.

¹⁹ Note M, pp. 154, 155.

²⁰ 1st Rep., s. 398, p. 281.

²¹ *Bahirji bin Krishnaji*, (1863) 1 B. H. C. 39.

²² *Rango Timaji*, (1880) 6 Bom. 402, 403.

(3) That a writ of liberation had been duly issued.

(4) That the accused knew of such writ when he kept the person wrongfully confined.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, wrongfully confined AB, knowing at the time of such wrongful confinement that a writ for the liberation of the said AB had been duly issued, and thereby committed an offence punishable under s. 345 of the Indian Penal Code, and within my cognizance [*or cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known¹ to any person interested in the person so confined, or to any public servant,² or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

Wrongful confinement in secret.

COMMENT.

The offence consists in wrongful confinement, aggravated by the offender's endeavour to deprive his prisoner and those interested in him or bound to protect him of the remedies which the law gives against this wrong.

1. 'Intention that the confinement of such person may not be known'.—In order to render a person liable under this section, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. The complainant, a woman, went to the Court to lodge a complaint of ill-treatment and torture against some relatives of the accused. The case not having been finished that day, she was asked to attend the Court the next day. As she was departing she was accosted by the accused who put her into a carriage and drove her away, taking her to various places, all strange and unknown to her at one or other of which she was detained. But a stir having arisen in the meantime on account of her disappearance she was brought back by the accused and produced by them before a pleader, in whose premises she remained till the next day when she was made over to the police. The Sessions Judge convicted the accused under this section but the High Court set aside the conviction on the ground that there was no intention that she should not be discovered and that her confinement was not actual but potential as she was induced but not forced.²³

2. 'Public servant'.—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342; and further (5) that such confinement was secret against (a) any person interested in the captive, or (b) a public servant, or (c) discovery of the place of confinement.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

²³ The Petition of *Sreenath Banerjee*, (1882) 9 Cal. 221.

347. Whoever wrongfully confines¹ any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security² or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence,³ shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement to extort property, or constrain to illegal act.

COMMENT.

This and the next section may be compared with ss. 329 and 330, as the aggravating circumstances mentioned in the former are the same as in the latter.

1. 'Wrongfully confines'.—A head constable in charge of a police outpost agreed to drop proceedings against K, who had been arrested on a certain charge, on condition that K paid to him a sum of money. The head constable sent away K in charge of two *chowkidars* to procure the money. In order to effect this object the *chowkidars* subsequently confined K at various places and maltreated him. It was held that it would be impossible to hold the head constable guilty of abetting an offence under this section in the absence of proof that he gave definite orders to that end.²⁴

2. 'Valuable security'.—See s. 30, *supra*. In Patna if a person places his thumb-impression on a blank sheet of paper, the understanding between him and the person to whom he delivers the paper ordinarily is that it is to be converted into a 'valuable security'. The thumb-impression is regarded as the signature of an illiterate man.²⁵ Where the accused intentionally put the executant in fear of injury to himself and thus dishonestly induced him to place his thumb-impression upon certain blank pieces of papers, it was held that the documents extorted were valuable securities and the accused were guilty under this section.¹

3. 'Offence'.—The word "offence" here means a thing punishable under this Code or any special or local law (s. 40).

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342; and further

(5) that such confinement was for the purpose of (a) extorting property, or a valuable security, or (b) constraining the doing of anything illegal, or (c) giving information which might facilitate the commission of an offence.

(6) That such extortion or constraint was from, or of, the person confined, or someone else interested in him.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, wrongfully confined AB for the purpose of extorting from the said AB (*or from a certain person interested in the said AB, to wit, CD*) a certain property, to wit—, and thereby committed an offence punishable under s. 347 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

348. Whoever wrongfully confines¹ any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence² or misconduct, or for the purpose of constraining the person confined or any person

Wrongful confinement to extort confession, or compel restoration of property.

²⁴ *Luchmun Singh*, (1904) 31 Cal. 710.

²⁵ *Batisa Singh*, (1932) 13 P. L. T. 588, 34

Cr. L. J. 81, [1932] AIR (P) 335.

¹ *Ibid.*

interested in the person confined to restore or to cause the restoration of any property or valuable security³ or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

This section may be compared with s. 330.

1. **'Whoever wrongfully confines'.**—The person liable is the person who wrongfully confines. The appellants charged the prosecutor with theft, and he was handed over to the police. It was held that the police, and not the appellants, were responsible for any oppression or extortion practised by the police on the prosecutor while in confinement.² Mere temporary detention of persons at a police-station by the police for purposes of search or investigation or generally for the purpose of enquiry into a crime does not amount to an offence of wrongful confinement, but it may amount to such an offence where the detention is serious and protracted enough to amount in law to a real and unauthorised prevention from proceeding beyond certain circumscribing limits.³ Police-officers during the investigation of a case have necessarily to call persons and keep them from going to some other place where they would prefer to be. But by detaining a person who is not concerned with any investigation for more than twenty-four hours, the police-officer commits an offence and is guilty under this section.⁴

2. **'Offence'.**—The word "offence" here means a thing punishable under this Code or any special or local law (s. 40).

3. **'Valuable security'.**—See s. 30, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342; and further

(5) that such confinement was for the purpose (a) of extorting a confession, or some information, etc., or (b) of constraining the restoration of some property, or (c) valuable security, etc.

(6) That such extortion or constraint was from, or of, the person confined, or some other person interested in him.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

As to joinder of charges, see *Queen-Empress v. Fakirapa*.⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, wrongfully confined one AB for the purpose of extorting from the said AB (*or from one CD in whom the said AB was interested*) any confession (*or any information which may lead to the detection of an offence, or misconduct, or for the purpose of constraining the person confined to restore, or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security*), and thereby committed an offence punishable under s. 348 of the Indian Penal Code, and within my cognizance [*or the cognizance of the Court of Session (or the High Court)]*.

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)]* on the said charge.

² *Shumbhoonath Panday*, (1864) 1 W. R. (Cr.) 26.

³ *Viswanatha Ayyar*, [1930] M. W. N. 723.

⁴ *B. Titus*, [1941] M. W. N. 505, (1941) 54 L. W. 81, 43 Cr. L. J. 3, [1941] AIR (M) 720.

⁵ (1890) 15 Bom. 491.

Of Criminal Force and Assault.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling : Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion, or to cease to move.

C O M M E N T .

This expression gives an elaborate explanation of the expression "to use force". The term 'force' contemplates the use of force to a person and not to a thing.⁶ The illustrations to s. 350 exemplify the various clauses of the definition given in this section.

1. 'Animal'.—See s. 47, *supra*.

350. Whoever intentionally uses force to any person,¹ without that person's consent,² in order to the committing of any offence,³ or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used,⁴ is said to use criminal force to that other.

ILLUSTRATIONS.

(a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(c) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent,

⁶ *Ram Chand*, [1939] Lah. 518.

intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z he has used criminal force to Z.

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(g) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has therefore intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(h) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

COMMENT

The preceding section defined 'force'. This section says that 'force' becomes criminal when it is used (1) without consent and in order to the committing of an offence, or (2) when it is intentionally used to cause injury, fear, or annoyance to another to whom the force is used. The term 'force' as defined here applies to force used in connection with the human body.⁷

The term 'criminal force' includes what in English law is called "battery". It will, however, be remembered that 'criminal force' may be so slight as not to amount to an offence (s. 95), and it will be observed that 'criminal force' does not include anything that the doer does by means of another person. The definition of 'criminal force' is so wide as to include force of almost every description of which a person is the ultimate object.⁸ It contemplates the use of force to a person and not to a thing.⁹

The present definition of 'criminal force' was called 'assault' in the original Code. Speaking of it, the framers of the Code say: "We have found great difficulty in giving a definition of assault, and are by no means satisfied with that which we now offer. As, however, it at present appears to us to include all that we mean to include, and to exclude all that we mean to exclude, we have adopted it in spite of the objections which we feel to its harsh and quaint phraseology. We have adopted it with the less scruple, because we trust that the illustrations will render every part of it intelligible to an attentive reader.

"A large proportion of the acts which we have designated as assaults will be offences falling under the heads of hurt and restraint. Thus, a stab with a knife is an offence falling under the head of hurt, and it is also an assault. The seizing a man by the collar, and thus preventing him from proceeding on his way, is unlawful restraint, and is also an assault. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint. A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horsewhip, who maliciously throws a stone at a person, squirts dirty water over a person, or sets a dog at a person, may cause no hurt and no restraint, yet it is evident that such acts ought to be prevented".¹⁰

Illustration (a) exemplifies 'motion', in s. 349; ill. (b), 'change of motion'; ill. (c), 'cessation of motion'; ills. (d), (e), (f), (g) and (h), 'causes to any substance any such motion'; ills. (d), (e), (g) and (h), 'brings that substance into contact with

⁷ *Sadasib Mandal*, (1918) 18 C. W. N. 1150, 15 Cr. L. J. 720, [1915] AIR (C) 131.

⁸ *Rasul*, (1888) P. R. No. 4 of 1889. See *Rose v. Kempthorne*, (1910) 22 Cox 356, 27 T. L. R. 132.

⁹ *Ram Chand*, [1939] Lah. 513; *Bhani v.*

Narain Singh, (1939) 41 P. L. R. 908, 41 Cr. L. J. 387, [1940] AIR (L) 84; *Kalar Din*, (1940) 42 Cr. L. J. 272, [1940] AIR (Pesh.) 51. Contra, *Roda v. Autar Singh*, (1938) 40 P. L. R. 923, 40 Cr. L. J. 380, [1938] AIR (L) 839.

¹⁰ Note M, p. 155.

any part of that other's body'; ills. (f) and (g), 'other's sense of feeling'. Clause (1) of s. 349 is illustrated by ills. (c), (d), (e), (f) and (g); cl. 2, by ill. (a); and cl. 3, by ills. (b) and (h).

Ingredients.—The section requires the following essentials:—

1. The intentional use of force to any person.
2. Such force must have been used without that person's consent.
3. It must have been used—
 - (a) in order to the committing of any offence; or
 - (b) with the intention to cause, or knowing it to be likely that he will cause, injury, fear or annoyance to the person to whom it is used.

1. **'Whoever intentionally uses force to any person'.**—The use of force must be intentional. The definition of "force" contemplates the presence of the person using the force and of the person to whom the force is used. When a person breaks open the lock of a house in the absence of the person in possession of the house and takes possession thereof, the possession taken is without any force or show of force.¹¹ The definition of 'criminal force' contemplates criminal force being used as against a person and does not take into account such force being used as against any matter or substance. Thus in causing dispossession of any person from immoveable property by means of an offence, the offence must be attended by criminal force to the person.¹² To strike a pot which a man is carrying and which is in contact with that man's body, constitutes the offence of criminal force if it is done to cause him fear, annoyance, etc., and if that person is a public servant in the discharge of his duties, the offence is punishable under s. 353.¹³

Where the accused went to the field of another and cut the crops sown by him and on the latter resisting they raised their sticks to strike him and that other ran away to save himself, it was held that the accused were guilty of using force by means of bodily power within the meaning of this section.¹⁴ The accused having been brought to a certain place to serve as a coolie attempted to run away, but was obstructed and prevented from doing so by a peon. In the struggle which ensued the accused seized the peon by the wrist, and attempted to get away. It was held that the accused did not commit this offence as he had acted in self-defence.¹⁵

2. **'Without that person's consent.'**—Mere submission by one who does not know the nature of the act done cannot be consent.¹⁶ See s. 90 as to the meaning of 'consent.'

On a charge of assault consent can never be a defence when the alleged assault consists in an unlawful act. It is an unlawful act to strike another person with such a degree of violence that bodily harm is a probable consequence. To this rule there are a number of well-recognized exceptions, such as blows struck in the course of friendly athletic contests or rough but innocent horseplay, but blows struck for the purpose of gratifying a perverted sexual passion do not come within any of the recognised exceptions to the general rule. The accused, in order to gratify a perverted sexual passion, beat a girl with a cane, which left seven or eight red marks on her body. He was charged with indecent assault and common assault and at the trial relied on the defence of consent. It was held that where an act was in itself unlawful, consent could never be an available defence. The conviction was, however, quashed as it was not conclusively proved that the accused's act was unlawful in itself and as there was inadequate direction in the summing-up to the jury.¹⁷

3. **'In order to the committing of any offence'.**—The force must have been used for the purpose of committing an offence. See s. 40 as to the definition of 'offence'.

4. **'Intending by the use of such force to cause, ... injury, fear or annoyance to the person to whom the force is used'.**—The force must have been used with the intention to cause or knowing it to be likely that by the use of such force he will cause injury, fear, or annoyance to the person to whom the force is used.

¹¹ *Bihari Lal*, (1934) 15 Lah. 786.

¹² *Balram Sahu v. Chamru Sahu*, (1920) 2 P. L. T. 120, 22 Cr. L. J. 329, [1921] AIR (P) 321.

¹³ *Darshan Singh*, [1941] Lah. 370, 373.

¹⁴ *Jai Ram*, [1914] 12 A. L. J. R. 154, 15 Cr. L. J. 231, [1914] AIR (A) 175; *Ashiq*

Husain Khan, (1922) 45 All. 25.

¹⁵ *Ganpati*, (1892) Cr. R. No. 23 of 1892, Unrep. Cr. C. 605.

¹⁶ *Lock*, (1872) L. R. 2 C. C. R. 10, 14.

¹⁷ *John George Donovan*, (1934) 25 Cr. App. R. 1, 30 Cox 187.

See s. 44. *supra*. as to the meaning of the word 'injury'.

Diseased spleen.—Where the accused struck a person, who had an enlarged spleen, in the course of a quarrel, and that person died owing to his bodily infirmity, it was held that the accused was guilty under this section.¹⁸ For other similar cases, see ss. 319 and 320.

Rescuing persons arrested by police.—Two police constables in the bona fide execution of their duty carried out an arrest under a warrant which, unknown to them, was in fact not legally issued; whereupon certain persons came up and rescued the prisoner and tore up the warrant but did not cause hurt to any one. It was held that the rescuers were guilty of using criminal force.¹⁹

351. Whoever makes any gesture, or any preparation¹ intending or knowing it to be likely² that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

ILLUSTRATIONS.

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

COMMENT.

It is not every threat, when there is no actual personal violence, that constitutes an assault. There must, in all cases, be the means of carrying the threat into effect. If a person is advancing in a threatening attitude, with an intention to strike another, so that his blow will almost immediately reach the other, if he is not stopped, then, this is an assault in point of law, though, at the particular moment when he is stopped, he is not near enough for his blow to take effect.²⁰

The offence of assault is one that is committed against a person and not against the public. It does involve a breach of the peace.²¹

A person in uniform, be he officer, N.C.O. or private, is no more than any one else entitled to assault another subject of the King whether in peace or time of war.²²

Assault: criminal force.—An assault is something less than the use of criminal force, the force being cut short before the blow actually falls. It seems to consist in an attempt or offer by a person having present ability with force to do any hurt or violence to the person of another. And it is committed whenever a well-founded apprehension of immediate peril from a force already partially or fully put in motion is created. An assault is included in every use of criminal force.²³

English law.—An assault consists in an attempt or offer by a person having present ability, with force, to do any hurt or violence to the person of another. Striking at another with a cane, stick, or fist, although the blow misses, drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike, presenting

¹⁸ *Jai Dayal*, (1876) P. R. No. 21 of 1876.

¹⁹ *Gokal*, (1922) 45 All. 142.

²⁰ *Stephens v. Myers*, (1830) 4 C. & P. 349.

²¹ *Nazir-ud-din*, [1933] A. L. J. R. 1345, 34

Cr. L. J. 859, [1933] AIR (A) 609.

²² *Strologo*, (1944) 46 Cr. L. J. 620, [1945] 2

M. L. J. 446, P. C., [1945] AIR P.C. 46.

²³ M. & M. 309.

a loaded gun at a man within range, or any other act indicating an intention to use violence against the person of another, is an assault. Battery is defined to be "any least hurt or violence unlawfully and wilfully or culpably done to the person of another."

Ingredients.—The action requires two things:—

1. Making of any gesture or preparation by a person in the presence of another.

2. Intention or knowledge of likelihood that such gesture or preparation will cause the person present to apprehend that the person making it is about to use criminal force to him.

1. 'Makes any gesture, or any preparation'.—See ill. (a) which illustrates that gestures which cause a person to apprehend that the person making them is about to use criminal force amount to an assault. It is an assault to point a loaded pistol at any one.²⁴ Mere utterance of some threats, unaccompanied by any gesture or preparation suggesting intention to use criminal force does not constitute this offence.²⁵

See ill. (b) as to 'preparation'. Though mere preparation to commit a crime is not punishable (see Comment on s. 511, *infra*) yet preparation with the intention specified in this section amounts to an assault. If a person throws bricks into the house of another this would be a gesture as it would cause the person into whose house the bricks are thrown to apprehend that criminal force was about to be used against him.¹ Where the accused went away threatening the officers that he would return and teach them a lesson and soon afterwards he did come back armed with a *lathi* along with some other persons, and came sufficiently close to the officers so as to raise in their minds a reasonable apprehension that actual force was likely to be used, it was held that the act of the accused came within the definition of "assault" and that his conviction under s. 353 was justified.²

According to the definition of assault in this section, the apprehension of the use of criminal force must be from the person making the gesture or preparation and if that apprehension arises not from that person but from somebody else it does not amount to assault on the part of that person. Further according to s. 349, criminal force cannot be said to be used by one person to another by causing change in the position of another human being. Where, therefore, the accused himself did nothing which could come under the definition of assault but simply made a gesture at which his followers advanced a little forward towards the complainant in a threatening manner, it was held that he was not guilty of assault under s. 353.³

2. 'Intending or knowing it to be likely'.—Intention is the gist of the offence. The gesture or preparation must be of such a nature that the person in whose presence it is made should apprehend that criminal force would be used to him. Throwing a bottle into a house, among the inmates, with the intention of hurting or frightening them, constitutes assault.⁴ Where one of the accused hit a constable and the others surrounded the constable in a threatening manner, it was held that that was not sufficient to convict the others of assault.⁵

The appellant met the respondent in the street and tendered him an order for discovery, which had been made against the respondent in a County Court action, the appellant acting on behalf of the solicitor to the other party to the action. The respondent refused to accept the document, and the appellant thrust it into the inner-fold of the respondent's coat. It was held that, as the appellant was entitled to serve the respondent personally and as there was no evidence that the appellant touched the respondent more than was necessary to bring the document home to the respondent, the appellant was not guilty of an assault on the respondent.⁶

Mere words do not amount to an assault, but the words which the party threatening uses at the time may either give his gestures such a meaning as may make them

²⁴ *James*, (1844) 1 C. & K. 530; *Vijaidatta Jha*, [1947] Nag. 237.

²⁵ *Kailash Chandra Seal*, (1939) 43 C. W. N. 756.

¹ *Mahadeo Pandey*, [1932] A. L. J. R. 224, 33 Cr. L. J. 889, [1932] AIR (A) 322.

² *Ram Singh*, (1935) 16 P. L. T. 295, 36 Cr.

L. J. 714, [1935] AIR (P) 214, S.B.

³ *Muneshwar Bux Singh*, (1938) 14 Luck. 409.

⁴ *Po Taw*, (1906) 3 L. B. R. 194, 14 Cr. L. J. 201.

⁵ *Munisami*, (1910) 11 Cr. L. J. 483.

⁶ *Rose v. Kempthorne*, (1910) 22 Cox 356, 27 T. L. R. 132.

amount to an assault, or, on the other hand, may prevent them from being held to amount to an assault. In the latter case the effect of the words must be such as clearly to show the party threatened that the party threatening has no present intention to use immediate criminal force.⁷ A preparation taken with words which would cause a person to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault. There must be evidence to show that the accused was about to use criminal force to him then and there.⁸ See *ill. (c)*.

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Punishment for assault or criminal force otherwise than on grave provocation. *Explanation.*¹—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.²

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

COMMENT.

This section provides punishment for assault or use of criminal force when there are no aggravating circumstances.

The forcible taking of a person's thumb impressions amounts to an offence under this section.⁹

1. **Explanation.**—See Comment on Exception 1 to s. 300.

2. **'Right of private defence'.**—See ss. 96 to 100 and Comments thereon.

A Sub-inspector in charge of a police-station unauthorisedly proposed to search the house of one S and his brothers. The latter stood up to him and refused to allow the search to be made. They were armed with *lathis* and assumed a threatening attitude. One of them, S, actually raised his *lathi* to strike the Sub-Inspector. It was held that S was guilty under this section.¹⁰

PRACTICE.

Evidence.—Prove (1) that the accused made a gesture or preparation to use criminal force.

(2) That the same was made in the presence of the complainant.

(3) That he intended, or knew, that it was likely that such gesture, etc., would cause the complainant to apprehend that such criminal force would be used.

(4) That such gesture, etc., did cause the complainant to apprehend the same.

(5) That the accused received no grave or sudden provocation from the complainant.

To substantiate a charge of assault on a particular person, it is not enough to prove that the words used and the preparations made by the accused were calculated to cause that person to apprehend that criminal force would be used to him, if he per-

⁷ *A. C. Cama v. H. F. Morgan*, (1864) 1 B. H. C. 205.

⁸ *Birbal Khalifa*, (1902) 30 Cal. 97.

⁹ *Jadumandan*, (1940) 21 P. L. T. 970.

¹⁰ *Sitaram Ahir*, (1943) 45 Cr. L. J. 806, [1944] AIR (P) 222.

sisted in a certain course of conduct ; there must be evidence to show that the accused was about to use criminal force to him then and there.¹¹

Or prove (1) that the accused used force¹² to the complainant.

(2) That he did so intentionally.

(3) That he used such force, without the complainant's consent.

(4) That he did so in order to commit an offence; or that he thereby intended to cause, or knew that he would thereby be likely to cause, injury, fear or annoyance to the complainant.

(5) That he received no grave or sudden provocation from the complainant.

Where two persons bring cases of mutual assault, the Magistrate cannot use evidence given in one case as evidence in the other and a conviction based on such evidence cannot be upheld.¹³

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

Autrefois acquit.—A person who is tried and discharged for the offence of using criminal force under this section cannot again, upon the same complaint, be tried for causing hurt, for, under whatever denomination the offence is classed, it is the one offence of assault.¹⁴

Complaint.—A Munsiff held an inquiry under s. 476, Criminal Procedure Code, and having come to the conclusion that the accused had committed offences under s. 183 and this section in connection with certain execution proceedings sent the case to the District Magistrate who transferred it to a Deputy Magistrate. The Deputy Magistrate acquitted the accused on the ground that there was no sanction. On appeal, the High Court held that with regard to s. 183 the Magistrate ought to have proceeded with the case according to law, and that with regard to this section no sanction was required.¹⁵

Punishment.—A sentence inflicting a fine of Rs. 50, and awarding imprisonment for one month in default of payment of fine, was held to be illegal with reference to s. 65 and this section.¹⁶

If there is grave provocation the Court will generally inflict a light punishment.

353. Whoever assaults¹ or uses criminal force² to any person being a public servant³ in the execution of his duty as such public servant,⁴ or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force to deter public servant from discharge of his duty.

COMMENT.

If hurt is caused under the circumstances mentioned in the section then either s. 332 or s. 333 will apply.

1. 'Assaults'.—See s. 351, *supra*. **2. 'Criminal force'—**See s. 349, *supra*. To strike a pot which a man is carrying and which is in contact with that man's body constitutes the offence of criminal force if it is done to cause him fear, annoyance, etc., and if that person is a public servant in the discharge of his duties the offence is punishable under this section.¹⁷

¹¹ *Birbal Khaliya*, (1902) 30 Cal. 97.

¹² *Vide* s. 349, *supra*.

¹³ *Mrs. W. Waugh*, (1939) 41 Cr. L. J. 247, [1940] AIR (C) 59.

¹⁴ *Kaplan v. G. M. Smith*, (1871) 7 Beng. L.

R. (Appx.) 25, 16 W. R. (Cr.) 3.

¹⁵ *Arjan Pramanik*, (1904) 31 Cal. 664.

¹⁶ *Jehan Buksh*, (1871) 16 W. R. (Cr.) 42.

¹⁷ *Darshan Singh*, [1941] Lah. 370, 373.

3. 'Public servant'.—See s. 21, *supra*¹⁸. A *pagi* (a village watchman) remunerated by fees paid by the villagers, is a public servant within the meaning of this section.¹⁹ Similarly, a lascar in the Public Works Department distributing water from public irrigation channels is a public servant and persons assaulting him while engaged in distributing water from an irrigation channel are liable to be convicted under this section.²⁰ The accused cannot claim exoneration on the ground that the person whom he assaulted was not attired in the livery which is ordinarily associated with the duty which he claimed to be discharging, if in fact the accused knew him to be a public servant acting in the execution of his duty as such servant.²¹ Until a member of the Civic Guard has been called out for duty under s. 4 of Ordinance VIII of 1940 and until any order calling him out has been notified in a *Gazette* as required by the Ordinance, he cannot be called a public servant. Where a person found drinking and quarrelling in a public street inflicted injury on a member of the Civic Guard while attempting to arrest him, it was held that as the Civic Guard had not been properly and legally called out for duty, he was not authorised to exercise any of the special powers of a police-officer, and the accused was justified in resisting his arrest and was not guilty under this section.²²

4. 'In the execution of his duty as such public servant'.—These words mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done in good faith under colour of his office.²³ The test is whether the officer at the time of the assault was lawfully discharging a duty imposed on him by law as such. Was he doing what it was his duty to do, when he was assaulted?²⁴ Where there is no illegality on the face of a warrant and it is on the face of it a legal warrant executed by a person who has authority to issue warrants of that nature, it is the duty of the officer executing the warrant to do so and in so doing he acts in the execution of his duty as a public servant.²⁵ An officer exercising his official duties grossly, illegally and in an outrageous manner, cannot be deemed to be a public servant in the execution of his duty so as to bring an assault against such officer within the purview of this section.¹ The public servant must be acting in the execution of his duty as such public servant. A commissioner attempting to give possession under a time-expired warrant has no authority to go upon land in the possession of the party, who resists the execution. The persons offering resistance are not guilty of an offence under this section.² A warrant of arrest signed by an officer of Court not duly authorised to sign such warrants is an illegal one, and resistance to the execution of such warrant cannot be punished under s. 325B and this section.³ If in an execution warrant sought to be executed, the date on or before which it is to be executed and the date on or before which it is to be returned to the Court is not specified, the warrant is bad. Thus, the warrant being illegal, a person resisting its execution by the Amin commits no offence under this section.⁴ A vaccinator who vaccinates in a place, where vaccination is not compulsory is not discharging any duty under the law when attempting to vaccinate a child. A person, therefore, who prevents a vaccinator from vaccinating a child, in a place where vaccination has not been made compulsory, is not guilty of an offence under this section.⁵ Where a cart-owner refused to give his cart for the use of a Forest Settlement Officer, who required it as per executive orders of Government, and assaulted the peon in preventing

¹⁸ *Vide Weir* (3rd Edn.) 203.

¹⁹ *Aja Narsang*, Criminal Revision case No. 377 of 1909, decided on February 2, 1910, by Chandavarkar and Knight, JJ. (Unrep. Bom.).

²⁰ *The Public Prosecutor v. Annan Nayudu*, (1924) 48 Mad. 867.

²¹ *Lava*, (1916) 13 N. L. R. 87, 18 Cr. L. J. 689, [1917] AIR (N) 231.

²² *Jitendra Mohan De*, [1944] 1 Cal. 456.

²³ See *Dalip*, (1896) 18 All. 246; *Raman Singh*, (1900) 28 Cal. 411, 414; *Bolai De*, (1907) 35 Cal. 361; *Meharban Singh*, (1911) 12 Cr. L. J. 112; *Asa*, (1913) 14 P. L. R. 1088, 14 Cr. L. J. 512; *Provincial Government, Central Provinces and Berar v. Nonelal*, [1946] Nag. 395.

²⁴ *Bhopo*, (1932) 34 Cr. L. J. 1147, 27 S. L. R. 209, [1933] AIR (S) 174; *Gulabi Mahto*,

(1940) 21 P. L. T. 144, [1940] P. W. N. 149. (1940) 41 Cr. L. J. 42, [1940] AIR (P) 361.

²⁵ *Shib Charan*, [1938] All. 386.

¹ *Ngwe Yon*, (1931) 32 Cr. L. J. 939, [1931] AIR (R) 169; *Seetaramiah*, [1933] M. W. N. 725; *Gulabrai Santdas*, (1943) 45 Cr. L. J. 559, [1944] AIR (S) 89.

² *Abinash Chandra Aditya v. Ananda Chandra Pal*, (1904) 31 Cal. 424; *Nandlal*, (1923) 19 N. L. R. 183, 25 Cr. L. J. 223, [1924] AIR (N) 68.

³ *Yedama Subbaramiah*, (1934) 39 L. W. 388, 66 M. L. J. 408, [1934] M. W. N. 399, 35 Cr. L. J. 782, [1924] AIR (M) 206.

⁴ *Kishori Lal*, (1934) 36 Cr. L. J. 295, [1934] AIR (A) 1016.

⁵ *Bozagellaya*, (1908) 19 M. L. J. 238, 11 Cr. L. J. 200.

him from seizing his cart, it was held that he could not be convicted of an offence under this section, because the rules aforesaid had not the force of law, and a public servant acting under them was not acting in the execution of his duty.⁶ A Tahsildar deputed his peon by a written order to procure some camels for the camp of a Settlement Officer. When the peon attempted to seize the camels of the accused he was assaulted by the accused and prevented from seizing the camels. It was held that the accused had committed no offence.⁷ The Collector has no authority to issue a distress warrant to a police-officer under the Income-tax Act of 1922 for arrear of income-tax. A police officer executing such a warrant is not acting in the execution of his duty as a police-officer, and resistance to him does not constitute an offence under this section.⁸ A bill collector cannot be said to be engaged in the lawful discharge of his public duty when he attempts to enforce a warrant for an amount in excess of what could be recovered by distress.⁹ A police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under this section for using criminal force to deter a public servant in the execution of his duty, it was held that no offence had been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house-trespass, and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused who was justified in causing the slight harm which he had inflicted on the constable.¹⁰

Where a Collector's peon was deputed to keep the peace during a distraint, and, when on the road to execute the order, was assaulted by the accused who attempted to deprive him of his *perwana*, it was held that the accused had committed an offence under this section.¹¹ A warrant of arrest was issued against R, on a charge of cheating, to the Sub-Inspector within whose jurisdiction R resided. That officer ordered his subordinate constables to be on the lookout for R and arrest him wherever found. One of the constables came across R and proceeded to arrest him informing him of the issue of a warrant against him. The warrant itself was, however, not produced. The accused interfered with the constable in arresting R and managed to prevent his arrest. It was held that under s. 54(1) of the Criminal Procedure Code the constable was empowered to make the arrest without warrant as he had credible information that the person wanted had committed a cognizable offence and in making the arrest he was occupied in the discharge of his duty as a police-officer and any interference with that arrest amounted to obstructing a police-officer in the discharge of his duty and was an offence under this section.¹² A warrant of attachment was endorsed to a bailiff for execution and another bailiff was directed to act with the former in the execution of the warrant. The accused whose property was to be attached under the warrant assaulted the latter bailiff and prevented him from attaching his property. It was held that the second bailiff was acting in good faith as a public servant and the accused was, therefore, guilty of an offence under this section.¹³ If the act of the public servant is authorised by law any resistance will be deemed penal, e.g., assaulting a public servant carrying on a search,¹⁴ or executing a writ of delivery of possession,¹⁵ or resisting a public servant directed to survey the accused's land,¹⁶ or resisting a warrant of arrest¹⁷ or of distraint.¹⁸

⁶ *Rakhmaji*, (1885) 9 Bom. 558.

⁷ *Asa*, (1913) 14 P. L. R. 1088, 14 Cr. L. J. 512; *Gokal Chand*, (1920) 22 Cr. L. J. 65, [1920] AIR (A) 301. The case of *Amir Khan*, (1913) 14 P. L. R. 621, 14 Cr. L. J. 141, seems to be of doubtful authority.

⁸ *Jairam Sahu*, (1923) 4 P. L. T. 171, 24 Cr. L. J. 490, [1923] AIR (P) 338.

⁹ *Ahmad Jalaluddin Rowther*, [1936] M. W. N. 638.

¹⁰ *Dorasamy Pillai*, (1903) 27 Mad. 52.

¹¹ *Methi Mullah*, (1870) 13 W. R. (Cr.) 49; *Kandaswami Goundan*, (1923) 46 M. L. J. 45, [1924] M. W. N. 50, 25 Cr. L. J. 290, [1924] AIR (M) 539. See *Ramasami*, (1889) 13 Mad. 131.

¹² *Gopal Singh*, (1913) 36 All. 6; *Prakash*

Chandra Kundu, (1914) 41 Cal. 836.

¹³ *Abdul Ghani*, (1922) 25 Cr. L. J. 122, (1924) AIR (L) 632.

¹⁴ *Bissar Misser*, (1913) 41 Cal. 261; *Bhim Singh*, (1918) 17 A. L. J. R. 115, 20 Cr. L. J. 174, [1919] AIR (A) 207.

¹⁵ *Preo Lal Mukerjee*, (1913) 18 C. W. N. 548, 15 Cr. L. J. 427, [1914] AIR (C) 908.

¹⁶ *Judagi Raut*, (1916) 2 P. L. J. 18, 18 Cr. L. J. 360, [1916] AIR (P) 35.

¹⁷ *Rajanikanta Saha*, (1930) 58 Cal. 940; *Kartick Chandra Maity*, (1930) 13 P. L. T. 167, 33 Cr. L. J. 706, [1932] AIR (P) 131.

¹⁸ *Peer Mastan Rowther*, (1938) 47 L. W. 673, [1938] M. W. N. 418, 39 Cr. L. J. 879, [1938] AIR (M) 659.

Where a police constable, W, was informed by certain constables that gambling was going on in a public place and he was asked to accompany them and assist in arresting the gamblers, and when the party was some paces from the place where the gambling was going on, the accused rushed forward and grappled with W shouting all the time to his companions to run away, it was held that as W was prevented by the accused from proceeding by use of criminal force and the accused having thus deterred W from discharging his duty which was to arrest the gamblers they were guilty under this section.¹⁹ Where at the search of the accused's house by a head constable under the orders of a Sub-Inspector the accused assaulted the constable and prevented his entering the house, it was held that the accused was guilty of an offence under this section, as the head constable, in conducting the search, was obeying the order of his superior officer, and that s. 165(3) of the Criminal Procedure Code did not apply to the case.²⁰

CASES

Defect in warrant.—Where the warrant for the arrest of a person, in execution of a civil process, was not signed in full under s. 251 of the Criminal Procedure Code, but was initialled by the officer issuing it, and was resisted by that person when the officer to whom it was entrusted sought to execute it, it was held that the person was guilty under this section, and the preliminary defect of the warrant formed no defence.²¹ It was held, similarly, where the provisions of s. 82 of the Civil Procedure Code were not complied with before the issuing of a warrant under which the accused was arrested but rescued by his friends.²² But if the warrant issued to a constable to arrest a person is invalid, as, for instance, where it is signed by an Honorary Magistrate who is not the presiding officer under s. 75, Criminal Procedure Code, the person against whom it is issued cannot be convicted under this section if with the assistance of other persons he manages to free himself from the constable and escapes.²³ Similarly, where the provisions of s. 77, Criminal Procedure Code, are not complied with and the warrant is illegal, the person helping the persons arrested to escape is not guilty of any offence.²⁴ A warrant of execution which does not bear a date on or before which it should be executed,²⁵ or where the date fixed for the execution has expired,¹ is not a good warrant. A warrant issued by a Revenue Officer for the arrest of a defaulting witness, which does not contain the name of the person to be arrested, is illegal, and persons assaulting the public servant to help the witness to escape are not guilty of an offence under this section.² Where a warrant required the *amin* to deliver possession of a certain house, after breaking open the locks, to the purchaser, and the *amin* broke open the lock and entered the house, and the accused pushed out the *amin* and his party and assaulted them, it was held that the warrant as it authorised the locks to be broken open was not according to law; that the balance of authority was in favour of the view that the offence committed was not one punishable under this section but only under s. 352; and that as the entry by the *amin* was over and it did not amount to an offence, the accused had no right of private defence.³

Search without proper order or warrant.—Where the accused resisted a public officer who attempted to search a house, in the absence of a proper written order authorizing him to do so, he was held to have committed no offence under this section⁴ or s. 352.⁵ The Madras High Court has held that a search without a search warrant

¹⁹ *Ramdeo*, (1935) 36 Cr. L. J. 558, [1935] AIR (A) 516.

²⁰ *Parasurama Asari*, (1910) 11 Cr. L. J. 727.

²¹ *Janki Prasad*, (1886) 8 All. 293. See *Diwan Singh*, (1885) 5 A. W. N. 244; *Narsingubhan*, Weir (3rd Edn.) 204; *Latchmana Goundan*, (1888) 1 Weir 343; *Perumalu*, (1885) 1 Weir 344; *Abdul Gafur*, (1896) 23 Cal. 896; *Bankey Behary Singh*, (1918) 3 P. L. J. 493, 19 Cr. L. J. 747.

²² *Narbadeshwar*, (1905) 27 All. 491.

²³ *Jagpat Koeri*, (1917) 2 P. L. J. 487, 18 Cr. L. J. 526, [1917] AIR (P) 17.

²⁴ *Paswathia Pillai*, (1927) 51 Mad. 873.

²⁵ *Mohini Mohan Banerji*, (1916) 1 P. L. J.

550, 18 Cr. L. J. 39, [1916] AIR (P) 272.

¹ *Raghubir*, (1941) 17 Luck. 311.

² *Jogendra Nath Laskar v. Hiratal Chandra Poddar*, (1924) 51 Cal. 902.

³ *Venkata Reddi*, [1937] M. W. N. 176; *Dashrath*, [1942] N. L. J. 50.

⁴ *Narain*, (1875) 7 N. W. P. 209; *Jagarnath Mandhata*, (1897) 1 C. W. N. 233; *Madho Sonar*, (1915) 13 A. L. J. R. 691, 16 Cr. L. J. 589, [1915] AIR (A) 442; *Sitaram Ahir*, (1943) 45 Cr. L. J. 806, [1944] AIR (P) 222.

⁵ *Faqira*, (1929) 30 Cr. L. J. 1145, [1929] AIR (A) 903.

does not justify an obstruction or resistance to an officer, if he was acting in good faith and without malice.⁶

Where a statute required the recording of reasons before a search was made for an offence committed under the statute, and an officer conducted the search without recording such reasons and he was assaulted by the accused, it was held that the accused was not guilty under this section as the officer making the search could not be said to be acting in the exercise of his powers.⁷

Illegal attachment.—An order allowing attachment of the movable property of a judgment-debtor wherever found, is illegal and resistance to such an attachment is not an offence under this section.⁸ Resistance to illegal attachment and seizure of goods by the police does render the persons resisting liable under this section.⁹

Unlawful act of public servant is good defence.—Where a licensed vaccinator attempted to take lymph from a child of one accused to vaccinate the child of the other, and was assaulted in consequence and received slight injuries, it was held that he was not entitled to take lymph from the arm of any person who objected, and his attempting to do so was unlawful, and that the accused were justified in assaulting him.¹⁰ Where the accused, on a vaccinator ordering a village servant to enter his house and bring out his child for vaccination, threatened to strike with a spade anyone who should enter his house, it was held that he was not guilty of assaulting a public servant under this section.¹¹ An Excise peon with the avowed object of seeing if *chandu* (a smoking mixture of opium) was not being manufactured, ascended the stairs of accused No. 1's house and looked into the place where accused No. 1 and his wife were sitting. Accused No. 1 on perceiving him came to the door, and shoved him down the steps and followed him, when accused No. 2 came in and hit him. It was found that the peon was not injured in any way. The accused were convicted under s. 353. It was held that the conviction was illegal. Accused No. 1 was justified in turning out the peon for he was not authorized to enter the premises of the accused even with the object of seeing if *chandu* was being manufactured.¹² Where a *surveille* on a domiciliary visit being paid to him by a police-officer, refused to allow his thumb impression to be taken, and, on the officer attempting to take it, produced a club saying he would not allow the impression to be taken, and, if any one asked for it, he would break his head, it was held that the act of the *surveille* did not amount to an assault and that his conviction under this section could not be sustained.¹³ Where, under a warrant authorizing distraint of the property of a person who had defaulted to pay water-tax, the person executing the warrant attempted to distrain the property of the lessee of the defaulter and was assaulted by the lessee, it was held that the lessee could not be convicted under this section.¹⁴ Where the accused, on being asked by a police constable to accompany him to a Sub-Inspector without a written order from the latter under s. 160 of the Criminal Procedure Code, assaulted the constable, it was held that the constable was not acting as a public servant engaged in the discharge of his duty, and that, therefore, the accused was not guilty.¹⁵ A member of a sanitation committee submitted to the Tahsildar a list of persons who had made default in payment of sanitation tax. Two peons accompanied by a watchman went round with the list and when they approached the accused, the latter tore up the list and buffeted the peons out of the premises. It was held that inasmuch as there was no formal writ at all and there was nothing to show that the tax had been demanded by the order of the Board, the accused were entitled to resist the demand and were not guilty of

⁶ *Pukot Kotu*, (1896) 19 Mad. 349. See also *Poomalai Udayan*, (1898) 21 Mad. 296.

⁷ *Chander Prasad*, (1937) 18 P. L. T. 398. [1937] P. W. N. 377, 38 Cr. L. J. 982, [1937] AIR (P) 501.

⁸ *Hari Prasad v. Bailiff, Small Cause Court*, [1941] Ran. 592.

⁹ *Gurucharan Matho*, (1946) 48 Cr. L. J. 60.

¹⁰ *Mangobindo Muchi*, (1899) 3 C. W. N. 627; *Nowrang Singh*, (1900) 5 C. W. N. 134; *Bahal*, (1906) 3 A. L. J. R. 327, 3 Cr. L. J. 868.

¹¹ *Pethan Kovan*, (1900) 1 Weir 345.

¹² *Allah Baksh*, (1904) 5 P. L. R. 390, 1 Cr. L. J. 956.

¹³ *Birbal Khalifa*, (1902) 30 Cal. 97.

¹⁴ *Mallampati Narasimham v. Sub-Inspector of Police*, (1924) 47 M. L. J. 447, 20 L. W. 669, 26 Cr. L. J. 223, [1924] AIR (M) 895.

¹⁵ *Tukaram*, (1918) 20 Cr. L. J. 48, [1918] AIR (N) 137; *Gopi Mahto*, (1931) 10 Pat. 821; *Gulbhi Mahto*, (1940) 21 P. L. T. 144, [1940] P. W. N. 149, (1940) 41 Cr. L. J. 742, [1940] AIR (P) 361.

an offence under this section, but were guilty of assault under s. 352.¹⁶ Where the accused caught hold of a Sub-Inspector's hand who wanted to remove his *jholu* by force, on the refusal of the accused to allow a search of his person, but he was thrown down and beaten by the Sub-Inspector, it was held that the conduct of the Sub-Inspector, who could not have arrested the accused without a warrant and who could not have searched the accused under any provision of law, was very high-handed and utterly without any justification in law and that the accused could not be convicted under this section.¹⁷ Where a police-officer proceeded to demolish a wall and open a drain without any authority from the Magistrate, and the accused resisted the act of the police-officer, it was held that accused did not commit any offence.¹⁸ In executing a writ of attachment before judgment of moveable property in the possession of the defendant (accused), the bailiff attempted to seize by violence money on the person of the accused and in resisting the seizure the accused used criminal force against the bailiff. The accused was charged with an offence under this section and was discharged. It was held that the bailiff while executing the writ in accordance with O. XXI, r. 48, Civil Procedure Code, had no authority to lay violent hands on the person of the accused and seize by force property found thereon.¹⁹

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was a public servant.

(2) That the accused assaulted, or used criminal force to such public servant.

(3) That when the accused assaulted, etc., him, he was acting in the execution of his duty as such public servant; or

that such assault, etc., was committed with intent to prevent or deter such public servant from discharging his duty, as such; or

that such assault was committed in consequence of something done, or attempted to be done, by such public servant in the lawful discharge of his duty.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

A person cannot, when called upon to meet a charge that he had assaulted a public officer in the discharge of his duties, on failure of that charge, be convicted of an offence of having assaulted a private individual, viz., a witness in the case, especially in the absence of a complaint by that private individual.²⁰ Where an accused has been convicted under this section for assaulting a person whom the Magistrate thought to be a public servant and the appellate Court finds that he was not a public servant there is no bar to the conviction being altered to one under s. 352.²¹

Sanction.—A charge under this section requires no sanction for initiation of proceedings.²²

Non-production of warrant at trial.—One of the accused was convicted under this section, and two others of abetment of an offence under it. But the warrant of attachment under which the public servant was acting was not produced at the trial, nor was any secondary evidence given to show its contents. It was held that in the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence, it was impossible to hold that the conviction was good.²³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, assaulted [*or used criminal force to*] AB, a public servant, to wit——, in the execution of his duty as such

¹⁶ *Muhammad Ibrahim*, (1931) 32 Cr. L. J. 853, [1931] AIR (L) 524.

¹⁷ *Ramain Rai*, [1942] All. 914.

¹⁸ *Sukar Sao*, (1941) 23 P. L. T. 232, [1941] P. W. N. 620, (1941) 42 Cr. L. J. 753, [1941] AIR (P) 560.

¹⁹ *Ghanshamdas*, 1946] Kar. 57.

²⁰ *Akbar Momin*, (1901) 6 C. W. N. 202.

²¹ *Maung Ba*, [1938] Ran. 139.

²² *Arjan Pramanik*, (1904) 31 Cal. 664.

²³ *Tafazzul Ahmed Chowdhry*, (1899) 26 Cal. 630; *Chunder Coomar Sen*, (1899) 3 C. W. N. 605; *Shwe Ko*, (1905) 3 L. B. R. 128, 3 Cr. L. J. 361.

public servant [or with intent to prevent or deter the said AB from discharging his duty as such public servant], and thereby committed an offence punishable under s. 353 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—A breach of the peace, even if involving an assault on a public officer of a mild character, unless there be some elements of criminality in it, should not ordinarily be punished by sentences of imprisonment. So far as possible the jails should be kept for the reception of persons who perform criminal acts of not merely a technical but of a criminal character.²⁴

354. Whoever assaults or uses criminal force to any woman,¹ intending to outrage or knowing it to be likely that he will thereby outrage her modesty,² shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force to woman with intent to outrage her modesty.

COMMENT.

An indecent assault upon a woman is punishable under this section.²⁵ Rape is punished under s. 376. The offence under this section is of less gravity than the one under s. 376.

Scope.—Assaults committed with the intention of committing rape are not contemplated by this section.

1. 'Woman' is defined as a female human being of any age (s. 10). The accused took a girl of six years to his room, where he made her lie down and he lay on her. The girl immediately screamed and ran away. For this act the accused was convicted and sentenced by the Magistrate under s. 352 and not under this section, on the ground that the girl was too young to have any modesty. It was held that the act of the accused was punishable under this section, for the girl, though young, was a 'woman' as defined by s. 10.¹

2. 'Intending to outrage or knowing it to be likely that he will thereby outrage her modesty.'—There must be intention or knowledge that the woman's modesty will be outraged. What constitutes an outrage to female modesty is nowhere defined. This will differ according to the country and the race to which the woman belongs. It would be an outrage to the modesty of one woman to do her what would be thought nothing of by another. A kiss that would be highly resented by a lady might be no affront to the maid.² To place hands on the shoulder of a woman will be an outrage on the modesty of a Hindu or a Mahomedan woman, but not a European.³ "In construing this section the Court must have regard to the race and the position in life of the particular woman; and women of one nationality may have different standards of modesty from women of another nationality... If women engage in professional work and come out into the open world, they must adopt the standards of ordinary men and women of the world and they cannot expect to retain the same hypersensitive notions of modesty which appealed to their ancestors in purdah... at the same time it is extremely important that men who are brought into professional contact with women should be exceedingly careful not to do anything to outrage the modesty of the women with whom they associate, and that really means that they should be careful not to introduce into their relations with the women any element of sex."⁴

Knowledge that modesty is likely to be outraged is sufficient to constitute the offence without any deliberate intention of having such outrage alone for its object.

²⁴ *Ananda Parhi*, (1931) 12 P. L. T. 791, 32 Cr. L. J. 1166, [1931] AIR (P) 342.

²⁵ *Shankar*, (1881) 5 Bom. 403.

¹ *Tatia Mahadev*, (1912) 14 Bom. L. R. 961, 18 Cr. L. J. 858. See *Soko*, (1932) 34 Cr. L. J. 308, [1933] AIR (C) 142.

² 1st Rep., s. 418, p. 285.

³ *George Evans*, (1906) Criminal Application

for Revision No. 58 of 1906, decided on April 10, 1906, per Jenkins, C. J., and Aston, J. (Unrep. Bom.).

⁴ Per Beaumont, C. J., in *Baloobhai Harishankar Bhat*, (1931) Criminal Appeal No. 279 of 1931, decided by Beaumont, C. J., and Barlee, J., on July 15, 1931 (Unrep. Bom.).

For instance, the pulling of a woman by the arm coupled with a request for sexual intercourse, amounts to an offence under this section.⁵ The accused cannot be convicted of this offence where the woman had either no modesty to mention or it was not such as would be outraged by the acts attributed to him.⁶

CASES.

Where a master took indecent liberties with a female scholar it was held that he was guilty of assault though she did not resist.⁷ Making a female patient strip naked under the pretence that the accused, a medical man, could not otherwise judge of her illness was held to be an assault.⁸ Where the accused took off a girl's clothes, threw her on to the ground and then sat down beside her and said nothing to her nor did he do anything more to her, it was held that he was guilty of an offence under this section.⁹ Accused entered a carriage occupied by a lady who was asleep therein and sat down on the berth on which she was sleeping. She woke up and the accused threatened to strangle her if she screamed. He then began to unbutton his trousers and had unfastened the top button when the lady began to struggle with him, whereupon the accused released her and asked her name. On discovering her identity, he ceased to molest her explaining that he had mistaken her for another lady. It was held that the accused was not guilty of an attempt to commit rape but was guilty of an indecent assault under this section.¹⁰ But where the evidence showed that the accused stripped a girl of eighteen or twenty nearly naked and was lying upon her when her cries attracted people to the spot, the accused was held liable under s. 376 for attempt to commit rape and not under this section.¹¹ The accused caught hold of a girl, threw her down, put sand in her mouth, got on her chest and attempted to have intercourse with her. She resisted and cried and her screams attracted a couple of persons seeing whom the accused ran away. It was held that the offence committed was an attempt to commit rape and not one under this section.¹² Where the accused caught hold of a woman by her arm and dragged her, but she raised a hue and cry and some neighbours released her, and there was no evidence as to what the intention of the accused was, it was held that he could not be convicted of abduction (s. 366) but was guilty of an offence under this section.¹³

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was a female.

(2) That the accused assaulted or used criminal force to her.

(3) That he intended thereby to outrage her modesty; or that he knew it to be likely that he would thereby outrage her modesty.

The charge under this section is one which is very easy to make and very difficult to rebut, and when such a charge is made it is necessary to see whether it is supported by independent evidence besides that of the woman herself, or is corroborated by her conduct and the surrounding circumstances and is consistent with ordinary probabilities.¹⁴

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, assaulted [or used criminal force to] AB, a woman, intending to outrage [or knowing it to be likely that you would thereby outrage] the modesty of the said AB by such assault [or criminal force], and thereby committed an offence punishable under s. 354 of the Indian Penal Code, and within my cognizance.

⁵ *Sena Shetty*, (1890) 1 Weir 347;

⁶ *Champa Pasin*, (1928) 29 Cr. L. J. 325, [1928] AIR (P) 326; *Baij Nath*, [1936] O. W. N. 601, 37 Cr. L. J. 892, [1936] AIR (O) 379.

⁷ *Nichol's Case*, (1807) Russ. & Ry. 130; *M'Gavaran*, (1852) 6 Cox 64.

⁸ *Rosinki's Case*, (1824) 1 Mood. Cr. C. 19.

⁹ *Nuna*, (1912) 13 P. L. R. 350, 13 Cr. L. J. 469.

¹⁰ *Jones*, (1925) 27 Cr. L. J. 916, [1935] AIR (R). 247.

¹¹ *Khadam*, (1910) 11 Cr. L. J. 611.

¹² *Bhartu*, (1933) 34 P. L. R. 832, 35 Cr. L. J. 432, [1933] AIR (L) 1002.

¹³ *Fakir*, (1928) 29 P. L. R. 444, 29 Cr. L. J. 479.

¹⁴ *Nga Aung Dwe*, (1894) 1 U. B. R. (1892-1896) 229.

And I hereby direct that you be tried on the said charge.

Punishment.—See the Frontier Crimes Regulation, 1901, ss. 11(3) (d) and 12(2).

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation¹ given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.

COMMENT.

The intention to dishonour may be supposed to exist when the assault or criminal force is by means of gross insults, such as kicking a man, pulling a man's nose, assaulting with a shoe, or laying a whip across the shoulders.

Where an accused, while under trial, struck a Sub-Inspector of Police, who was in the witness-box giving evidence against him, it was held that he was guilty of an offence under this section.¹⁵

1. 'Grave and sudden provocation.'—See Exception 1 to s. 300.

Where a low caste woman splashed water of a stream on the body of an orthodox Brahmin while he was performing his *sandhya* (morning prayer), it was held that the pollution and interruption thus caused in the continuity of his prayers were sufficient to cause grave and sudden provocation so as to justify the use of force such as catching her in order to express his resentment at her conduct, and there could be no inference from such action that there was an intention on the part of the Brahmin to dishonour the woman.¹⁶

PRACTICE.

Evidence.—Prove (1) the assault or use of criminal force by the accused.

(2) That the accused intended thereby to dishonour the person assaulted, etc.

(3) That he did not receive grave or sudden provocation from the person so assaulted, etc.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That you, on or about the—day of—, at—, assaulted [or used criminal force to] AB, intending by such assault [or criminal force] to dishonour the said AB, and thereby committed an offence punishable under s. 355 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

356. Whoever assaults or uses criminal force to any person, in attempting¹ to commit theft² on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force in attempt to commit theft of property carried by a person.

COMMENT.

Object.—This section applies to cases of using criminal force in an attempt to commit theft and not to those cases in which theft has been actually committed.¹⁷ It provides a separate punishment for the rare cases of criminal force used in an

¹⁵ *Altaf Mian*, (1907) 27 A. W. N. 186, 6 Cr. L. J. 22.

¹⁶ *Sheodin Hari Prasad v. Juwari*, (1926) 27

Cr. L. J. 1003, 9 N. L. J. 157, [1927] AIR (N) 47.

¹⁷ *Mukun*, (1865) Unrep. Cr. C. 3.

attempt to commit theft, and yet not amounting to robbery. The section will generally apply to pickpockets.

1. 'Attempting.'—See s. 511, *infra*. 2. 'Theft.'—See s. 378, *infra*.

PRACTICE.

Evidence.—Prove (1) the assault or use of criminal force by the accused.

(2) That the person assaulted, etc., at the time, was wearing, or carrying the property in question.

(3) That the accused committed such assault, etc., in attempting to commit theft of such property (*vide* ss. 511 and 378).

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, assaulted [*or used criminal force to*] AB in attempting to commit theft of certain property, to wit——, which the said AB was then wearing [*or carrying*], and thereby committed an offence punishable under s. 357 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

357. Whoever assaults or uses criminal force to any person, in attempting¹ wrongfully to confine² that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to one thousand rupees or

Assault or criminal force in attempt wrongfully to confine a person.

with both.

COMMENT.

This section deals with an assault committed in attempting wrongfully to confine a person.

1. 'Attempting.'—See s. 511, *infra*.

2. 'Wrongfully to confine.'—See s. 340, *supra*.

PRACTICE.

Evidence.—Prove (1) the assault, or use of criminal force by the accused.

(2) That he did so in an attempt wrongfully to confine the person assaulted, etc.

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, assaulted (*or used criminal force to*) AB, in attempting wrongfully to confine the said AB, and thereby committed an offence punishable under s. 357 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both.

Assault or criminal force on grave provocation.

Explanation.—The last section is subject to the same Explanation as section 352.

COMMENT.

This is a somewhat mitigated form of the offence described in s. 352. Where a bill-collector illegally distrained the doors of a house, under s. 32(2) of the Madras

Local Boards Act, 1884, and he was assaulted by the accused, it was held that the accused was guilty under this section and not s. 353.¹⁸

Explanation.—The Explanation is not happily worded. The expression 'the last section' is incorrect. The purport of the Explanation is that this section is subject to the same Explanation as s. 352.

PRACTICE.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

Of Kidnapping, Abduction, Slavery and Forced Labour.

359. Kidnapping is of two kinds : kidnapping from British India, and kidnapping from lawful guardianship.

COMMENT.

Kidnapping is divided into two kinds. But there may be cases in which the two kinds overlap each other. For instance, a minor may be kidnapped from British India as well as from lawful guardianship.

360. Whoever conveys any person beyond the limits of British India¹ without the consent of that person,² or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

COMMENT.

The offence of kidnapping is sometimes committed by means of assault, and is sometimes attended with restraint; but this is not always the case. For instance, a labourer who has been induced to embark on board a ship by false assurances that he shall be taken to a country where he shall have good wages, but whom the captain of the ship intends to sell for a slave, has not as yet been either assaulted or retained although he is kidnapped.

Ingredients.—This section requires two essentials :—

1. Conveying of any person beyond the limits of British India.
2. Such conveying must be without the consent of that person.

1. 'Conveys any person beyond the limits of British India.'—This offence may be committed on a grown-up person or a minor by conveying him or her beyond the limits of 'British India.'

See s. 15, *supra*, as to the definition of 'British India.'

2. 'Without the consent of that person.'—The conveying must be without the consent, express or implied, of the person conveyed. Where the accused induced certain women to leave British India for Ceylon on the misrepresentation that they were to be married to his sons, and after arriving at Ceylon made them work as coolies on a tea estate, it was held that the women must be held to have been taken without their consent and that the accused was guilty of kidnapping from British India.¹⁹

A person kidnapping a girl of fifteen years of age out of British India with her consent does not come within the purview of this section.²⁰

See s. 90, *supra*, as to the definition of 'consent.'

361. Whoever takes or entices any minor¹ under fourteen years of age if a male, or under sixteen years of age if a female,² or any person of unsound mind,³ out of the keeping of the lawful guardian⁴ of such minor or person of unsound mind, without the consent of such guardian,⁵ is said to kidnap such minor or person from lawful guardianship.

¹⁸ *Chinnaswami Pillai v. Chairman of the Arkonam Union*, (1914) 15 Cr. L. J. 687.

¹⁹ *Periaswami Kangani*, [1910] M. W. N.

262, 11 Cr. L. J. 368.

²⁰ *Haribhai*, (1918) 20 Bom. L. R. 372, 42 Bom. 391.

Explanation.—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

COMMENT.

Object.—The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.

Under English law this offence is known as ‘child-stealing.’

Scope.—Kidnapping is an offence irrespective of any intent with which it is committed. It may be committed without assault or wrongful restraint or confinement. A child, for example, who is decoyed from its guardian, who soon forgets its home, and who consents to remain with the kidnapper, cannot be said to have been assaulted or restrained. This offence may be committed in respect of either a minor or a person of unsound mind. To kidnap a grown-up person, therefore, is not this offence.²¹

Ingredients.—The section has four essentials :—

1. Taking or enticing away a minor or a person of unsound mind.
2. Such minor must be under fourteen years of age, if a male, or under sixteen years of age, if a female.
3. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
4. Such taking or enticing must be without the consent of such guardian.

1. ‘Takes or entices any minor.’—The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not.²² There must be a taking of the child out of the possession of the parent.

If a child leaves its parents’ house for a particular purpose with their consent, it cannot be said to be out of the parents’ keeping. A mere leading of a not unwilling child will be sufficient.

The word “taking” means physical taking. Thus, where a father sent his daughter to live in a house with another married daughter of his, who got her married to an inmate of the house without the consent of the father, it was held that no offence was committed by the married daughter, because there was no taking out of lawful guardianship inasmuch as the daughter never left the house where she was residing with the consent of her father.²³

The period of detention is immaterial to the offence. Where, therefore, it was proved that the accused having met a girl by arrangement, stayed with her away from her father’s house for three days, sleeping with her at night; and that he took her away without her father’s consent and against his will, in order to gratify his passions and then allowed her to return home, but not with a view to keeping her away from her home permanently, it was held that he was guilty of this offence.²⁴ If a girl under sixteen has been found in the streets by herself and seduced away, that is not a taking out of the possession of the father, even though he is living in the place and she lives with him.²⁵ If a man, by previous promises to a girl as to what he will do if she will leave her parents’ house and go to live with him, induces her at

²¹ (1867) 8 W. R. (Cr. L.) 11.

²² *Manktelow*, (1853) 6 Cox 143.

²³ *Jagan Nath*, (1914) 15 Cr. L. J. 630, [1914] AIR (O) 126. See *Jagannadha Rao v. Kamuraju*, (1900) 24 Mad: 284.

²⁴ *Timmins*, (1860) 8 Cox 401; *Bailey*, (1859)

8 Cox 238. But see *Hibbert*, (1869) L. R. 1 C. C. R. 184.

²⁵ *Green*, (1862) 3 F. & F. 274, followed in *Hibbert*, (1869) L. R. 1 C. C. R. 184; *Primett*, (1856) 1 F. & F. 50.

length to do so, and then receives and harbours her secretly, he is guilty of taking her out of the possession of her parents.¹

It is not necessary to show a trespass or anything of that nature in the taking, other than the act of taking.²

Bramwell, B., in stating the law on the subject, said: "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away. It is, however, equally clear that, if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet, if he avails himself of that leaving which took place at his persuasion, that would be a taking her out of the father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave."³

If the suggestion to go away with the accused came from the girl only, and he took the merely passive part of yielding to such suggestion, he is entitled to an acquittal.⁴

When taking is complete.—The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as the minor is kept out of such guardianship. The act of taking is not, in the proper sense of the term, a continuous act; when once the boy or girl has been actually taken out of the keeping, the act is a completed one.⁵ The question whether such taking was or was not complete is a question of fact in each particular case. J, a minor girl, was taken away from her husband's house to the house of R and there kept for two days. Then one M came and took her away to his own house and kept her there for twenty days, and subsequently clandestinely removed her to the house of the accused, and from that house the accused and M took her through different places to Calcutta. It was held that the taking away out of the guardianship of the husband was complete before the accused joined the principal offender in taking the girl to Calcutta, and that the accused, therefore, could not be convicted under s. 363.⁶ Where one L enticed a minor girl to come out of a *gachhi* to the road and then to the motor car in which R was sitting so that the latter might drive away with her, it was held that the offence of kidnapping was complete only when R drove away with her.⁷

Speaking generally, the keeping of the guardian will be at an end when the person of the minor has been transferred from the custody of the guardian or some person on his behalf into the custody of some person not entitled to the custody of the minor.⁸

'Enticing' is an act of the accused by which the person kidnapped is induced of his or her own accord to go to the kidnapper. It is not necessary that the taking or entering should be shown to have been by means of force or fraud.⁹ For instance, the enticing away of a child playing on a public road is sufficient.¹⁰

¹ *Robb*, (1864) 4 F. & F. 59; *George Kipps*, (1850) 4 Cox 167.

² *Frazer*, (1861) 8 Cox 446.

³ *Christian Olifier*, (1866) 10 Cox 402, 404.

⁴ *James Jarvis*, (1903) 20 Cox 249. See *Nga San Hlaing*, (1902) 1 L. B. R. 205, 8 Burma L. R. 255.

⁵ *Nemai Chatteraj*, (1900) 27 Cal. 1041, F.B.; *Chekutty*, (1902) 26 Mad. 454; *Ram Dei*, (1896) 18 All. 350; *Ram Sundar*, (1896) 19 All. 109; *Nanak Sao*, (1926) 5 Pat. 536; *Chanda*, (1892) P. R. No. 6 of 1894; *Mad. Baksh alias Lehna*, (1893) P. R. No. 8 of 1894. *Samia Kaundan*, (1876) 1 Mad. 173, has been distinguished in *Nemai's* case on the ground that that was a case of kidnapping out of British India and, as,

when the accused in that case intervened, the minor had not been actually taken out of British India, the process of taking was regarded as still going on, or continuing.

⁶ *Ibid.*

⁷ *Rekha Rai*, (1927) 6 Pat. 471; *Khushal*, (1930) 32 Cr. L. J. 615, [1931] AIR (L) 53.

⁸ *Gurdit Singh*, (1916) 17 Cr. L. J. 236, [1916] AIR (L) 230.

⁹ *Bhungee Ahur*, (1865) 2 W. R. (Cr.) 5; *Amgad Bugeah*, (1865) 2 W. R. (Cr.) 61; *Koordan Sing*, (1865) 3 W. R. (Cr.) 15; *Abdul Sathar*, (1927) 54 M. L. J. 456, 27 L. W. 683, 29 Cr. L. J. 635, [1927] AIR (M) 585.

¹⁰ *Mussamut Ozeerun*, (1867) 7 W. R. (Cr.) 62 [98].

'Minor.'—This word includes married as well as unmarried female minors.¹¹ According to Mahomedan law the occurrence of puberty determines minority and the mother's right to custody, but for the purpose of s. 363 regard must be had only to the definition of minority in s. 3, Indian Majority Act.¹²

Abetment.—The offence of kidnapping not being a continuing one there can be no abetment of the taking after the minor has once been completely taken out of the keeping of her lawful guardian.¹³ But if there is a conspiracy before the kidnapping takes place, a conviction for abetment of kidnapping can be sustained.¹⁴

2. '**Under sixteen years of age if a female.**'—Where the minor kidnapped is a girl under sixteen years of age, it is no defence that the accused did not know the girl to be under sixteen, or that from her appearance he might have thought she was of a greater age.¹⁵ Any one dealing with such a girl does so at his peril, and if she turns out to be under sixteen he must take the consequences,¹⁶ even though he bona fide believed and had reasonable ground for believing that she was over sixteen.¹⁷

If the girl is not under sixteen no offence is committed under this section.¹⁸

3. '**Any person of unsound mind.**'—An unconscious person cannot be said to be of unsound mind. Where a girl of twenty years of age had been made unconscious from *dhatūra* poisoning when she was taken away, it was held that she could not be said to be a person of unsound mind and the person taking her away was not guilty of the offence of kidnapping under s. 366.¹⁹

4. '**Out of the keeping of the lawful guardian.**'—"The Legislature has advisedly preferred this phrase to the word 'possession' which frequently recurs in the Code—in connection with inanimate objects. The word 'keeping'... connotes the fact that it is compatible with independence of action and movement in the object kept. It implies neither prehension nor detention but rather maintenance, protection and control, manifested not by continual action but as available on necessity arising. And this relation between the minor and the guardian is... certainly not dissolved so long as the minor can at will take advantage of it and place herself within the sphere of its operation."²⁰ The offence consists in taking the girl out of the guardianship of the lawful guardian, and so long as the girl has an opportunity of going back to her guardian the relationship of guardianship continues. The expression "taking out of the keeping of the lawful guardian" must signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian or, in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did.²¹ A girl under sixteen years of age was going to a vegetable market in search of work. On her way she met accused No. 1, another woman, who asked the girl to accompany her under a promise of obtaining work for her. The woman took the girl to her house and kept her there till evening, when she was removed by accused No. 2 to a bungalow and kept there for two days after which she was allowed to return to her home. It was held that the relation between the minor and the guardian was not dissolved at the time when accused No. 1 met the minor in the market, and that the accused were guilty under s. 366.²² Where a minor girl leaves the immediate custody of her lawful guardian for a temporary purpose she will be deemed to be still in his keeping. Where a female minor met a person in the street and went away voluntarily with that person, it was held that she was just as much in the possession of her legal guardian when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her guardian's house when taken off.²³ A, a married

¹¹ *Kammu*, (1878) P. R. No. 12 of 1879.

¹² *Muthu Ibrahi*, (1913) 37 Mad. 567.

¹³ *Durga Das*, (1904) P. R. No. 13 of 1904, 1 Cr. L. J. 949; *Abdur Rahman*, (1916) 38 All. 464; *Gokaran*, (1920) 24 O. C. 329, 23 Cr. L. J. 58, [1921] AIR (O) 226.

¹⁴ *Tika*, (1903) 26 All. 197.

¹⁵ *Robins*, (1844) 1 C. & K. 456; *Krishna Maharana*, (1929) 9 Pat. 647.

¹⁶ *Christian Olifier*, (1866) 10 Cox 402; *Mycock*, (1871) 12 Cox 28.

¹⁷ *Prince*, (1875) L. R. 2 C. C. R. 154; *Krishna Maharana*, (1929) 9 Pat. 647; *Kesar Mal*, (1932) 33 P. L. R. 727, 33 Cr. L. J. 673, [1932] AIR (L) 555.

¹⁸ *Mirza*, (1918) 19 Cr. L. J. 1011, [1918] AIR (L) 37.

¹⁹ *Din Mohammad*, [1939] Lah. 517.

²⁰ *Jetha*, (1904) 6 Bom. L. R. 785, 788, 1 Cr. L. J. 981, 983; *Karan Singh*, (1916) 14 A. L. J. R. 792, 17 Cr. L. J. 532, [1916] AIR (A) 272.

²¹ *Abdul Sathar*, (1927) 54 M. L. J. 456, 27 L. W. 683, 29 Cr. L. J. 635, [1928] AIR (M) 585.

²² *Jetha*, (1904) 6 Bom. L. R. 785, 1 Cr. L. J. 981; *Mulo*, (1914) 8 S. L. R. 182, 16 Cr. L. J. 117; *Manshomal*, (1912) 6 S. L. R. 71, 13 Cr. L. J. 736.

²³ *Nga Shwe Thwe*, (1907) 1 U. B. R. (1907-1909) (P. C.) 1, 6 Cr. L. J. 30.

woman under sixteen years of age, being dissatisfied with her mother-in-law, left her husband's home to go to her maternal uncle. On the way she was induced by K to accompany him and he deceitfully took her to a village where she was kept in the house of K's brother. Here negotiations were set on foot by K to remarry the girl as a *jat*, but on the girl disclosing her identity to the inquirers K left the village. Thereupon K's brother took her to the police-station, and pending inquiry by the police she lived for a month at his place. It was held that K was guilty of kidnapping, inasmuch as although the girl left home of her own accord she did not cease to be under the guardianship of the husband, her lawful guardian, but that K's brother was not guilty of any offence as he had done nothing in furtherance of a common intention.²⁴ A *jat* girl under sixteen years of age was ordered by her father to take food to the bullocks. As she was coming home, one of the accused came to her and persuaded her to accompany him. Her hair was cut and she was dressed in boy's clothes. She lived for some time with both the accused. After this both the accused were taking away the girl when they were discovered by a *chowkidar*. She was crying and told the *chowkidar* that she was a girl and not a boy. The *chowkidar* then arrested the accused. It was held that the accused were guilty of kidnapping, having removed the girl from the lawful guardianship of her father without his consent.²⁵

There must be a taking or enticing of a child out of the keeping of the lawful guardian. Where, therefore, a girl runs away from home in consequence of ill-treatment, and, on meeting the accused on the road, agrees to take service as a coolie and goes with him, this offence is not committed.¹ Similarly, where a girl was driven away from her parental roof and was found some days after in the company of the accused, no offence was held to have been committed.² Where a person took away a minor girl who had been turned out by her husband and allowed to be free to go anywhere, there was no kidnapping from lawful guardianship.³ If a minor girl leaves the protection of her husband and parents of her free will or voluntarily, and subsequently stays with another man of her own accord, that man will not be guilty of taking her out of the keeping of the lawful guardian of such minor.⁴ The mere fact that the minor leaves the protection of her guardian does not put her out of the guardian's keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping.⁵ Where a female minor by a preconcerted arrangement with the accused, left the house of her parents of her own accord, intending not to return, and met the accused at a place appointed and eloped with him willingly, it was held that the accused was an active participator in the minor's leaving her parents' house, and was, therefore, guilty of this offence.⁶ Where a female minor went to the accused's house and asked him to take her away, and she had no intention of leaving her parents if the accused did not consent, it was held that the minor had no such intention of not returning as to remove her from her parents' guardianship, and consequently, the accused had committed this offence.⁷ A low class girl under sixteen years of age left the custody of her husband and his parents and voluntarily stayed with the accused for a month. After that she was made over to certain other persons who performed certain operations on her so as to make her appear as much as possible a *jat* woman. She then changed hands several times and was finally made over to a person in order to be married to his brother. It was held that the accused was not guilty of the offence of taking or enticing a minor out of the keeping of her lawful guardian.⁸

English cases.—A went in the night to the house of B, and placed a ladder against a window, and held it for J, the daughter of B, to descend, which she did, and then eloped with A. It was held that this was a taking of J out of the possession of her father.⁹ A girl under the age of sixteen years having, by persuasion, been

²⁴ *Karan Singh*, (1916) 14 A. L. J. R. 792, 17 Cr. L. J. 532, [1916] AIR (A) 272.

²⁵ *Harkesh*, (1918) 40 All. 507.

¹ *Gunder Singh*, (1865) 4 W. R. (Cr.) 6.

² *Pandayaram Sastrulu*, [1912] M. W. N. 538, 13 Cr. L. J. 598.

³ *Francis Hector*, (1936) 38 Cr. L. J. 401, [1937] AIR (A) 182.

⁴ *Ram Chander*, (1914) 12 A. L. J. R. 265, 15 Cr. L. J. 265, [1914] AIR (A) 376; *Ewaz Ali*, (1915) 37 All. 624; *Lachhi Ram*, (1928) 24 Cr. L. J. 564, [1928] AIR (L) 330.

⁵ *R. W. Valliant v. Mrs. Eleazar*, (1924) 30 C. W. N. 215, 26 Cr. L. J. 977, [1926] AIR (C) 467; *Israr Husain*, [1941] Luck. 128.

⁶ *Nga Te Hla*, (1907) 1 U. B. R. (1907-1909) (P. C.) 11, 7 Cr. L. J. 210; *Nga San Hlaing*, (1902) 1 L. B. R. 205.

⁷ *Asgar Ali*, (1909) 1 U. B. R. (1907-1909) (P. C.) 27, 11 Cr. L. J. 81; *Abdul Sathar*, (1927) 54 M. L. J. 456, 27 L. W. 683, 29 Cr. L. J. 635, [1928] AIR (M) 585.

⁸ *Ewaz Ali*, (1915) 37 All. 624.

⁹ *Robins*, (1844) 1 C. & K. 450.

induced by the accused to leave her father's house and go away with him without the consent of the father, left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the accused, and then went away together some distance, without the intention of returning. It was held that there was a taking of the girl out of the father's possession when he met the girl and went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection.¹⁰ A met a girl in the street going to school, and induced her to go with him to a town some miles distant, where he seduced her. They returned together and he left her where he met her. The girl then went to her home, where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met A. A made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to, and did not, believe that she was a girl of the town. It was held that A was not guilty of having unlawfully taken the girl out of the possession of her father under s. 55 of 24 & 25 Vic., c. 100, which says: 'Whosoever shall unlawfully take ... any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.'¹¹ Under similar circumstances the accused in British India will be guilty of kidnapping because his omission to inquire whether a minor has a guardian or not is no defence.¹² Where a servant girl had permission from her master to go and see her parents from Sunday to Monday night, and went to see them on the Sunday for a few hours only, and then told them that she was going back to her employment, instead of which she remained with the accused all night, and did not return to her master's employment until some days afterwards, it was held that the girl was under the lawful charge of her master, and not of her father, at the time of the alleged offence, and that there would be no conviction for kidnapping.¹³ Similarly, where a girl was employed as a bar-maid at a distance from her father's home, it was held that she was under the lawful charge of her employer, and not in the possession of her father.¹⁴

A child under ten years of age is, *prima facie*, subject to guardianship, and any one removing such child without permission properly obtained takes the risk of such act upon himself; the fact of having omitted to inquire whether the child has a guardian or not is no defence.¹⁵ If the minor is not in the custody of a lawful guardian the offence cannot be committed whatever the belief of the taker may be.¹⁶

In the case of a grown-up person of unsound mind there must be evidence of some kind of persuasion or moral force as a result of which he was taken out of the protection of his guardian.¹⁷

'Lawful guardian.'—The word 'lawful' does not necessarily mean that the person who entrusts a minor to the care or custody of another must stand in the position of a person having a legal duty or obligation to the minor. It is a sufficient compliance with the section and its Explanation if the entrusting of the minor to the care of another is effected without illegality or the commission of any unlawful act by a person legally competent to do so.¹⁸ The explanation of these words is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly, in cases of abduction, that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the legal acceptance of the word.¹⁹ A brother of eighteen years is lawful guardian of his sister aged sixteen when the parents are dead.²⁰ But it must be shown that the minor was abducted from lawful guardianship, and lawful guardianship is the guardianship of a person who is lawfully entrusted with the care or custody of the minor. A girl of fourteen years, being left an orphan, accompanied a woman to a town where they lived by begging and selling grass. She was persuaded by a man G to depart with him without the knowledge of the woman. She remained with him for some months and was betrothed to one of his sons. One B persuaded her to quit G's house and

¹⁰ *Manktelow*, (1853) 6 Cox 143.

¹¹ *Hibbert*, (1869) L. R. 1 C. C. R. 184.

¹² *Umsadbaksh*, (1878) 3 Bom. 178.

¹³ *Miller*, (1876) 13 Cox 179.

¹⁴ *Henkers*, (1866) 16 Cox 257.

¹⁵ *Umsadbaksh*, (1878) 3 Bom. 178.

¹⁶ *Hardeo*, (1879) P. R. No. 7 of 1880; *Khuda Baksh*, (1887) P. R. No. 27 of 1887.

¹⁷ *Abdul Kayum Mamajivalla*, Criminal Appeal No. 86 of 1913, decided on May 29, 1913, by Scott, C. J., and Shah, J. (Unrep. Bom.).

¹⁸ *Mussammatt Kesar*, (1918) 4 P. L. J. 74, 20 Cr. L. J. 161, [1919] AIR (P) 27, F.B.

¹⁹ *Pemantle*, (1882) 8 Cal. 971.

²⁰ *Mehr Hussain Shah*, (1929) 81 P. L. R. 554, 81 Cr. L. J. 530, [1929] AIR (L) 885.

to go with him. This she did. B was; thereupon, convicted of an offence under s. 363. The High Court quashed the conviction on the ground that G was not the lawful guardian of the minor as he had not been lawfully entrusted with the care or custody of her.²¹ Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles who had obtained mutation in her favour of certain property which was claimed by her paternal uncles, was forcibly carried away by her paternal uncles and got married, it was held that the paternal uncles were guilty of kidnapping her from lawful guardianship.²²

Explanation.—"The Explanation... is not intended to limit the protection which the section gives to parents and minors. It is intended to extend that protection by including in the term 'lawful guardian' any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend, for a limited purpose and for a limited time, cannot... determine the father's rights as guardian or his legal possession for the purposes of the Criminal Law... the Court must consider all the facts and see whether they are consistent or not with the continuance of the father's legal possession of the minor. If they are not inconsistent, the minor must be held to be in the father's possession or keeping even though the actual physical possession should be temporarily with a friend or other person."²³ *De facto* guardianship is sufficient.²⁴ The term 'lawful guardian' does not include a person who has himself gained possession of the minor by an offence under this section. But it does include, not only the parents or relations in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right. Thus, where the husband of a minor girl, under sixteen years of age, sold her to another man, and while she was living with that man she was persuaded by the accused to leave his house and to go away with a third man, it was held that for the purpose of this section the person to whom the girl was sold was the lawful guardian of the girl and that the accused was consequently guilty of kidnapping her from lawful guardianship."²⁵

The Explanation extends the accepted definition of the words "lawful guardian" under civil law to preclude persons other than the civil law guardian from raising the technical plea that the legal relation of ward and guardian did not exist between the person kidnapped and the person from whose actual custody the minor is taken away. But as against a person, who, in fact, is the civil law guardian of the minor, mere *de facto* guardianship cannot be set up so as to convict the real civil law guardian of an offence under this section.¹ The word 'entrusted' means the giving, handing over, or confiding of something by one person to another. It involves the idea of active power and motive by the person reposing the confidence towards the person in whom the confidence is reposed. For an entrusting, within the meaning of this explanation, there must necessarily be three persons, viz. (1) the person reposing the confidence or trust; (2) the person in whom the trust is reposed; and (3) the person constituting the subject-matter of the trust. This Explanation contemplates a declaration of trust by a person competent to make such a declaration, conveying, handing over and confiding a minor to the care and custody of another in whom a confidence and trust is imposed. It is necessary for the person accepting the trust to do so either by express assent, or by necessary implication arising from tacit acquiescence in the performance of the trust. Neither the declaration of trust nor its acceptance need be necessarily in writing; it is sufficient if the declaration is verbally made and given, or if it arises from a course of conduct consistent only with the existence of such antecedent declaration; and accepted verbally or by necessary implication arising from the conduct of the person so entrusted with the duty imposed.² This case has

²¹ *Buldeo*, (1870) 2 N. W. P. 286.

²² *Baij Nath*, (1914) 15 Cr. L. J. 640.

²³ *Per Benson, J.*, in *Jagannadha Rao v. Kamaraju*, (1900) 24 Mad. 284, 291; *Baz*, (1922) 3 Lah. 213; *Mohammad Husain*, (1924) 23 A. L. J. R. 10, 26 Cr. L. J. 796, [1925] AIR (A) 15; *Jangli Mian*, (1933) 15 P. L. T. 229, 35 Cr. L. J. 814; *K. K. Ali*, (1936) 18 P. L. T. 535, [1937] P. W. N. 454, 38 Cr. L. J. 673; *Baz*, (1922) 23 Cr. L. J. 588, [1922] AIR (L) 380.

²⁴ *Muthuswami Sastri v. Narayana Sastri*,

[1911] 1 M. W. N. 36, 21 M. L. J. 195, 11 Cr. L. J. 641; *Velagupudi Appayya*, (1911) 12 Cr. L. J. 239; *Banamali Tripathy*, (1942) 22 Pat. 263.

²⁵ *Mussammatt Fatti*, (1911) P. R. No. 7 of 1911, 12 Cr. L. J. 211.

¹ *Saharali Mahammad v. Kamizuddin Mahammad*, (1930) 58 Cal. 897; *Dhuna Manjhi*, (1942) 43 Cr. L. J. 918, [1943] AIR (P) 109.

² *Mussammatt Kesar*, (1918) 4 P. L. J. 74, 20 Cr. L. J. 161, F.B.; *Mohansingh*, (1930) 31 Cr. L. J. 949, [1930] AIR (S) 164.

been doubted in a subsequent case decided by the same High Court. The Court observed that it is doubtful "if the section contemplates either a formal declaration of trust or that there must necessarily be three persons in order that a person may be lawfully entrusted with the care and custody of a minor... a person should be regarded in the eyes of law as having been lawfully entrusted with the care and custody of a minor, if he has acquired control over the minor lawfully and in such circumstances as would imply trust even though he may not have been formally entrusted with the care and custody of the minor by a third person."³ The Nagpur High Court has held that the expression "lawfully entrusted" signifies that the care and custody of a minor should have arisen in some lawful manner so as to show as if the person having the custody of the minor had been entrusted with the care and custody of the minor. The "entrustment" contemplated by the Explanation may be by a legal guardian; it may be written or oral; express or implied. In the absence of a legal guardian or proof of declaration, written or oral, by a legal guardian, the entrustment may be presumed from a well defined and consistent course of conduct of a person alleged to be the lawful guardian of the minor or of the person actually taking upon himself the duties of the care and custody of the minor. The expression "lawful guardian" must be literally construed so as to distinguish it from "legal guardian" as a guardian may be lawful without being legal.⁴

Temporary guardianship does not oust lawful guardian's right.—Where a girl who was under the temporary guardianship of a person was taken away with his consent and married to a boy without the consent of her father, this offence was held to have been committed.⁵ A girl under sixteen years of age, living under the guardianship of her mother, was sent by the latter with another woman on a visit to her sister and on the way there the accused kidnapped her and took her to their own village and there she was married to one of the accused. The accused were convicted of an offence under s. 366 as it was immaterial whether the girl was kidnapped with the consent of the woman in charge, as she had no authority to give such consent.⁶ Where the accused was put in charge of a boy, below the age of fourteen, by his father for the purpose of teaching the Koran, but he took him away to a distant city with the object of teaching him how to paint scenes so that he might join a theatrical company, it was held that the removal of the boy amounted to taking him out of the keeping of the lawful guardian.⁷

Hindu law.—A father is the guardian of his children and is ordinarily entitled to their custody. A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as taking out of his keeping. If a mother removes a girl from her father's house for the express purpose of marrying her without his consent, it will amount to a taking out of the keeping of the lawful guardian.⁸

If the husband and wife live separate and the children are given in the custody of the wife under an order of the Court, the father cannot take away the children from the mother. If he does so he will be guilty of kidnapping.⁹ But if there is no order of the Court, the removal by the father of his child from the custody of its mother, who was deserted by him, will not amount to kidnapping from lawful guardianship because under Hindu law the father is the lawful guardian of his children and his rights of guardianship are paramount to those of any other person.¹⁰ The taking away of a minor Hindu girl from the custody of a person in temporary charge of her by a guardian under the Hindu law does no amount to kidnapping. The only persons having an absolute right to the custody of a Hindu minor are the father and mother of the minor. No such right exists in the person who happens to be the nearest major

³ *K. K. Ali*, (1936) 15 Pat. 817, 832.

⁴ *Nathusingh*, [1942] Nag. 34.

⁵ *Jagannadha Rao v. Kamaraju*, (1900) 24 Mad. 284.

⁶ *Baz*, (1922) 3 Lah. 213.

⁷ *Mohammad Hussain*, (1924) 23 A. L. J. R.

10, 26 Cr. L. J. 796, [1925] AIR (A) 295.

⁸ *Prankrishna Surma*, (1882) 8 Cal. 969.

See *Dhara Singh v. Mussummat Kahno*, (1877) P. R. No. 8 of 1878.

⁹ *Damodardas Kuberdas Soni*, (1917) Crim. Appln. for Revision No. 313 of 1917, decided by Heaton and Shah, JJ., on November 30, 1917 (Unrep. Bom.).

¹⁰ *Chowdarayya*, [1932] Mad. 805.

male relation of the minor and such a relationship would not in law be a defence to a charge of kidnapping a minor from the custody of a *de facto* guardian.¹¹

The mother is the natural guardian of her minor children after the father, if the father has not appointed any one else as their guardian.¹² The mother of an illegitimate child is its proper and natural guardian during the period of nurture. And where the mother, on her death-bed, entrusts the care of such child to a person who accepts the trust and maintains the child, such a person is "lawfully entrusted" with the care and custody of the minor.¹³

The husband is the lawful guardian of a girl after marriage. The husband of a Hindu girl of fifteen is her lawful guardian; and, if the father of the minor takes away the girl from her husband, without the latter's consent, such taking away amounts to kidnapping from lawful guardianship even though the father may have had no criminal intention in so doing.¹⁴ Among the Hindus, according to a well recognised custom, a minor married girl, until she attains puberty, continues to be under the guardianship of her father if she is legitimate and of her mother if she is illegitimate.¹⁵ Where a married girl had been away from her husband's house for a period of five or six years, and lived with her mother, it was held that she was not in the "keeping" of her husband but that of her mother.¹⁶

The husband's relations, if any exist, within the degree of a *sapinda*, are guardians of a minor widow in preference to her father or his relations. If a minor widow has taken up her residence with her husband's mother, the husband's mother is the lawful guardian of the girl.¹⁷

A minor brother cannot be the guardian of his sister and cannot therefore maintain a complaint for kidnapping.¹⁸

Mahomedan law.—Under Mahomedan law, if the father take away a son under seven years, or a daughter under puberty, if *Sunni*, or under seven years, if *Shiah*, or an illegitimate child from the custody of the mother, he can be said to kidnap his own child: because the mother is by law the lawful guardian.¹⁹ According to *Sunni* law, the mother is the guardian of the minor daughter till she reaches puberty which is presumed when the daughter completes her fifteenth year. Even a divorced wife is entitled to the custody of her children.²⁰ In the absence of mother, mother's mother is the lawful guardian of a girl who has not attained puberty.²¹ The removal of a Mahomedan girl of eleven or twelve years of age from the house of her mother-in-law in whose charge her husband had left her, by a third person acting at the instance, and under the instigation, of her mother, was held to be not a taking from "lawful guardianship" because under the Mahomedan law the mother was entitled to the custody of her daughter, in preference to the husband, until the girl attained the age of puberty.²² S, a Mahomedan married girl under sixteen years of age, who had attained puberty, was taken away from her mother's house with whom she was living (her father being dead) by the respondents. The Magistrate convicted the accused under ss. 366 and 368. On appeal, the Sessions Judge quashed the conviction on the ground that as under Mahomedan law a mother could be a guardian only until her daughter attained puberty or completed her fifteenth year, S had become *sui juris* and that therefore the accused had not kidnapped her from lawful guardianship. On an appeal being preferred by Government against the acquittal, it was held that the mother of the girl was her lawful guardian within the terms of this section; and that the accused had been rightly convicted of the charge of kidnapping S from the guardianship of her mother.²³

¹¹ *Sital Prasad*, (1919) 42 All. 146.

¹² *Soobah Pirthee Lal Jha v. Soobah Doorgah Lal Jha*, (1867) 7 W. R. (Civil) 73.

¹³ *Pemantle*, (1882) 8 Cal. 971.

¹⁴ *Dhuronidhur Ghose*, (1889) 17 Cal. 298; *Behari Maharaj*, (1906) 4 Cr. L. J. 361.

¹⁵ *Nathusingh*, [1942] Nag. 34.

¹⁶ *Banamali Tripathy*, (1942) 22 Pat. 263.

¹⁷ *Tek Chand*, (1915) P. R. No. 27 of 1915, 16 Cr. L. J. 780, [1915] AIR (L) 390.

¹⁸ *Mam Raj*, (1921) 3 L. L. J. 588, [1921] AIR (L) 316.

¹⁹ *Musst. Raj Begum v. Nawab Reza Hossein*, (1865) 2 W. R. (Civ. Rul.) 76; *Nur Kadir v. Zuleikha Bibi*, (1885) 11 Cal. 649; *Hamid Ali*

v. Imtiazan, (1878) 2 All. 71; *Idu v. Amiran*, (1886) 8 All. 322; *Bawa Mahomed Gulzar*, (1935) Crim. Rev. No. 232 of 1935, decided by Broomfield and Divatia, JJ., on September 9, 1935 (Bom. Unrep.).

²⁰ *Ayshabai*, (1904) 6 Bom. L. R. 536, 1 Cr. L. J. 599; *Zarabibi v. Abdul Rezzak*, (1910) 12 Bom. L. R. 891, 11 Cr. L. J. 687.

²¹ *Bawa Mahomed Gulzar*, (1935) Cr. Rev. No. 232 of 1935, decided by Broomfield and Divatia, JJ., on September 9, 1935 (Bom. Unrep.).

²² *Korban*, (1904) 32 Cal. 444.

²³ *Miran Baksh*, (1905) P. R. No. 60 of 1905, 2 Cr. L. J. 190.

A brother under eighteen years of age is the lawful guardian of a girl whose parents are dead and who is under sixteen years of age. There is no rule of law which prevents him from being the 'lawful guardian.'²⁴

The husband becomes the guardian of his wife after she attains puberty.²⁵ It is necessary to prove a legal marriage between the woman and the alleged husband.¹ The husband is not the lawful guardian of her person before puberty. In the absence of any evidence that a lawful guardian entrusted the custody of a Mahomedan minor girl to her husband, a person cannot be convicted for kidnapping her from the custody of her husband. Where the maternal uncle of a minor girl carried her away from her husband's house by force, it was held that, in the absence of evidence to prove that the husband was lawfully entrusted with the care and custody of the girl, the maternal uncle had committed no offence.²

If the mother marries a person who is an outsider so far as the family is concerned, she loses her right to be the lawful guardian of her minor daughter. If her minor daughter under sixteen years of age is enticed away from her custody, the accused cannot be convicted under this section.³ This decision is against the spirit of the Explanation to this section.

The mother is the natural guardian of her illegitimate children.

Other nationalities.—There is no law under which among Native Christians a father has a preferential right to the custody of his children to the mother and, therefore, the removal of her children by the mother from the house occupied by their father does not amount to an offence under this section.⁴ Where on an application by the husband for divorce the District Judge made a decree *nisi* for dissolution of marriage, and also directed the wife to deliver up to the husband the son born of the marriage and subsequent to the decree the husband without the assistance of the Court obtained the custody of the son, but before the confirmation of the decree by the High Court the wife removed the boy from the father's custody and was charged with kidnapping, it was held that the order for custody which was made was an order *nisi* without legal effect until confirmed by the High Court, and the wife had committed no offence in removing the boy from the father's custody.⁵

In the case of illegitimate children, under the English law, neither the father nor the mother has a preferential right. During the period of nurture the mother would naturally be preferred,⁶ but after the period the putative father would have the preference.⁷

5. 'Without the consent of such guardian.'—The consent of the minor is immaterial.⁸

Consent given by the guardian after the commission of the offence would be of no avail. Where a temporary guardian is proved to have been in collusion with the other party, and the taking away is accomplished in consequence of such collusion, there could be no such consent of the lawful guardian as the section requires.⁹ The English Courts have held that by the fraud of the temporary guardian the right to possession of the child reverts to its natural guardian.¹⁰

A consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of s. 90, and as such is not useful as a consent under this section. A misrepresentation as to the intention of a person is a misrepresentation of a fact.¹¹ If a minor is taken with the consent of the guardian and subsequently

²⁴ *Mehr Hussain Shah*, (1929) 31 P. L. R. 554, 31 Cr. L. J. 530, [1929] AIR (L) 835.

²⁵ *Nur Kadir v. Zuleikha Bibi*, (1885) 11 Cal. 649; *Wazeer Ali v. Kaim Ali*, (1873) 5 N. W. P. 196.

¹ *Wasima*, (1935) 36 Cr. L. J. 1031, [1935] AIR (A) 566.

² *Derajuddin Akanda*, (1923) 27 C. W. N. 531, 37 C. L. J. 329, 24 Cr. L. J. 712, [1923] AIR (C) 672.

³ *Harbhorasha Mahommed v. Jhapuran Bibi*, (1929) 51 C. L. J. 476, 32 Cr. L. J. 90, [1930] AIR (C) 665.

⁴ *Mrs. Peter*, (1927) 28 Cr. L. J. 513, [1927] AIR (L) 496.

⁵ *Borthwick v. Borthwick*, (1913) 41 Cal. 714.

⁶ *Pemantle*, (1882) 8 Cal. 971; *Barnardo v.*

McHugh, [1891] A. C. 388.

⁷ *Nash*, (1883) 10 Q. B. D. 454.

⁸ *Bhungee Ahur*, (1865) 2 W. R. (Cr.) 5; *Amgad Bugeah*, (1865) 2 W. R. (Cr.) 61; *Koordan Sing*, (1865) 3 W. R. (Cr.) 15; *Sokee*, (1867) 7 W. R. (Cr.) 36 [54]; *Gooroodoss Rajbunsee*, (1865) 4 W. R. (Cr.) 7; *Mussammat Soma*, (1916) P. R. No. 17 of 1916, 18 Cr. L. J. 18, [1916] AIR (L) 414; *Wali Muhammad*, (1926) 27 Cr. L. J. 1018, [1926] AIR (L) 677; *Bhagwati Prasad*, (1929) 30 Cr. L. J. 985, [1929] AIR (A) 709.

⁹ *Ganesh*, (1909) 31 All. 448.

¹⁰ See Roscoe, 14th Edn., p. 358.

¹¹ *Jaladu*, (1911) 36 Mad. 453; *Mussammat Soma*, (1916) P. R. No. 17 of 1916, 18 Cr. L. J. 18, [1916] AIR (L) 414.

married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.¹²

If a man by false and fraudulent representations induce the parents of a girl to allow him to take her away, such taking will amount to kidnapping.¹³ But where a mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public houses, and she was taken away for a day by the accused, it was held that the act of the accused could not be said to have happened against her will.¹⁴ Similarly, where a female minor went to the house of a mutual friend and had sexual intercourse with the accused, she having previously had sexual intercourse with the accused in the presence and with the consent of her guardian, her mother, in her mother's house, it was held that the accused could not be convicted of kidnapping as there was no taking of the minor; and even if there was a constructive taking, as the mother was proved to have connived at the seduction of her daughter, there was reason to believe that the subsequent taking was effected with her consent.¹⁵

Pledging minor girl.—The pledging of a girl to secure a loan is not a legal contract and may not be enforced in law; but if a minor is retained in the custody of a person with the consent of the lawful guardian he will not commit the offence of kidnapping. It is essential in terms of the section that the minor should be taken or enticed out of the keeping of the lawful guardian of the minor without the consent of such guardian; and if there is consent given, the section has no application. It does not matter whether the consent is given for consideration or not. If, after having obtained custody of a minor in a lawful manner with the consent of its guardian, the minor is married or disposed of in such a manner as to make it impossible for the lawful guardian to get back the custody of the minor, an offence under this section would be committed and the temporary guardian doing any such act would be liable under the section; but so long as nothing is done which would render the restoration or exercise of the custody of the child by the lawful guardian impossible, the mere fact of transferring the guardianship by the temporary guardian would not constitute an offence. Hence, where A pledged his girl with B to secure a loan, but he did not pay the loan, and B pledged her with C to secure a loan raised by him from C; and A, without demanding the custody of the girl from B or C, instituted a complaint under this section against B and C, it was held that neither B nor C was guilty of kidnapping.¹⁶

Marrying without consent of her 'lawful guardian.'—Where the mother had assigned by a will the guardianship of her minor daughter, and the duty of marrying her, to R, and a paternal relative of the daughter removed her by fraud and force for the purpose of getting her married to a person other than the one selected by R, it was held that the paternal relative had been guilty of kidnapping as well as abducting.¹⁷ Where a Hindu woman left her husband's house, taking with her her infant daughter, and went to the house of A, and on the same day the daughter was married to B, the brother of A, without the father's consent, it was held that A had committed an offence, under ss. 109 and 369, of abetting the offence of kidnapping.¹⁸ Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles and had obtained mutation in her favour of certain property which was claimed by her paternal uncles, after having lived for eighteen months with the maternal uncles, was forcibly carried away by her paternal uncles and was given in marriage, it was held that the paternal uncles were guilty of kidnapping.¹⁹

Where a person carried off, without the consent of her father, a girl to whom he was betrothed by her father, because the father suddenly changed his mind and broke off the marriage, it was held that he was guilty of kidnapping.²⁰

Exception.—The Exception protects the father of an illegitimate child or the person who believes himself entitled to the lawful custody of a child. The act must

¹² *Jaladu*, (1911) 36 Mad. 453.

¹³ *Hopkins*, (1842) Car. & M. 254.

¹⁴ *Primett*, (1858) 1 F. & F. 50.

¹⁵ *Abdul Rahman*, (1912) 1 U. B. R. 136, 14 Cr. L. J. 109.

¹⁶ *Jildar Kaiyer*, (1929) 10 P. L. T. 326, 30 Cr. L. J. 980, [1929] AIR (P) 316.

¹⁷ *Mahakor*, (1895) Cr. R. No. 66 of 1895, Unrep. Cr. C. 820.

¹⁸ *Prankrishna Surma*, (1882) 8 Cal. 969.

¹⁹ *Baij Nath*, (1914) 15 Cr. L. J. 640, [1914] AIR (O) 329.

²⁰ *Gooroodoss Rajbunsee*, (1865) 4 W. R. (Cr.) 7; *Modhoo Paul*, (1865) 3 W. R. (Cr.) 9.

not be in furtherance of an immoral or unlawful purpose. The word 'unlawful', in its general connotation, means what is not justifiable by law. It is wider than "illegal" and is not synonymous with "immoral." The father of an illegitimate child forcibly removing it from its mother to hush up the scandal is not protected by this Exception.²¹ If a child is kidnapped for a purpose which is prohibited and punishable by law the purpose is an "unlawful purpose" within the meaning of that term as used in the Exception to this section. Thus, the intention to give a child in marriage in contravention of Act XIX of 1929 is an "unlawful purpose" within the Exception.²²

Where a mother in good faith believed that she was entitled to the custody of her own minor children a conviction for kidnapping them from the guardianship of their father was set aside.²³ A husband cannot be convicted of kidnapping his own wife when he believes in good faith that he has the right of personal custody of his wife.²⁴

362. Whoever by force compels, or by any deceitful means induces,¹ any person to go from any place,² is said to abduct that person.

Abduction.

COMMENT.

This section merely gives a definition of the word 'abduction', which occurs in some of the penal provisions which follow. Under the Code, kidnapping from lawful guardianship is a substantive offence, but 'abduction' is an auxiliary act, not punishable by itself, but made criminal only when it is done with one or other of the intents specified in the following section.²⁵

"Kidnapping" and "abduction" stand on the same footing. They do not include the offence of wrongful confinement or keeping in confinement a kidnapped person.¹

Ingredients.—The section requires two essentials :—

1. Forcible compulsion or inducement by deceitful means.
2. The object of such compulsion or inducement must be the going of a person from any place.

1. 'Whoever by force compels, or by any deceitful means induces.'—Where no force or deceit is practised on the person abducted, a conviction cannot stand.² The force or fraud must have been practised upon the person.³ Actual force is required and not show or threat of force.⁴

"To induce" means "to lead into", it connotes a leading of the woman in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind.⁵

An orphan girl about seventeen years of age was brought up by A as his own daughter. The accused, A's neighbour, induced her to leave home on the pretext that he would either marry her himself or get her married. He did neither but debauched her himself and handed her over to a friend of his who also proceeded to have connection with her. It was held that the expression 'deceitful means' is wide enough to include the inducing of a girl to leave her guardian's house by means of a representation that the person to whom she went would either marry her himself or arrange for her marriage and that the accused was guilty of this offence.⁶

2. 'Any person to go from any place.'—In the case of a grown up woman it would be an offence to carry her away by force against her own will even with the object of restoring her to her husband.⁷

²¹ *Mahendranath Chakrabarti*, (1934) 62 Cal. 629.

²² *Khalil-ur-Rahman*, (1933) 11 Ran. 213, F.B.

²³ *Howka Ramalakshmi*, (1886) 1 Weir 348; *John Tinkler*, (1859) 1 F. & F. 513.

²⁴ *Askur*, (1864) W. R. (Gap No.) (Cr.) 12.

²⁵ *Sant Ram*, (1929) 11 Lah. 178, 186; *Bidhoomooke Dabee v. Sreemath Haldar*, (1870) 15 W. R. (Cr.) 4, 6 Beng. L. R. (Appx.) 129; *Ganga Dei*, (1914) 12 A. L. J. R. 91, 15 Cr. L. J. 154, [1914] AIR (A) 17; *Nanhua Dhimar*,

(1930) 53 All. 140; *Nura*, (1933) 3 Cr. L. J. 1386, [1934] AIR (L) 227.

¹ *Adhigope*, (1946) 25 Pat. 241.

² *Komal Dass*, (1865) 2 W. R. (Cr.) 7.

³ *Barrett*, (1884) 15 Cox 658.

⁴ *Koya Moidin*, [1937] M. W. N. 1197.

⁵ *Allahrakhio*, (1934) 36 Cr. L. J. 231, [1934] AIR (S) 164.

⁶ *Mahbub*, (1907) 4 A. L. J. R. 482, 6 Cr. L. J. 9.

⁷ *Fatnaya*, [1942] Lah. 470, 480.

The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another.⁸ Accused came on to the roof of a house where a woman was sleeping. Waking her up they asked her to accompany them. She refused and they lifted her up in order to carry her away, whereupon she raised an alarm, and the accused dropped her on the roof and made good their escape. It was held that the accused were not guilty of abduction, inasmuch as the woman was not compelled to go from the place where she was, but was merely lifted up and was dropped down again, but that the action of the accused amounted to an attempt to abduct and that they were, therefore, guilty of an offence under ss. 366 and 511.⁹

Abduction and kidnapping.—‘Abduction’ differs from ‘kidnapping from guardianship’. ‘Kidnapping from guardianship’ is committed only in respect of a minor or person of unsound mind; ‘abduction’, in respect of any person. In ‘kidnapping’ the person kidnapped is removed out of lawful guardianship; in ‘abduction’ this is not necessary. In ‘kidnapping’ the minor or the person of unsound mind is simply taken away or enticed to go with the kidnapper; in ‘abduction’ force, compulsion, or deceitful means are used. In ‘kidnapping’ consent of the person enticed is immaterial. In ‘abduction’ consent of the person moved, if freely and voluntarily given, condones it. In ‘kidnapping’ the intent of the offender is irrelevant but in ‘abduction’ it is the all-important factor. Kidnapping from lawful guardianship is not a continuing offence. As soon as the minor is removed out of the custody of his or her guardian, the offence is completed, but a person is being abducted not only when he is first taken from any place but also when he is removed from one place to another.¹⁰

In ‘kidnapping from British India’, there is removal of a person outside British India without his consent or of some one authorised to give it. He may or may not be a minor or of unsound mind.

Abetment.—A married woman cannot abet her own abduction as herein defined.¹¹ Because if a woman consents to her own abduction a substantial offence of abduction is an impossibility.

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section specifies the punishment for the offences defined in ss. 360 and 361. To support a conviction of kidnapping from lawful guardianship under this section, the facts must come within the ambit of s. 361, i.e., the person against whom the offence is committed must be under the age of fourteen, if a male, and under the age of sixteen, if a female. This section must be read with s. 361, and the offence of kidnapping from lawful guardianship penalised by this section is the offence which is defined by s. 361.¹²

PRACTICE.

Evidence.—For kidnapping from British India prove—

- (1) That the person in question was at the time of the offence in British India.
- (2) That the accused conveyed that person beyond the limits of British India.
- (3) That he did so without the consent of that person, or of some person legally authorized to consent on that person's behalf.

For kidnapping from guardianship prove—

- (1) That the person in question was at the time of the offence a minor under fourteen years of age (if a male), or under sixteen years of age (if a female); or that

⁸ *Ganga Dei*, (1914) 12 A. L. J. R. 91, 15 Cr. L. J. 154, [1914] AIR (A) 17.

⁹ *Altu*, (1925) 26 P. L. R. 119, 26 Cr. L. J. 948, [1925] AIR (L) 512.

¹⁰ *Nanhua Dhimar*, (1930) 53 All. 140; *Nura*,

(1933) 35 Cr. L. J. 1386, [1934] AIR (L) 227.

¹¹ *Natha Singh*, (1883) P. R. No. 11 of 1883.

¹² *Ismail Sayadsaheb*, (1933) 35 Bom. L. R. 886, 57 Bom. 537, F. B.

such person was of unsound mind. The age of the girl must be proved by the prosecution. A doctor's opinion as to age is not of much value.¹³ Where, in a trial under a charge of kidnapping, the doctor's statement as to the age of the girl was an opinion based entirely on such particulars as her height, weight and teeth, which could be observed by any layman, and it did not appear that the doctor brought any scientific knowledge to bear upon his opinion, it was held that such opinion did not amount to legal proof of age of the girl.¹⁴

Where in a case under this section the Magistrate finds that there is *prima facie* sufficient evidence to show that the girl was enticed away he should not be content merely with finding that the girl was not proved to be under sixteen, but should examine and decide the question whether the accused can be charged with an offence under s. 366 or some other cognate offence against a female of over sixteen.¹⁵

(2) That such minor, or person of unsound mind, was, at the time, lawfully entrusted to the keeping of a guardian.

(3) That the accused took or enticed such minor, or person of unsound mind, out of such keeping.¹⁶

(4) That he so took or enticed, etc., without the consent of such guardian.

The definition of kidnapping from lawful guardianship contains the words "whoever takes or entices any minor." Where a minor girl is taken or enticed by the accused, it is for the prosecution to prove that the accused either took or enticed her from her home. The mere fact that she left her home and was found a day and a half later in the company of the accused in circumstances that would possibly offend very greatly against canons of morality is not sufficient to show that he must either have taken her or enticed her.¹⁷

Consent of girl.—Although the consent of the girl is no defence, but it is a factor which may be taken into account in awarding punishment.¹⁸

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Jurisdiction.—A subject of an Indian State, though not amenable to the British Court on a charge of culpable homicide committed out of British territories, may be so amenable on a charge of kidnapping from those territories.¹⁹ This view is hardly tenable when kidnapping is not considered to be a continuing offence. The Calcutta High Court has laid down that a person charged with having committed the offence of kidnapping in Moyurbhunj, which is outside British India, cannot be tried by a Court in British India within the local limits of whose jurisdiction the person kidnapped may be conveyed or concealed or detained.²⁰

The offence of kidnapping may be tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.²¹

So far as the person who abducts a woman and goes on removing her from place to place is concerned the offence of abduction is a continuing offence and he may be properly charged for the offence in any of the places where the woman is kept detained against her will. But where persons join the original abductor later on, they cannot be joined in the same trial unless it can be alleged that the offences committed by all the persons were in the course of the same transaction.²²

Magistrates should not give themselves jurisdiction by trying cases under s. 363 which really fall under s. 366. The form of kidnapping which is punishable by s. 366 is a seriously aggravated form, which only Sessions Courts and the District Magistrates in the exercise of their special powers have jurisdiction to try.²³

¹³ *Nathu*, (1930) 32 P. L. R. 98, 32 Cr. L. J. 1041, [1931] AIR (L) 401.

¹⁴ *Qudrat*, [1939] All. 871.

¹⁵ *Phuman Singh*, (1924) 26 Cr. L. J. 1158, [1925] AIR (L) 339.

¹⁶ *Neela Bebee*, (1868) 10 W. R. (Cr.) 33; *Mohim Chunder Sil*, (1871) 16 W. R. (Cr.) 42.

¹⁷ *Baldeo Raj*, (1939) 42 P. L. R. 25.

¹⁸ *Wali Muhammad*, (1926) 27 Cr. L. J. 1018, [1926] AIR (L) 677.

¹⁹ *Dhurmonarani Moitro*, (1864) 1 W. R. (Cr.) 39.

²⁰ *Bhuta Santal v. Dama Santal*, (1915) 20 C.

W. N. 62, 17 Cr. L. J. 128; *Koochri*, (1913) 7 S. L. R. 17, 14 Cr. L. J. 439.

²¹ The Criminal Procedure Code, s. 181 (4). This section as framed now by Act V of 1898 settles the conflict of opinion existing between several High Courts. See *Thaku*, (1884) 8 Bom. 312; *James Ingle*, (1891) 16 Bom. 200; *Ram Dei*, (1896) 18 All. 350; *Surja*, (1883) 3 A. W. N. 164; *Abbi Reddi*, (1894) 17 Mad. 402; *Jaimal Singh*, (1900) P. R. No. 1 of 1901.

²² *Adhigope*, (1946) 25 Pat. 241.

²³ *Nga Po Saw*, (1901) 1 U. B. R. (1897-1901) 328.

Sections 346 and 363.—Where an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt, and goes to form part of that offence, and is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence and should not form the subject of a separate conviction and sentence.²⁴

Misdirection.—In a charge to the jury the Judge should adhere to the words of the section and not substitute phraseology of his own, otherwise there will be misdirection.²⁵

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, kidnapped AB [a female minor under—years] from British India [*or from lawful guardianship of CD, her —*], and thereby committed an offence punishable under s. 363 of the Indian Penal Code, and within my cognizance [*or cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.¹

Punishment.—The maximum sentence prescribed for this offence should only be awarded in a case of the most aggravated nature.² See the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*) and 12 (2). See the Indian Penal Code (N.-W. F. P. Amendment) Act (III of 1941, s. 2) as regards enhanced punishment in the North-West Frontier Province.

364. Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or
abducting in order
to murder.

ILLUSTRATIONS.

(a) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

COMMENT.

This section provides for the case of a kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The section is not applicable where the object of the kidnapper is to hold the kidnapped person to ransom. In such a case the kidnapper can be convicted properly either under s. 363 or s 365 of the Code.³

The section provides for the punishment of a specific offence and is not intended as an indirect method of punishing persons who are suspected but not proved to have committed a murder.⁴

PRACTICE.

Evidence.—Prove (1) the kidnapping by the accused.⁵

(2) That he so kidnapped the person in question in order (*a*) that such person might be murdered; or (*b*) that such person might be so disposed of as to be put in danger of being murdered.

Or prove for abduction—

(1) That the accused compelled the person to go from the place in question.

²⁴ *Mungroo*, (1874) 6 N. W. P. 293.

²⁵ *Nakul Kabiraj*, (1909) 13 C. W. N. 754.

¹ (1866) 5 W. R. (Cr. L.) 1; (1867) 8 W. R. (Cr. L.) 11.

² *Mussamut Bhooodea*, (1867) 8 W. R. (Cr.) 3.

³ *Samundar*, (1923) 27 Cr. L. J. 64.

⁴ *Alim Jan Bibi*, [1937] 1 Cal. 484, 488.

⁵ *Vide* s. 363, sup.

(2) That he so compelled that person by means of force; or that he induced that person to do so by deceitful means.

(3) That he so abducted the person in question in order that (a) such person might be murdered, or (b) such person might be so disposed of as to be put in danger of being murdered.

To establish a charge of abduction in order to murder, when the case is one of abduction by deceitful means, it is not enough for the prosecution merely to prove certain circumstances under which the abducted person was induced to go, nor even to prove a mere misrepresentation. They must prove that there was a misrepresentation, that that particular misrepresentation was the result of a plan to murder, and that it was one by which the abducted person was himself deceived and was induced to go.⁶

It must be proved that the person charged with the offence had the intention at the time of abduction that the person abducted should be murdered or would be so disposed of as to be put in danger of being murdered. The prosecution has therefore to prove that the accused had that particular intention at the time he took away the girl. Where the case for the prosecution is that the person abducted has been murdered by the abductor, there can be no scope for a charge under this section. The abductor should be charged with murder pure and simple.⁷

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, kidnapped [*or abducted*] AB in order that the said AB might be murdered [*or might be so disposed of as to be put in danger of being murdered*], and thereby committed an offence punishable under s. 364 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [*by the said Court*] on the said charge.

Punishment.—See the Indian Penal Code (N.-W.F.P. Amendment) Act, III of 1941, s. 3, as regards enhanced punishment in the North-West Frontier Province.

365. Whoever kidnaps or abducts any person with intent to

Kidnapping or abducting with intent secretly and wrongfully to confine person.

cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section lays down the same penalty as s. 363, but it punishes abduction not mentioned in that section. It requires an intention to confine a person secretly and wrongfully.⁸ Kidnapping and confining in broad daylight without any secrecy amounts to an offence under s. 342.⁹

Where a person was abducted in order that he might be held to ransom by his abductors, it was held that this section was applicable.¹⁰

Where a child is shut up so that its natural protector or guardian cannot get at it and it is prevented from proceeding with the help of its natural protector or guardian, it is wrongfully confined. An offence under this section can be committed in respect of a child which cannot walk.¹¹

Where a girl was removed by force by the accused from her father's house at the instance of her husband and she was taken to the house of her husband's brother-in-law so that her father should not be able to find her, it was held that the intention of the accused at the time of abduction can be deduced only from what they subsequently

⁶ *Abdul Gaffur Khan*, (1936) 41 C. W. N. 287.

⁷ *Upendra Nath Ghosh*, (1940) 71 C. L. J. 597, (1940) 42 Cr. L. J. 285, [1940] AIR (C) 561.

⁸ *Akbar Ali*, (1925) 26 P. L. R. 733, 27 Cr. L. J. 229, [1925] AIR (L) 614.

⁹ *Indar Singh*, (1927) 29 Cr. L. J. 597.

¹⁰ *Po Lan*, (1912) 6 L. B. R. 160, 14 Cr. L. J. 167; *Samundar*, (1923) 27 Cr. L. J. 64; *Bahadur Ali*, (1922) 24 Cr. L. J. 622, [1923] AIR (B) 158.

¹¹ *Mahendranath Chakrabarti*, (1934) 62 Cal. 629.

did, and the Sessions Judge was entitled to come to the conclusion that she was to be secretly confined in that house, and the conviction of the accused under this section was justified. It was further held that a husband was not entitled to use force to compel his wife to leave her parent's house and join him.¹²

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused;¹³ or abduction by him.¹⁴

(2) That the accused thereby intended that the person kidnapped or abducted should be kept in wrongful or secret confinement.¹⁵

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Conviction under s. 452 no bar to subsequent trial under this section.—

One M formed intimacy with one H, a widow, and H took up her abode in M's house. Some of H's relations attacked the house of M, beat him and his brothers, and carried off H. For this they were tried, and convicted under s. 452 of the Code. After being removed from M's house, H disappeared, and, after all efforts to find her had been unavailing for a space of some two years, the persons who had been concerned in the attack on M's house were put on their trial under this section. It was held that their previous conviction under s. 452 was no bar to their being tried under this section.¹⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, kidnapped (*or abducted*) one XY with intent to cause the said XY to be secretly and wrongfully confined, and thereby committed an offence punishable under s. 365 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—The accused abducted a girl B in order to put pressure upon her friends to restore another girl whom they had abducted. She was restored a few days after B was abducted and then B was also released. It was not found that any harm was done to B. It was held that under such circumstances heavy sentences of imprisonment were not necessary.¹⁷

See the Indian Penal Code (N.-W.F.P. Amendment) Act III of 1941, as regards enhanced punishment in the North-West Frontier Province.

366. Whoever kidnaps or abducts any woman¹ with intent

Kidnapping, abducting or inducing woman to compel her marriage, etc.

that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will,² or in order that she may be forced or seduced to illicit intercourse,³ or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

COMMENT.

The offence under this section is merely an aggravated form of the offence under s. 363 and the same person cannot be convicted on the same facts under both the sec-

¹² *Ghungru*, [1986] A. L. J. R. 340, 37 Cr. L. J. 827, [1986] AIR (A) 360.

¹³ *Vide* s. 363, sup.

¹⁴ *Vide* (1) and (2), s. 364, sup.

¹⁵ *Baharuddin Mandal*, (1913) 18 C.L.J. 578;

15 Cr. L. J. 43.

¹⁶ *Baldeo Prasad*, (1905) 3 A. L. J. R. 2, 3 Cr. L. J. 93.

¹⁷ *Waris*, (1916) 17 P. L. R. 237, 17 Cr. L. J. 472, [1916] AIR (L) 269.

tions.¹⁸ An intention to seduce subsequent to the elopement is an essential part of this offence.

Scope.—The former Chief Courts of Lower Burma and the Punjab held that this section did not apply to a case in which a minor girl at the time of the kidnapping from lawful guardian, intended to cohabit of her own free will with the kidnapper.¹⁹ It applied where she was compelled to marry a person against her will or where she was forced or seduced to illicit intercourse. But the Calcutta High Court is of opinion that the offence of kidnapping a minor girl, in order that she may be seduced to illicit intercourse, is established by the accused taking her from lawful guardianship, with such object, although she left home with the intention of having illicit intercourse with him. Sanderson, C. J., observed: "It is further conceded that the offence dealt with by section 366 is merely an aggravated form of the offence created by s. 363; and it would, therefore, seem to follow that when the matter under consideration, in relation to section 366, is the seduction to illicit intercourse of a girl under 16 years of age, as in this case, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under s. 363. One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience."²⁰ It is not necessary to show that after the first act of abduction or kidnapping of the girl there was another act of seduction of the girl to illicit intercourse where from the proximity of events the Court is satisfied that the effect of the inducement which was the cause of abduction continued till the time of illicit intercourse.²¹ The Lahore High Court has held that this section cannot be applied to a case where the accused is said to have been carrying on an intrigue with a girl under sixteen while she was in the custody of her lawful guardian and goes away with her because obstacles are thrown in the way of that intrigue, even though when he so goes away with her it was with the intention of carrying on that intrigue."²²

Ingredients.—This section requires:—

1. Kidnapping or abducting any woman.
2. Such kidnapping or abducting must be
 - (a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or
 - (b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

The second part of the section requires two things:—

- (1) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place.
- (2) Such going must be with intent that she may be, or with knowledge that it is likely that she will be, forced or seduced to illicit intercourse, with some person.

1. '**Kidnaps or abducts any woman.**'—See s. 10 as to the definition of 'woman'. The word 'woman' includes a minor female.²³

If the girl was sixteen or over, she could only be abducted and not kidnapped, but if she was under sixteen she could be kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means.²⁴

It is not necessary that the accused should know definitely who the guardian of a minor girl is whom he finds wandering about and make use for his own ends.²⁵

Where a man committed sexual intercourse with a girl in a field near her own home without having any intention of taking her away with him, it was held that he was not guilty of an offence under this section.¹

¹⁸ *Isree Panday*, (1867) 7 W. R. (Cr.) 56.

¹⁹ *Nga Chan Mya*, (1902) 1 L. B. R. 297; *Nga Nge*, (1905) U. B. R. (P. C.) 17, 2 Cr. L. J. 476; *Durga Das*, (1904) P. R. No. 13 of 1904, 1 Cr. L. J. 949.

²⁰ *Safdar Reza*, (1922) 49 Cal. 905, 909; *Sultan*, (1929) 31 Cr. L. J. 85, [1930] AIR (A) 19. ²¹ *Tufail*, (1927) 28 Cr. L. J. 413, [1927] AIR (L) 370.

²² *Allah Rakhi*, (1936) 38 P. L. R. 98.

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²³ *Dhera Singh v. Mussammat Kahno*, (1877) P. R. No. 8 of 1878.

²⁴ *Prafullakumar Basu*, (1929) 57 Cal. 1074, 1079.

²⁵ *Idu*, (1923) 27 O. C. 32, 25 Cr. L. J. 913, [1924] AIR (O) 335; *Mulo*, (1914) 8 S. L. R. 182, 16 Cr. L. J. 117; *Burma*, (1930) 6 Luck. 30.

¹ *Abdul*, [1932] A. L. J. R. 776, 34 Cr. L. J. 100, [1932] AIR (A) 580.

2. 'With intent that she may be compelled...to marry against her will.'—The intention of the accused is the basis and the gravamen of an offence under this section. The volition, the intention and the conduct of the woman determine the offence; they can only bear upon the intent with which the accused kidnapped or abducted the woman, and the intent of the accused is the vital question for determination in each case. Once the necessary intent of the accused is established the offence is complete, whether or not the accused succeeded in effecting his purpose, and whether or not in the event the woman consented to the marriage or the illicit intercourse.² Intention is a matter of inference from the circumstances of the case and the subsequent conduct of the accused after the abduction has taken place.³ This section makes use of the words "compelled, or knowing it to be likely that she will be compelled." If, therefore, a woman is not compelled to do the acts specified in the section no offence is committed. Where a procuress induced a married woman of twenty years of age to become a prostitute, and the facts showed that she made a deliberate choice to go to Calcutta, and become a prostitute, it was held that the procuress could not be convicted under this section, because the woman was not compelled to go, nor was she forced or seduced to illicit intercourse; but that she could properly be convicted under s. 498, because, whatever the woman's secret inclinations were, she would have had no opportunity of carrying them out but for the accused.⁴ Where certain persons conspired together to induce by deceitful means a girl of eighteen to leave her home and accompany them to another place with the intention of making her over to the accused's brother for marriage and on the refusal of the girl to accept the company of the accused, the latter caught hold of her hand and dragged her, it was held that the accused was guilty of abduction under this section.⁵ A Mahomedan girl of ten or eleven years of age was handed over by her mother to the accused and the mother consented to the marriage of the accused with her daughter. The marriage was performed but the girl did not consent to it, as she was not capable of giving her consent, nor had the consent of her brother been obtained who was her guardian for marriage under the Mahomedan law. It was held that the accused was guilty of an offence under this section.⁶ The accused, who were near paternal relations of a girl over sixteen years of age, and were admittedly entitled to her custody as against her mother with whom she was living, carried her away forcibly in order to marry her to one of themselves. It was held that the accused were guilty of an offence under this section.⁷ Where a Hindu mother removed her minor daughter from the father's house for the express purpose of marrying her without her father's consent and thereby deprived the father forever of the guardianship of his minor daughter, it was held that this act amounted to a taking out of the keeping of the lawful guardianship of the father and the mother was guilty of an offence under this section.⁸ Where a Hindu mother-in-law forced her minor daughter-in-law to marry a person against her will, it was held that she was guilty of an offence under this section.⁹

This section requires a special intent or knowledge. Such intent cannot be presumed in the case of a young girl of thirteen years.¹⁰

If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.¹¹

The word 'marry' implies going through a form of marriage whether the same is in fact valid or not.¹²

'Against her will.'—Every act done "against the will" of a person is done "without his consent"; but an act done "without the consent" of a person is not necessarily "against his will", which expression imports that the act is done in spite of the opposition of the person to the doing of it. The provisions of s. 90 are not to

² *Khalil-ur-Rahman*, (1933) 11 Ran. 213, F.B.; *Parag*, (1932) 9 O. W. N. 1181, 34 Cr. L. J. 20, [1933] AIR (O) 45.

³ *Banta Singh*, (1928) 29 Cr. L. J. 643.

⁴ *Srimotee Poddee*, (1864) 1 W. R. (Cr.) 45.
⁵ *Sundar Singh*, (1924) 2 O. W. N. 17, 26 Cr. L. J. 695, [1925] AIR (O) 328.

⁶ *Ahmed Bepari*, (1924) 26 Cr. L. J. 290, [1925] AIR (C) 578.

⁷ *Sher*, (1923) 25 Cr. L. J. 480, [1924] AIR

(L) 110.

⁸ *Hulla*, (1933) 11 O. W. N. 30, 35 Cr. L. J. 469, [1934] AIR (O) 89.

⁹ *Sant Ram*, (1929) 11 Lah. 178.

¹⁰ *Mussammatt Mehran*, (1916) P. R. No. 13 of 1916, 17 Cr. L. J. 283, [1916] AIR (L) 352.

¹¹ *Jaladu*, (1911) 36 Mad. 453.

¹² *Taher Khan*, (1917) 45 Cal. 641; *Sant Ram*, (1929) 11 Lah. 178.

be applied to this section. Where the accused has kidnapped a girl under twelve with intent to give her in marriage no *presumptio juris et de jure* arises that the accused kidnapped the child with intent to compel her to marry against her will. The intent must be proved by evidence in each case.¹³

'Will' means the will of the girl and not that of the guardian.¹⁴

3. 'Forced or seduced to illicit intercourse.'—There must be forcing or seducing for the purpose of illicit intercourse in order that an offence under this part of the section is committed. The word 'force' is used in its ordinary dictionary sense and imputes force by stress of circumstances.¹⁵ Where the accused attacked another person and dragged or carried his wife in broad daylight, it was held that in the absence of any proof that the intention of the accused was to compel the wife to illicit intercourse they could not be convicted under this section but only under s. 325.¹⁶

The term "seduce" is used in the general sense of "enticing or tempting", and not in the limited sense of committing the first act of illicit intercourse. The substantial offence under the section is the act of kidnapping or abduction. The illicit nature of the intercourse for which the kidnapping or abduction takes place constitutes an aggravation of the offence.¹⁷ The word 'seduction' is not used in the narrow sense of inducing a girl to part with her virtue for the first time, but includes subsequent seduction for further acts of illicit intercourse.¹⁸ To 'seduce' is to draw aside from the path of rectitude and duty in any manner, to entice to evil, to lead astray, to tempt, and lead to iniquity. The words "seduced to illicit intercourse" do not therefore refer only to the first act of seduction or the surrender of chastity.¹⁹ The phrase "seduced to illicit intercourse" is intended to indicate something different from "seduction" in its popular, usual or ordinary sense and cannot be restricted to inducing a girl to surrender her chastity for the first time. It means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse." Therefore an accused cannot be convicted of this offence unless the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter have resumed a life of purity. On the other hand, if she is already leading a life of indulgence in unlawful sexual intercourse, it cannot be said that she was kidnapped "in order that she might be seduced to illicit intercourse."²⁰ If a girl is carrying on an intrigue up to the time of abduction and then the accused takes her away to continue that intrigue this section does not apply.²¹ The Madras High Court has held that this section is applicable even if chastity had already been surrendered before the abduction or kidnapping took place.²² Seduction is a comprehensive expression and does not exclude the possibility of deceitful means being used in order that seduction may be practised with effect.²³ The words 'illicit intercourse' mean merely sexual intercourse between a man and a woman who are not husband and wife.²⁴ It is not confined to sexual intercourse by a man with a married woman but includes such intercourse between two unmarried persons.²⁵ Where a man kidnaps a minor girl from lawful guardianship and thereafter cohabits with her without marriage he has, subsequent to the kidnapping, seduced her to illicit intercourse, and he has kidnapped her in order that she may be seduced to illicit intercourse, and he has committed an offence under this section, quite independent of any

¹³ *Khalil-ur-Rahman*, (1933) 11 Ran. 213, F.B.

¹⁴ *Fulchand Tepriwalla*, (1931) 36 C. W. N. 49, 33 Cr. L. J. 512, [1932] AIR (C) 442.

¹⁵ *Prafullakumar Basu*, (1929) 57 Cal. 1074.

¹⁶ *Hazara Singh*, (1926) 27 P. L. R. 867, 27 Cr. L. J. 727, [1926] AIR (L) 553.

¹⁷ *Lakshman Bala*, (1934) 37 Bom. L. R. 176, 59 Bom. 652; *Ayubkhan Mirsultan*, (1943) 46 Bom. L. R. 203, 45 Cr. L. J. 750, [1944] AIR (B) 159.

¹⁸ *Prafullakumar Basu*, (1929) 57 Cal. 1074; *Suppiah*, [1930] M. W. N. 905, 32 Cr. L. J. 357, [1930] AIR (M) 980.

¹⁹ *Nga Ni Ta*, (1903) 1 U. B. R. (1902-03) (P. C.) 15. This case is therefore in conflict with *Nga Chan Mya*, (1902) 1 L. B. R. 297;

Nga Nge, (1905) U. B. R. (P. C.) 17, 2 Cr. L. J. 476; *Durga Das*, (1904) P. R. No. 13 of 1904, 5 P. L. R. 410, 1 Cr. L. J. 949; *Srimotee Poddee*, (1864) 1 W. R. (Cr.) 45.

²⁰ *Sahab Ali*, (1933) 60 Cal. 1457. Sub-nom. *Taki Mia*, (1933) 38 C. W. N. 71.

²¹ *Nura*, (1933) 35 Cr. L. J. 1386, [1934] AIR (L) 227.

²² *Manicka Chetty*, [1935] M. W. N. 358.

²³ *Mahammad Jalaluddin*, (1930) 31 Cr. L. J. 1092, [1930] AIR (C) 433.

²⁴ *Mahbub*, (1907) 4 A. L. J. R. 482, 6 Cr. L. J. 9.

²⁵ *Kesar Mal alias Kesra*, (1932) 33 P. L. R. 727, 33 Cr. L. J. 673, [1932] AIR (L) 555.

intention or consent on the part of the minor girl and quite independent of any question as to whether she had surrendered her chastity before the act of kidnapping.¹ Where a girl, over fourteen and under sixteen years of age and in lawful custody, consents to an act of illicit intercourse with a man and is persuaded to elope with him for that purpose, he is guilty of an offence under this section.² If the intention to kidnap a girl in order to seduce her to illicit intercourse is present, the fact that the accused had illicit intercourse with the girl before she was kidnapped is wholly immaterial.³ But in a subsequent case the Allahabad High Court has held that this section does not apply to a case where the accused was said to have been carrying on an intrigue with a girl under sixteen, while she was in the custody of her lawful guardian, and went away with her because obstacles were thrown in the way of that intrigue, even though when he so went away with her it was with the intention of continuing illicit intercourse. The Court observed: "In the first place we note that the very phrase, 'seduce to illicit intercourse' implies two distinct stages in the acts of the accused, the seduction and the illicit intercourse. These must be two distinct acts, though they may follow in immediate sequence. The words or actions of the accused which induce the girl to submit to the illicit intercourse must precede the actual act. This does not appear to have been borne in mind in some of the cases which we have mentioned above. The reason for this is possibly that sometimes the word 'seduction' is used by itself to include comprehensively the 'seducing' and the 'intercourse'; but where both words are used 'seduced to' can only refer to the preliminary act of persuasion. The more important question is whether the term 'seduced to' can properly be applied only to that which leads to the first act of illicit intercourse, or whether it can be properly applied to that which precedes each subsequent act of illicit intercourse. The Oxford Dictionary defines 'seduction' in this connection as 'to induce a woman to surrender her chastity', which suggests at the outset that the term 'seduction' can only apply properly to the first act of illicit intercourse, for once that act has been completed, the girl has surrendered her chastity. We would, therefore, hold that the term 'seduction' can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man. Neither of these conditions apply to the present case... Next we note that the act of seduction alleged must be subsequent to the kidnapping in order to make section 366 applicable. The section says 'kidnaps any woman in order that she may be seduced to illicit intercourse.' This is manifestly wholly different from 'kidnaps any woman whom he has seduced to illicit intercourse'.⁴ Where a woman, who was going peaceably with her husband on the road, was robbed of all her ornaments and jewellery, and carried off by force to a distant village where she was kept confined in a house to which no other person could have any access except the accused themselves, it was held that no other inference was possible except that the woman was carried off with the object that she might be forced or seduced to illicit intercourse.⁵

Where the accused, a Santal man, had by smearing the forehead of a Santal girl by vermilion married her according to the customary form of *itut* marriage, and then took away the minor girl from her father's custody, it was held that no offence had been committed.⁶

The mere taking of a girl to an immigration recruiter is not necessarily the taking of the girl to his house with a knowledge that it was likely that she would be forced or seduced to illicit intercourse.⁷

Under Buddhist law a man cannot contract a valid marriage with a minor without her guardian's consent. Therefore, sexual intercourse without such consent will be "illicit intercourse" under this section even though marriage is intended.⁸

Seduction *per se* is not a criminal offence either in India or in England.

¹ *Nga Ni Ta*, (1903) U. B. R. (1902-03) (P. C.) 15.

² *Ayubkhan Mirsultan*, (1943) 46 Bom. L. R. 203, 45 Cr. L. J. 750, [1944] AIR (B) 159.

³ *Prem Narain*, [1929] A. L. J. R. 114, 30 Cr. L. J. 218, (1929) AIR (A) 82; *Krishna Maharana*, (1929) 9 Pat. 647.

⁴ *Bajinath*, (1932) 54 All. 756, 759, 760.

⁵ *Chandu Singh*, (1921) 23 Cr. L. J. 459, [1921] AIR (L) 323.

⁶ *Dhuma Manjhi*, (1942) 43 Cr. L. J. 918, [1943] AIR (P) 109.

⁷ *Ganga Dei*, (1914) 12 A. L. J. R. 91, 15 Cr. L. J. 154, [1914] AIR (A) 17.

⁸ *Nga Ne U*, (1883) S. J. L. B. 202.

Marrying girl for purpose of inducing her to prostitute herself.—Where the accused by false representations and deceitful means induced a girl to marry him and leave her home and accompany him to Kohat, where, upon their arrival, he instigated her to prostitute herself, and it appeared that it was with that end in view that he had induced the girl to marry him, it was held that he was guilty of an offence under this section.⁹

Sheltering girls with view to prostitute themselves.—Where two girls under the age of sixteen years ran away from their houses and remained for one or two days in the house of a woman of quality and no report was made to the police, it was held that the woman in whose house the girls stayed was guilty of an offence under this section.¹⁰

Abduction of married woman with intent to compel her to marry another.—One W on her husband's death returned as a widow to live with her mother. She received a proposal of marriage from D but she refused him as he was an old man with children. She entered into a marriage in *nika* form with P. The accused a day after the marriage came to her house and took her away by force to a place and there she received another proposal of marriage from D. It was held that the accused were guilty of an offence under this section.¹¹

Abetment.—A married woman consenting to her own kidnapping cannot be convicted of abetting the offence. If the woman is herself a consenting party to her own removal, a fact which is necessarily involved in a finding that she abetted that act, it follows that the substantive offence of kidnapping could not have been committed by the person who is alleged to have kidnapped her, and, consequently, the woman cannot be convicted of abetting such an offence which in fact is not committed.¹²

Amendment. Clause 2.—This clause was added by the Indian Penal Code (Amendment) Act (XX of 1923), s. 2. As to the meaning of 'criminal intimidation', see s. 503.

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused;¹³ or abduction by him.¹⁴

(2) That the person so kidnapped or abducted is a woman.

(3) That the accused then intended, or knew that it was likely,

(a) that such woman might or would be compelled to marry a person against her will, or

(b) that she might or would be forced or seduced to illicit intercourse.¹⁵

Intention is a matter of inference from the circumstances of the case and the subsequent conduct of the accused after the abduction has taken place.¹⁶ Ordinarily it is not possible for the prosecution to establish the intention except by proving the conduct of the accused.¹⁷ Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first and natural presumption must be that he has abducted her with the intention of having sexual intercourse with her, either forcibly or with her consent after seduction or after marrying her. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under s. 105, Indian Evidence Act, to prove that intention.¹⁸

Under the second part of the section prove—

(1) That the accused induced a woman to go from any place by criminal intimidation, or abuse of authority, or by compulsion.

(2) The accused did so with intent, or knowledge that it was likely, that the woman might or would be forced or seduced to illicit intercourse with some person.

⁹ *Bahadur*, (1880) P. R. No. 7 of 1881.

¹⁰ *Jasauli*, (1912) 34 All. 340.

¹¹ *Taher Khan*, (1917) 45 Cal. 641.

¹² *Natha Singh*, (1883) P. R. No. 11 of 1883.

¹³ *Vide* s. 363, sup.; *Mohim Chunder Sil*, (1871) 16 W. R. (Cr.) 42.

¹⁴ *Vide* (1) & (2), s. 364, sup.

¹⁵ *Meer Alum Khan*, (1868) P. R. No. 23 of 1886; *Naba*, (1911) 12 P. L. R. 737, 12 Cr. L.

J. 393.

¹⁶ *Banta Singh*, (1928) 29 Cr. L. J. 643; *Jowaya*, (1929) 31 Cr. L. J. 131, [1930] AIR (L) 163.

¹⁷ *Haider Shah*, (1929) 31 P. L. R. 388, 31 Cr. L. J. 529, [1930] AIR (L) 52.

¹⁸ *Mohammad Sadiq*, (1937) 40 P. L. R. 730, 39 Cr. L. J. 844, [1938] AIR (L) 474.

The most important witness in an abduction case is generally the abducted woman herself and where she is not forthcoming, and the other witnesses are not of a very reliable type, the prosecution evidence must be carefully scrutinised and weighed.¹⁹ The evidence of the woman should be taken with caution.²⁰ It is extremely dangerous and permissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence, and the rule must be properly emphasised in the charge to the jury. Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction which vitiates the conviction.²¹ The Judge must tell the jury that it is unsafe in cases of this character to convict on the uncorroborated testimony of the prosecutrix, adding, however, that if in spite of the warning they are satisfied that she is telling the truth, they would be at liberty to convict on her evidence.²² In a case of abduction, especially where the sexual intercourse is admitted by the accused, it is not necessary that the details of the sexual intercourse should be corroborated, though the Court would normally require corroboration of the woman's statement that the intercourse was without her consent.²³ The rule of corroboration of the evidence of the prosecutrix applies only to cases of rape. There is no warrant for extending the rule to other cases of a sexual nature.²⁴ The age of the girl is very material on the question of consent.²⁵

To ask for a verdict on a charge under this section, upon both heads of abduction and kidnapping, is a complete misunderstanding of the law. There cannot be any such verdict under this section and a verdict returned upon such a direction cannot be upheld.¹

Medical evidence as to age.—In a case under this section in view of the fundamental importance of the question of age of the girl concerned, it is the duty of the Judge to obtain the evidence of the medical witness with the utmost precision and to have it brought out clearly whether the witness was prepared to stake his opinion that the girl could not be of the age of sixteen or over.²

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Direction to jury.—In a trial with a jury under this section the Sessions Judge on the question of intent charged the jury in the following words: "It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent in the face of the facts." It was held by the High Court that this amounted to a misdirection of the jury. The question of intent was a pure question of fact, but the way in which it had been put to the jury left them no option but to adopt the view taken by the Judge.³

In a trial for offences under ss. 366, 366A and 376, a direction to the jury to the effect that the general moral character of the girl is of no consequence amounts to a misdirection.⁴

Where the accused is charged both with kidnapping and abduction, it is essential to take a separate verdict on each charge.⁵

Punishment.—Under s. 363, imprisonment, which may extend to seven years, is the punishment for kidnapping. The extra three years prescribed by s. 366 are

¹⁹ *Ghulam*, (1926) 28 Cr. L. J. 277, 27 P. L. R. 747.

²⁰ *Mohammad Sadiq*, (1937) 40 P. L. R. 730, 39 Cr. L. J. 844, [1938] AIR (L) 474.

²¹ *Sachinder Rai*, (1939) 18 Pat. 698; *Kalu Mia*, (1940) 44 C. W. N. 622; *Taser Pramanik*, (1940) 44 C. W. N. 835, 71 C. L. J. 590, 41 Cr. L. J. 841, [1940] AIR (C) 391.

²² *Krishna Chandra*, (1940) 45 C. W. N. 27.

²³ *Kasamalli Mirzalli*, (1941) 44 Bom. L. R. 27, [1942] Bom. 390, F.B.

²⁴ *Banubai Irani*, (1942) 45 Bom. L. R. 281, 44 Cr. L. J. 534, [1943] AIR (B) 150, F.B.

²⁵ *Mohiuddin*, (1930) 51 C. L. J. 352, 32 Cr. L. J. 455, [1930] AIR (C) 437.

¹ *Krishna Chandra*, (1940) 45 C. W. N. 27.

² *Hatem Ali*, (1946) 47 Cr. L. J. 325.

³ *Hughes*, (1891) 14 All. 25.

⁴ *Sachinder Rai*, (1939) 18 Pat. 698.

⁵ *Nanda Ghosh*, (1938) 40 Cr. L. J. 640, [1939] AIR (C) 321.

most appropriate for the intention to bring force or persuasion to bear on the girl, after she has been removed from the shelter of her home and deprived of the support which her guardian's presence would give her in resisting either threats or enticements. It is contrary to the well-known rule of construction of penal statutes to say that an intention to seduce to illicit intercourse can be presumed, when the girl has already consented to illicit intercourse.⁶

Where the accused had forcibly carried away the complainant and had subsequently raped her, it was held that he had brought himself within the purview of this section the moment he forcibly carried her away with the intention of having illicit intercourse with her, and the infliction of a separate additional sentence under s. 376 for rape was not contrary to the provisions of s. 71 of the Code.⁷

A severe sentence should be passed in the case of an offence under this section.⁸

The consent of the girl makes no difference to the offence, but where she is a consenting party it will have a bearing on the sentence to be imposed.⁹

Alteration of charge.—It is not competent to a Judge in appeal to alter a charge under s. 376 of the Code to one under this section because a charge under this section involves different elements and different questions of fact from a charge under s. 376.¹⁰

In the case of a charge of abduction, notice of the charge of kidnapping is not a fair, proper and sufficient notice to such a charge. Where the accused is charged with kidnapping only, the Judge should not leave the jury to convict the accused of abduction.¹¹

Alternative charge.—If an accused is to be charged in the alternative of kidnapping or abduction of a minor girl, or with both the offences, a separate charge must be framed in respect of each offence, for the simple reason that though these offences are punishable under the same section they are quite distinct from each other.¹² When the question of the age of the prosecutrix is in dispute, a charge under this section of kidnapping and abduction in the alternative is not illegal.¹³

The joinder of the two offences of kidnapping and abduction in the alternative in one charge is an irregularity and not an illegality and, when no failure of justice has been occasioned, s. 537 of the Code of Criminal Procedure applies. An accused may be charged separately with kidnapping and with abduction and tried at one trial for each of such offences. It is not sufficient merely to charge an accused in the bare words of the section. Particulars must always be given sufficient to give him notice of the matter with which he is charged.¹⁴

Charge.—I (*name and office of Magistrate. etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, kidnapped (*or abducted*) a woman, to wit—, with intent that she may be compelled (*or knowing it to be likely that she will be compelled to marry against her will [or in order that the said woman—may be forced (or seduced) to illicit intercourse, or knowing it to be likely that she will be forced (or seduced) to illicit intercourse]*, and thereby committed an offence punishable under s. 366 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried (by the said Court) on the said charge.

If the offence is committed under the second clause the charge should say :—

That you, on or about the—day of—, at—, induced a woman to wit—, to go from (*mention place*) with intent that she may be (*or knowing that it is likely that she will be*) forced (*or seduced*) to illicit intercourse with another person by means of criminal intimidation (*or abuse of authority or other method of compulsion*, to wit—), and thereby committed an offence punishable under the second part of

⁶ *Nga Nge*, (1905) U. B. R. (P. C.) 17, 2 Cr. L. J. 476.

⁷ *Ghulam Muhammad*, (1926) 7 Lah. 484.

⁸ *Imral*, (1929) 31 Cr. L. J. 7, [1929] AIR (A) 916.

⁹ *Khem Das*, (1926) 27 Cr. L. J. 851.

¹⁰ *Sakharam*, (1905) 8 Bom. L. R. 120, 3 Cr. L. J. 240.

¹¹ *Isu Sheikh*, (1926) 45 C. L. J. 584, 31 C.

W. N. 171, 28 Cr. L. J. 201, [1927] AIR (C) 200.

¹² *Jangli Mian*, (1933) 15 P. L. T. 229, 35 Cr. L. J. 814, [1934] AIR (P) 180; *Mozam Dafadar*, (1933) 34 Cr. L. J. 682, [1933] AIR (C) 563.

¹³ *Prafullakumar Basu*, (1929) 57 Cal. 1074.

¹⁴ *Rajabuddin Mandal*, (1933) 63 Cal. 1394; *Ramizullah*, (1932) 37 C. W. N. 1071, 35 Cr. L. J. 487, [1934] AIR (C) 85.

s. 366 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

366A. Whoever, by any means whatsoever,¹ induces any minor girl under the age of eighteen years² to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse³ with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Procurement of minor girl.

COMMENT.

This section and s. 366B were added by the Indian Penal Code (Amendment) Act (XX of 1923) to give effect to certain Articles of International Convention for the Suppression of the Traffic in Women and Children. The material Articles of the Convention which was signed at Paris on May 4, 1910, are as follows :—

“**Article 1.** Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished notwithstanding that the various acts constituting the offence may have been committed in different countries.

“**Article 2.**—Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished notwithstanding that the various acts constituting the offence may have been committed in different countries.

“**Article 3.**—The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding Articles engage to take or to propose to their respective Legislatures the necessary steps to punish these offences according to their gravity”.¹⁵

The Statement of Objects and Reasons stated : “The principles in this International Convention were endorsed in the international Convention regarding the Traffic in Women and Children which was adopted by the Second Assembly of the League of Nations. In Article 1 of this Convention it is provided that the High Contracting Parties in event of their not being already parties to the International Convention of May 4, 1910, shall transmit with the least possible delay their ratifications of, or adhesions to, that instrument in the manner laid down therein. Further, the term “under age” which did mean under 20 completed years of age, according to paragraph B of the final Protocol of the Convention of 1910 is now interpreted as meaning under 21 completed years of age by virtue of the provisions of Article 5 of the International Convention, adopted by the Second Assembly of the League of Nations.

“In view of the resolutions adopted by the Council of State on January 31, 1922, and by the Legislative Assembly on February 7, 1922, the International Convention adopted by the Second Assembly of the League of Nations was signed at Geneva on behalf of the Government of India by His Majesty’s Minister at Berne on March 28, 1922, with the following reservation :—

‘India reserves the right of its discretion to substitute the age of sixteen years or any greater age that may be subsequently decided upon for the age limit prescribed in paragraph B of the Final Protocol of the Convention of May 4, 1910, and in Article 5 of the present convention’”.¹⁶

Object.—This section and s. 366B were introduced to punish the export and import of girls for prostitution. This section deals with procurement of minor girls from one part of British India to another. Section 366 penalises the procurement of a woman where such procurement amounts to abduction. The aim of this section is to prevent immorality, and its provisions are framed more with the desire of safe-

¹⁵ Vide *Gazette of India* for 1922, Part V, p. 343

¹⁶ Vide *G. I.* 1922, Part V, p. 343.

guarding the public interest of morality than the chastity of one particular woman. Often it may happen that a girl under eighteen may desire to leave her husband to better her prospects elsewhere. Such a desire would not save her helper from a conviction under this section.¹⁷

Scope.—There is a close resemblance in the texts of s. 362 and this section and some of the salient ingredients of the two offences are common. An offence under this section is a continuing offence.¹⁸ The offence is one of inducement with a particular object, and when after the inducement the offender offers the girl to several persons a fresh offence is not committed at every fresh offer for sale.¹⁹

1. **'By any means whatsoever'.**—The means employed may be legal or illegal. The means may be intimidation or abuse of authority referred to in the second article of the International Convention.

2. **'Induces any minor girl under the age of eighteen years'.**—Any reason given by the accused to move the girl from one place to another is sufficient for inducement. Even where the girl discovers that she is not being so taken and falls in with the plan of the accused, the inducement is complete, and the girl's subsequent willingness will neither prevent the offence nor reduce its gravity.²⁰

3. **'Forced or seduced to illicit intercourse'.**—See Comment on s. 366. An offence under this section is only committed when a girl between sixteen and eighteen years of age is induced by a person to go from any place with intention that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. A person who induces such a girl without force and fraud to go from any place with the intention that she will have illicit intercourse with himself does not commit any offence under this section or any other section.²¹ The expression "illicit intercourse" in this section means sexual intercourse between a man and a woman who are not husband and wife.²² Merely giving shelter to a girl or taking her from one place to another without knowing that she is a married girl and without any intention or knowledge that she is likely to be forced or seduced to illicit intercourse with another person is no offence under this section.²³ The accused took a girl of less than eighteen years of age from place to place with the intention of compelling her to marry against her will or in order that she may be forced or seduced to illicit intercourse. There was no evidence that the girl was compelled to accompany the accused by force or by deceitful means. It was held that the accused was guilty of an offence under this section and not s. 366.²⁴ A woman aged about sixteen years having quarrelled with her husband, left his house with the idea of going to her maternal grandfather's house. On the way she met A and B. B promised to take her to her grandfather's house but took her to A's house. A took her to a neighbouring village and attempted to sell her but being unsuccessful in selling her brought her back to his own house and concealed her there. The woman was discovered in A's house and A and B were charged under this section. A contended that he did not know that the woman was married. It was held (1) that even assuming that A did not know that the woman was married, his attempt to sell her made him liable under s. 366A; (2) that B was also liable as he had by deceitful means induced the woman to stay at his house and taken her to A's house instead of her grandfather's house.²⁵ Where a married girl was unhappy with her husband and the father took her from the husband's house and gave her as a wife to B it was held that the act of the father would amount to an inducement under this section but B was not guilty under this section as the inducement to leave must have for its object seduction by another person and not by the person who himself induced the woman to leave.¹ Where A and B induced a girl to go with them offering to take her to her destination but with the real object of

¹⁷ *Bhagwati Prasad*, (1929) 30 Cr. L. J. 985, [1929] AIR (A) 709.

¹⁸ *Nanhua Dhimar*, (1930) 53 All. 140; *Chiragh*, (1936) 39 P. L. R. 365, 38 Cr. L. J. 474, [1936] AIR (L) 850.

¹⁹ *Sis Ram*, (1929) 51 All. 888.

²⁰ *Bhagwati Prasad*, (1929) 30 Cr. L. J. 985, [1929] AIR (A) 709.

²¹ *Abbas Bahara*, (1932) 37 C. W. N. 317, 34 Cr. L. J. 341, [1933] AIR (C) 362.

²² *Kesar Mal*, (1932) 33 P. L. R. 727, 33 Cr. L. J. 673, [1932] AIR (L) 555.

²³ *Rati Ram*, (1927) 28 P. L. R. 260, 28 Cr. L. J. 584, [1927] AIR (L) 727.

²⁴ *Saadat Khan*, (1925) 2 O. W. N. 445, 26 Cr. L. J. 1151, [1925] AIR (O) 454.

²⁵ *Sher Singh*, (1930) 31 P. L. R. 643, 32 Cr. L. J. 460, [1930] AIR (L) 463.

¹ *Ram Saran*, [1930] A. L. J. R. 1113, 31 Cr. L. J. 861, [1930] AIR (A) 497.

selling her for illicit intercourse and afterwards C and D took her from one place to another with the object of selling her but there was no evidence to show that C and D offered any inducement to the girl or to do any act with the intention that she may be or knowing it to be likely that she will be forced to illicit intercourse. It was held that the offence under this section was complete when A and B induced the girl to leave her place and what happened afterwards did not constitute a fresh offence under this section either against A and B or against any other accused who first took her from one place to another and passed her on from hand to hand.²

PRACTICE.

Evidence.—Prove (1) that the accused induced a girl.

(2) That the girl was under eighteen years of age.

(3) That the girl was induced to go from a place or to do an act.

(4) That the accused did as above with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person.

Corroboration as to age.—It cannot be said that the evidence of the girl always needs corroboration in cases under this section, but where it is found that the girl in question has been definitely lying on important points in her story, then it is unsafe to rely on other parts of her evidence to convict any person of a criminal offence unless that evidence, is corroborated in material points. The presence of the girl in the house of the accused is not a material point for the purpose of corroboration in a case under this section.³

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Direction to jury.—It is the duty of the Judge to direct the jury that if they are not completely satisfied that it has been established that the girl is under eighteen they are bound to acquit the accused upon a charge under this section.⁴ The fact that a girl is handsome is no evidence at all to show that the persons with whom she goes away had any intention that she should become an inmate of a brothel. Where the Judge in dealing with the evidence regarding the intention under this section told the jury to look at the surrounding circumstances and he then pointed out that the girl was handsome, it was held that it amounted to a serious misdirection.⁵

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, induced AB——, a girl under eighteen years of age [to go from——(*specify the name of the place*)] or [to do the following act, to wit——] with intent that the said AB may be (*or knowing that it is likely that the said AB will be*) forced (*or seduced*) to illicit intercourse with——(*name the person*), and thereby committed an offence punishable under s. 366A of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Whipping.—Where the accused was convicted for an offence under this section and sentenced both to detention at the Borstal School and also to receive twenty lashes, it was held that the sentence of whipping in addition to a punishment to which he was liable not under the Penal Code but under s. 25 (I) of the Burma Prevention of Crime (Young Offenders) Act III of 1930, was illegal. Where the accused has given way to his passions, detention in a Borstal institution is normally not likely to prove either so efficacious or so salutary a punishment as a whipping, which in such cases operates as a wholesome and striking reminder that young men must behave themselves properly in their relations with women and girls and must learn to control their natural instincts. This object is much more likely to be achieved by a whipping than by a period of reflection and detention in a Borstal institution.⁶

² *Kesar Mal*, (1932) 33 P. L. R. 727, 33 Cr. L. J. 673, [1932] AIR (L) 555.

³ *Kanuj Shaikh*, (1946) 48 Cr. L. J. 301.

⁴ *Sachinder Rai*, (1939) 18 Pat. 698.

⁵ *Ekkari Das*, (1939) 40 Cr. L. J. 660, 43 C. W. N. 668, [1939] AIR (C) 290.

⁶ *Shwe Bein*, (1934) 12 Ran. 349.

366B. Whoever imports into British India from any country outside India any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse¹ with another person,

and whoever with such intent or knowledge imports into British India from any State in India any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person,

shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

COMMENT.

This section was introduced along with s. 366A by the Indian Penal Code (Amendment) Act (XX of 1923). See Comment on s. 366A.

Object.—This section makes it an offence (1) to import into British India from any country outside India a girl under the age of twenty-one years with the intent or knowledge specified in the section, or (2) to import into British India from any State in India a girl under the age of twenty-one years who has been imported in such State from any country outside India with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with any person. The Select Committee in their Report observed : “The case of girls imported from foreign country we propose to deal with by the insertion of a new section 366B in the Code. We are unanimously of opinion that the requirements of the Convention will be substantially met by penalising the importation of girls from a foreign country. At the same time we have so worded the clause as to prevent its being made a dead-letter by the adoption of the course of importing the girl first into an Indian State.”

1. ‘Forced or seduced to illicit intercourse’.—See Comment on s. 366.

PRACTICE.

Evidence.—Prove (1) that the accused imported a girl into British India.

(2) That the girl was imported from any country outside India or from any State in India.

(3) That such girl was under the age of twenty-one years.

(4) That the accused imported the girl with intent that she may be, or knowing it to be likely that she will be, forced or seduced to ‘illicit intercourse’ with some person.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, imported into British India from——(*specify the name of the country*) a country outside India (*or a State in India*) by yourself [*or by——(mention the name of the person)*] AB, a girl under the age of twenty-one years, with intent that she may be (*or knowing it to be likely that she will be*) forced (*or seduced*) to illicit intercourse with another person, to wit—— and thereby committed an offence punishable under s. 366B of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried (by the said Court) on the said charge.

367. Whoever kidnaps or abducts any person¹ in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt,² or slavery,³ or to the unnatural lust⁴ of any person, or knowing it to be likely that such person will

¹ *Gazette of India*, dated February 10, 1923, Part V, p. 79.

be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Kidnapping for grievous hurt, slavery, or unnatural offence, is punishable under this section.

1. 'Person'.—See s. 11, *supra*.
2. 'Grievous hurt'.—See s. 320, *supra*.
3. 'Slavery'.—See ss. 370, 371, *infra*.
4. 'Unnatural lust'.—See s. 377, *infra*.

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused;⁸ or abduction by him.⁹

(2) That he so kidnapped or abducted the person in question—

- (a) in order that such person might be subjected to grievous hurt, slavery, etc., or to unnatural lust, etc.
- (b) in order that such person might be so disposed of as to be put in danger thereof;
- (c) knowing it to be likely that such person would be so subjected or disposed of.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, kidnapped (*or abducted* XY in order that the said XY may be subjected (*or may be so disposed of as to be put in danger of being subjected*) to grievous hurt [*or slavery or to the unnatural lust of——*)] *or* knowing it to be likely that such person will be so subjected or disposed of], and thereby committed an offence punishable under s. 367 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

368. Whoever, knowing¹ that any person has been kidnapped

Wrongfully concealing or keeping in confinement, kidnapped or abducted person.

or has been abducted, wrongfully conceals² or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same

purpose as that with or for which he conceals or detains such person in confinement.

COMMENT.

This is one of those sections in which subsequent abetment is punished as a substantive offence.

Scope.—This section refers to some other party who assists in concealing any person who has been kidnapped and not to the kidnappers.¹⁰ A kidnapper who has been convicted under s. 366 cannot, therefore, be convicted also under this section.¹¹ For the purpose of this section, it is not necessary to prove that the person confined was abducted by any particular person.

1. 'Knowing'.—This section is confined to 'knowledge' only of the fact of kidnapping or abduction. For practical and legal purposes knowledge means the state of mind entertained by a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose

⁸ *Vide* s. 363, *sup*.

⁹ *Vide* (1) and (2), s. 364, *sup*.

¹⁰ *Sheikh Oozeer*, (1866) 6 W. R. (Cr.) 17.

¹¹ *Bannu Mal*, (1926) 2 Luck. 249.

veracity he has no reason to doubt. Where, therefore, an accused has no such knowledge of the girl having been kidnapped or abducted he does not render himself liable to punishment under this section.¹²

2. '**Wrongfully conceals**'.—These words, "taken in their plain and ordinary meaning, refer to some act or omission whereby the actual person of the individual concealed is withdrawn from observation. Doubtless lies told about such a person may as effectually hoodwink those interested in discovering him or her; but what we have to assign to the word 'conceals' is only its plain signification. On this principle, as well as on that of '*noscitur a sociis*'.—looking at the alternative act mentioned in the same section, which is keeping such person in confinement, it appears that the act of concealment refers to the withdrawal from the actual observation of others, by removal or otherwise, of the person kidnapped or abducted, and does not include the mere giving false information about such person".¹³ The mere fact of a girl being received into a house and retained there by the owner, even after he may have become aware of or found reason to believe that she had been kidnapped, does not amount to concealment of her unless an intention of keeping her out of view be apparent.¹⁴ Where a kidnapped girl was taken to a well where she was allowed to move about in the neighbouring fields, it was held that she was not concealed within the meaning of this section.¹⁵

C A S E S .

Concealing kidnapped girl.—Where a girl of eleven years of age was taken out of the custody of her lawful guardian by the first accused and offered for sale in marriage to another, and the second accused illegally concealed her, the conviction of the former was upheld under s. 363, and of the latter, under s. 368.¹⁶ A girl under sixteen years of age who lived with her widowed mother was going to a vegetable market in search of work. On her way she met another woman who asked the girl to accompany her under a promise of obtaining work for her. The woman took the girl to her house and kept her there till evening, when she was removed by the accused in a closed carriage to a solitary bungalow far away from the town. The girl was kept there during two days and nights, after which she was permitted to return to her house. It was held that the accused had committed this offence.¹⁷

P R A C T I C E .

Evidence.—Prove (1) that the person in question has been kidnapped or abducted.

(2) That the accused knew of such kidnapping or abduction.¹⁸

(3) That he, having such knowledge, wrongfully concealed or kept such person in confinement.¹⁹

Prove also the intention or knowledge with which the accused concealed or kept such person in confinement; or prove the purpose for which he did so.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

An offence under this section is not exclusively triable by a Court of Session when the girl is wrongfully confined or concealed for the purpose of forcing her to illicit intercourse.²⁰

Even if a charge under this section is unsustainable, ss. 420, 494 and 109 of the Code may apply.²¹ But a conviction under ss. 368 and 109 is a bar to a conviction for wrongful confinement under s. 343 of the Code.²²

¹² *Zamin*, (1931) 8 O. W. N. 1325, 33 Cr. L. J. 275, [1932] AIR (O) 28.

¹³ *Phula Singh*, (174) P. R. No. 10 of 1874.

¹⁴ *Jharrup*, (1873) 5 N. W. P. 133; *Mussu Mat Chubboo*, (1873) 5 N. W. P. 189; *Ram Shastri*, (1902) 15 C. P. L. R. 185.

¹⁵ *Shiv Singh*, (1938) 41 P. L. R. 162, 40 Cr. L. J. 277, (1939) AIR (L) 26.

¹⁶ *Isree Panday*, (1867) 7 W. R. (Cr.) 56.

¹⁷ *Jetha Nathu*, (1904) 6 Bom. L. R. 785, 1 Cr. L. J. 931.

¹⁸ *Durgamoni Dassi*, (1938) 43 C. W. N. 196; *Francis Hector*, (1936) 38 Cr. L. J. 401, (1937) AIR (A) 182; *Sohan Singh*, (1938) 41 P. L. R. 45, 40 Cr. L. J. 684, [1939] AIR (L) 180.

¹⁹ *Amar Ali*, (1926) 27 Cr. L. J. 554, [1926] AIR (L) 384.

²⁰ *Sarnam Singh*, [1934] A. L. J. R. 1234, 36 Cr. L. J. 117, [1935] AIR (A) 63.

²¹ *Ibrahim*, (1893) P. R. No. 7 of 1894.

²² *Ishwar Chandra Jogee*, (1864) W. R. (Cr.), (Gap No.). 21.

Joint trial.—A and B abducted a girl and took her to the house of C where she was wrongfully confined. A, B and C were jointly tried, A and B for offences under s. 366 and C for an offence under this section. It was held that the joint trial was valid.²³ But where two persons were charged under this section for separate acts of concealment in respect of the same girl, it was held that they could not be tried together.²⁴

Venue.—The venue for the trial of a case under this section is evidently the Court within whose jurisdiction the kidnapped or abducted person has been wrongfully concealed or confined.²⁵

369. Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly¹ any moveable property² from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Object.—Enticing away of children with no intention of taking them from their parents, but for the purpose of stealing ornaments from their person is punishable under this section.

Scope.—The offence described in s. 368 is included in that described in this section, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the latter section.¹ The consent of the child kidnapped is immaterial.

1. 'Dishonestly'.—See s. 24, *supra*. 2. 'Moveable property'.—See s. 22, *supra*.

PRACTICE.

Evidence.—Prove (1) the kidnapping by the accused;² or abduction by him.³ (2) That the person kidnapped or abducted was a child under the age of ten years.

(3) That the accused thereby intended to take movable property from that child's person.

(4) That such intention was dishonest.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Commitment.—This being a serious offence a Magistrate should always commit the case.⁴

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, kidnapped (*or abducted*) XY, a child then under the age of ten years, with the intention of taking dishonestly any movable property, to wit—, from the person of the said XY, and thereby committed an offence punishable under s. 369 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court.*)

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—See the Indian Penal Code (N.-W. F.P. Amendment) Act, III of 1941, s. 2, as regards enhanced punishment in the North-West Frontier Province.

²³ *Dosa*, (1928) 29 Cr. L. J. 496, [1928] AIR (L) 751.

²⁴ *Durgamoni Dassi*, (1938) 43 C. W. N. 196.

²⁵ *Nanhua Dhimar*, (1930) 53 All. 140.

¹ *Shama Sheikh*, (1867) 8 W. R. (Cr.) 35.

² *Vide* s. 363, *sup*.

³ *Vide* (1) and (2), s. 364, *sup*.

⁴ *Sohoy Dome*, (1866) 6 W. R. (Cr.) 2.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

370. Whoever imports, exports, removes, buys, sells or disposes of any person as a slave,¹ or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section deals with slavery. Before the Penal Code was enacted, slavery was dealt with by the Indian Slavery Act (V of 1843), which is still in force.

Object.—The sections of the Code relating to slavery were enacted for the suppression of slavery, not only in its strict and proper sense, namely, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another.⁵

This section is “directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct, in any respect.”⁶

Ingredients.—The section makes penal—

1. The importation, exportation, removal, buying, selling or disposing of a person as a slave.
2. The buying, selling or disposal of a person as a slave.
3. The acceptance, reception or detention of any person against his will as a slave.

1. ‘As a slave’.—“A slave is a creature without any rights or any status whatsoever, who is or may become the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even of life or death over the slave, without being responsible to any legal authority.”⁷

There must be a selling or disposal of a person as a slave, that is, a selling or disposal whereby one who claims to have a property in the person as a slave transfers that property to another.⁸

There may be lawful contracts for the transfer of a child by its parents either for a time or permanently to another person; as in the case of a child whose parents permit it to be adopted by others, or in the case of a child who is apprenticed or put out for a time to learn a lawful trade or calling, etc. These, it is needless to say, are not offences against this or any other section of the Code. But care should be taken that the law is not eluded by some device or pretence of a contract. When the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of ‘as a slave’ within the meaning of this section, whatever form the parties to the transaction may attempt to give it.⁹ In determining the nature of the transaction the Court should look primarily to the terms of the documents in which it is embodied, and, secondarily to the surrounding circumstances as indicating whether the parties had in mind something different from what is set forth in the document.¹⁰

Importing into British India a girl purchased in a foreign territory.—“The purchase of a girl in foreign territory, knowing her to be a slave, is not in itself an offence punishable under the Indian Penal Code, and to make the importing of her into British territory offence, it is necessary that...he (the accused) imported her as a slave.”¹¹

⁵ *Ram Kuar*, (1880) 2 All. 723, 731, F.B.
See *Koroth Mammad*, (1917) 41 Mad. 334.

⁶ Per Stuart, C. J., in *Ram Kuar*, (1880) 2 All. 723, 727, F.B.

⁷ Per Stuart, C. J., in *Ram Kuar*, (1880) 2 All. 723, 726, F.B.

⁸ *Ibid.*, p. 731.

⁹ M. & M. 320.

¹⁰ *Koroth Mammad*, (1917) 41 Mad. 334.

¹¹ Per Barkley, J., in *Nanda*, (1882) P. R. No. 26 of 1882.

Buying girls for marriage.—Buying or importing girls with a view to marriage is not punishable under this section.¹² Where R, having obtained possession of D, a girl eleven years of age, disposed of her to a third person for value, with intent that such person should marry her and such person received her with that intent, it was held that R could not be convicted of disposing of D as a slave under this section.¹³

CASES.

Selling of girl.—A kidnapped a Hindu girl and sold her to B, a Mahomedan. B made her a Mahomedan, changed her name, supplied her with food and clothes, but gave her no wages. She was employed in menial services, and was not allowed to leave the house. After staying thus for four years the girl escaped. It was held that B had committed an offence under this section.¹⁴ The accused were parties to a document in the capacity of vendor and purchaser which ran as follows:—"I execute to you and give you this day this jenmam deed giving you Vellandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please." It was held that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the accused were guilty of an offence under this section.¹⁵

A bought a girl from B, her mother (a low class woman) and gave her to C, a man of higher caste, for marriage to his son in consideration of the sum of Rs. 10, A having represented to C that the girl was of C's caste. It was held that B was guilty of an offence under this section and A under s. 417.¹⁶

Buying of girl.—S transferred to A for Rs. 25 his right in the person of B, a girl of thirteen years. In a document in which the transaction was recorded, B was described as a *vellati* (slave girl) purchased by S from P. It was held that A was guilty of buying B as a slave.¹⁷

PRACTICE.

Evidence.—Prove (1) that the accused imported, exported, etc., the person in question as a slave; or

that the accused accepted, received or detained the person in question as a slave.

(2) That he did so against the will of that person.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Jurisdiction not affected by re-sale.—Jurisdiction to try such an offence is not affected by a re-sale of the person as a slave in another district.¹⁸

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, imported (*or exported or removed, or etc.*), a person, to wit—, as a slave [*or accepted, received or detained against his will a person, to wit—, as a slave*], and thereby committed an offence punishable under s. 370 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

371. Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Habitual dealing
in slaves.

¹² *Roda*, (1867) P. R. No. 19 of 1867; *Nanda*, (1882) P. R. No. 26 of 1882; *Ganpat*, (1884) P. R. No. 20 of 1884.

¹³ *Ram Kuar*, (1880) 2 All. 723, F.B.

¹⁴ *Mirza Sikundur Bukhut*, (1871) 3 N. W. P. 146. This has been pronounced to be a

most extraordinary decision by Stuart, C. J., in *Ram Kuar*, (1880) 2 All. 723, F.B.

¹⁵ *Koroth Mammad*, (1917) 41 Mad. 334.

¹⁶ Book Cir. 25 of 1865 (Oudh).

¹⁷ *Amina*, (1884) 7 Mad. 277.

¹⁸ *Nga Shwe Pe*, (1894) P. J. L. B. 81.

COMMENT.

This section is enacted for the punishment of the slave-trader, who is habitually engaged in the traffic of buying and selling human beings. The last section dealt with a casual offender. A slave-dealer on land is punished under this section; such a dealer on sea is treated as a pirate by all civilised nations and punished severely.

PRACTICE.

Evidence.—Prove (1) that the accused imported, exported, etc., slaves.

(2) That he did so habitually.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

372. Whoever sells, lets to hire, or otherwise disposes of¹ any person under the age of eighteen years² with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose,³ or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Selling minor for purposes of prostitution, etc.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a *quasi-marital* relation.

COMMENT.

This section was materially altered by the Indian Penal Code (Amendment) Act (V of 1924) which has been repealed by Schedule II of the Repealing and Amending Act (VIII of 1930).

The age-limit was raised to eighteen years from sixteen by Act V of 1924, s. 2. The words “person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be” were substituted for the words “minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be” by Act XVIII of 1924, s. 2. Explanations I and II were added by s. 3 of the same Act. “The amendment is designed to make it clear that an offence is committed under section 372 or 373 of the Indian Penal Code, when the minor is either disposed of or procured for the purpose of being sexually known either before or after attainment of the age of eighteen years, and whether she is made over to a life of immorality or merely subjected to an isolated act of carnal intercourse. In either case the child is equally deserving of protection”.¹⁹

¹⁹ Statement of Objects and Reasons appended to Bill No. 9 of 1924, *Gazette of India*, 1924, L. C.—57

Part V, p. 36.

The gist of the offence under this section or s. 373 consists in the intention that the person under the age of eighteen years shall be employed or used for the purpose of prostitution or for illicit intercourse, or for any unlawful and immoral purpose, or in the knowledge that it is likely that such person will be employed or used for any such purpose. In the absence of any intention or knowledge of the kind referred to the mere buying, selling, letting, or obtaining possession of such person is not *per se* a criminal act.²⁰ But where such intention or knowledge does exist, and a change in the position or circumstances of the person has been effected with such knowledge or intention, it is quite immaterial whether third persons have or have not observed any ceremonies recognized by custom as necessary to give prostitutes a particular status.²¹ The offence consists in the intentional or conscious exposure of a person under eighteen years, whether a male or a female, to the danger of degradation.

This section deals with the person who sells such person, the next section punishes the person who buys such person.

Scope.—This section applies to married as well as unmarried females under the age of eighteen years,²² and is applicable even where the girl concerned is a member of the dancing girl caste.²³ The offence under this and the following section is committed even though the girl, prior to sale or purchase, was leading an immoral life.²⁴

Ingredients.—The section requires the following essentials :—

1. Selling, or letting to hire, or other disposal of a person.
2. Such person should be under the age of eighteen years.
3. The selling, letting to hire, or other disposal must be with intent, or knowledge of likelihood that the person shall at any age be employed or used for
 - (i) the purpose of prostitution, or
 - (ii) illicit intercourse with any person, or
 - (iii) any unlawful and immoral purpose.

1. 'Sells, lets to hire, or otherwise disposes of'.—The terms 'sell' and 'hire' do not necessarily connote a present or immediate transfer of possession and where a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of a transfer of possession.²⁵ The words 'lets to hire' are the counterpart of the word 'hire' in s. 373. The section now contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse, or with the intention of subjecting her to an isolated act of sexual intercourse.¹ Where a young prostitute was brought to a house of assignation by the accused at the request of the complainant and for his supposed use on that one occasion, it not being contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by him for that course of life, it was held that such a letting out by the accused was not within the meaning of this section.² Under the present amended section such letting out will amount to an offence.

Where a girl was deserted by her husband and after living with prostitutes and others for a time, finally took up her residence in the kothel kept by the accused, well knowing their occupation and there prostituted herself to all comers, the accused housing, feeding and clothing her in consideration of receiving the wages of her prostitution, it was held that the accused by thus receiving money did not let the girl to hire within the meaning of this section, and that the persons, whom the girl, in consideration of a money payment to the accused, allowed to have intercourse with her, did not hire her within the meaning of s. 373.³

²⁰ See *Khushala*, (1880) P. R. No. 27 of 1880.

²¹ *Bhimde Pandu Deoli*, (1905) 7 Bom. L. R. 562, 2 Cr. L. J. 500.

²² *Kamnu*, (1878) P. R. No. 12 of 1879.

²³ See *Ramanna*, (1899) 12 Mad. 273.

²⁴ See *Ismail Rustomkhan*, (1906) 8 Bom. L. R. 236, 3 Cr. L. J. 334.

²⁵ (1881) 1 Weir 359, 362, F.B.

¹ *Ahmedkhan*, (1898) Cr. R. No. 16 of 1898, Unrep. Cr. C. 962. *Dowlath Bee v. Shaikh Ali*, (1870) 5 M. H. C. 473, 1 Weir 377; *Mussumat*

Rahman, (1872) P. R. No. 29 of 1872; *Mohubbut*, (1873) P. R. No. 16 of 1873; *Nga Shree Thwe*, (1907) 1 U. B. R. (1907-09) (P. C.) 1, 6 Cr. L. J. 30, are of no authority.

² *Sukee Raur*, (1893) 21 Cal. 97; *Noor Jan*, (1870) 14 W. R. (Cr.) 39, 6 Beng. L. R. Appx. 34. See *The Public Prosecutor v. Maddala Mutyalu*, (1918) 35 M. L. J. 157, [1918] M. W. N. 484, 8 L. W. 253, 19 Cr. L. J. 965.

³ *Ahmedkhan*, (1898) Cr. R. No. 16 of 1898 Unrep. Cr. C. 962.

A full bench of the Madras High Court held that the "term 'dispose of' has many meanings. It denotes (*inter alia*) "to bestow for an object or purpose", "to make a change in the circumstances"; it does not necessarily imply that there has been a transfer of possession, nor indeed do the terms 'sell' or 'hire' necessarily connote a present or immediate transfer of possession, and where, as is no doubt generally the case, a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of a transfer of possession".⁴ It is not necessary that there should have been a disposal tantamount to a transfer of possession or control over the minor's person.⁵ In a later case, the same High Court said: "The term 'dispose of' has many meanings. In Webster's Dictionary it is defined as (a) to determine the fate of, to exercise the power of control over, to fix the condition, employment, &c., of, to direct or assign for a use; (b) to exercise finally one's power of control over, to pass over into the control of some one else as by selling, to get rid of. Seeing that the term in s. 372, Indian Penal Code, is used in conjunction with selling and letting to hire, it would seem that the Legislature rather contemplated some physical disposal for a mercenary purpose or the exercise of some power of control which would be final and irrevocable in its *moral effects*, more especially as the words used are 'sells, lets to hire, or otherwise disposes of', thus suggesting other acts *ejusdem generis*".⁶ Where the accused, who was a customer of a brothel, came across a minor girl, who had run away from her father's house, unable to bear the ill-treatment of her step-mother, and directed her to the brothel, it was held that such a mere direction to her or recommending to her to go there would not constitute a 'disposal', within the meaning of this section.⁷ The word 'disposal' necessarily connotes some control by the person disposing over the minor disposed of.⁸

The Bombay High Court has held that the performance of *gejje* ceremony on a minor girl does not amount to her disposal within the meaning of this section.⁹ Similarly, it has held that the ceremony of tying a *talimani* to a minor girl, worshipping a basin of water by her and distributing food, is merely a preliminary step before the selling, letting out, or disposing of the girl for the purpose of prostitution, and is no offence under this section.¹⁰

2. 'Person under the age of eighteen years'.—The age-limit was raised to eighteen years by the Indian Penal Code (Amendment) Act (V of 1924), s. 2 (now repealed by Schedule II of the Repealing and Amending Act (VIII of 1930)). The section applies to all persons under eighteen years, whether males or females.

3. 'With intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose'.—It is necessary to prove that the accused intended that the person *shall* be employed for an immoral purpose. Mere possibility of the person being so used is not sufficient. It would be sufficient to show that the girl was given and accepted with the intention mentioned in the section. When an act is not *per se* criminal the specific intent which renders it criminal must be established by cogent evidence.

'At any age.'—The introduction of these words takes away the defence that though a girl was made over to a prostitute it was not intended that she should actually be used for the purpose of prostitution until she had passed the age of eighteen years.¹¹

'For the purpose of prostitution.'—Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that is required. The ordinary and commonly understood meaning of the word prostitution is the offering of the person for promiscuous sexual intercourse with men, and that must be taken to be its meaning in the section.¹² The word 'prostitution' is not confined to

⁴ (1881) 1 Weir 359, 362, F.B.; *Marakatham*,^{*} (1881) 1 Weir 364, See *Noor Jan*, (1870) 14 W. R. (Cr.) 39, 6 Beng. L. R. (Appx.) 34.

⁵ *Arunachellam*, (1876) 1 Mad. 164.

⁶ Per Parker, J., in *Srinivasa v. Annasami*, (1892) 15 Mad. 323, 329.

⁷ *Senjimalai*, (1924) 48 M. L. J. 594, 21 L. W. 472, 26 Cr. L. J. 868.

⁸ *Ibid.*

⁹ *Parmeshwari Subbi*, (1920) 22 Bom. L. R.

894, 21 Cr. L. J. 721, [1920] AIR (B) 63.

¹⁰ *Sahebava Birrappa*, (1925) 27 Bom. L. R. 1022, 26 Cr. L. J. 1482.

¹¹ *Ramanna*, (1889) 12 Mad. 273, *The Deputy Legal Remembrancer v. Karuna Baistobi*, (1894) 22 Cal. 164, overruled.

¹² Per Scotland, C. J., in *Dowlath Bee v. Shaik Ali*, (1870) 5 M. H. C. 473, 476, 1 Weir 377, 379.

acts of natural sexual intercourse, but includes any act of lewdness. Prostitution is proved if it is shown that a woman offers her body for purposes amounting to common lewdness in return for the payment of money.¹³

‘Illicit intercourse with any person.’—These words were added by Act XVIII of 1924, s. 2. If the person disposing of a girl knew that she would be used for illicit intercourse he would be liable. Explanation II explains what is meant by ‘illicit intercourse’. These words take away the defence that though the girl was handed over to a particular man for his carnal knowledge of her, yet it was not intended that she should be a prostitute at all, and that though the act or acts for which she was given may have been immoral, yet they were not unlawful.¹⁴ The accused will not be able to rely on the plea that the girl was not destined for a life of prostitution but merely for a single act of sexual intercourse.

‘Unlawful and immoral purpose.’—The word ‘unlawful’ is to be construed *ejusdem generis* with the word ‘immoral’.¹⁵ The purpose must be both unlawful and immoral. The accused transferred his daughter to a person for the purpose of concubinage. It was held that the accused was guilty under this section.¹⁶ To sell a woman as a mistress of another person comes within the section, this being an immoral purpose. The section does not involve a distinction between taking a woman as a mistress and taking her to be used as a prostitute.¹⁷

Adoption of daughter by dancing girl.—Where a dancing girl adopted a daughter, it was held that she had committed no offence if the girl was to be brought up as a daughter, although the girl might have her choice of following the profession of prostitute or marrying; and that she would be guilty under the section, if the girl was adopted in order to follow the profession as a minor.¹⁸ Subsequently, the same High Court has held that such an adoption would be an offence under the Penal Code.¹⁹ The Bombay High Court has held such an adoption to be invalid.²⁰ Under the present section such an act would be an offence if it was done with the intention or knowledge specified in the section. The burden of proof that the possession of the girl is not given to or obtained by a prostitute for leading an immoral life is on the person who gives the possession of such girl and the person who receives the girl under Explanation I to this section and s. 373.

Explanation 1.—This Explanation provides that if a minor girl is disposed of to a prostitute or to a brothel-keeper or manager, the person so disposing of her shall be presumed to have done so with the improper intent mentioned in s. 372.²¹ The same presumption is raised in the case of a prostitute or a brothel-keeper who obtains possession of a girl under Explanation 1 to s. 373.

‘Prostitution’ is defined as “promiscuous sexual intercourse for hire, whether in money or kind.”²²

As to the meaning of a “prostitute” Beaumont C. J. has observed: “A kept woman, who confines her favours exclusively to one man, even though he is not her husband, is not, in my opinion, a prostitute. Of course, a kept woman may also be a prostitute, as may a married woman. But I think that prostitution involves a more or less indiscriminate employment of the woman’s body for hire. The definition in the Oxford Dictionary of a ‘prostitute’ is ‘a woman who offers her body to indiscriminate sexual intercourse, especially for hire’. I do not say that that is an universal definition, and I do not suggest that a prostitute is bound to be entirely indiscriminate and to accept the first customer who offers her price like a cabman or the rank. But I certainly think that prostitution involves more than intercourse with one man.”²³

¹³ *De Munk*, [1918] 1 K. B. 635; *Lalya Bapu Jadhav*, (1929) 31 Bom. L. R. 521, 30 Cr. L. J. 787.

¹⁴ *Mula*, (1888) P. R. No. 13 of 1888, overruled.

¹⁵ *Narayan*, (1889) Unrep. Cr. C. 440.

¹⁶ *Ponrangam*, (1885) 1 Weir 373.

¹⁷ *Girdhari*, (1933) 35 Cr. L. J. 571.

¹⁸ *Ramanna*, (1889) 12 Mad. 273; *Ponrangam*, supra.

¹⁹ *Guddati Reddi Obala v. Ganapati Kondanna*, [1912] M. W. N. 1138, 23 M. L. J. 493.

²⁰ *Mathura Naikin v. Esu Naikin*, (1880) 4

Bom. 545; *Hira Naikin v. Radha Naikin*, (1912) 14 Bom. L. R. 1129. But see *Manjamma v. Sheshgiri Rao*, (1902) 4 Bom. L. R. 116.

²¹ Statement of Objects and Reasons appended to Bill No. 9 of 1924, *Gazette of India*, 1924, Part V, p. 36.

²² The North-West Frontier Province Anti-Prostitution and Suppression of Brothels Act (N. W. F. P. III of 1937), s. 2.

²³ *Babibai*, (1942) Criminal Revision No. 157 of 1942, decided by Beaumont, C. J., and Wassoodew, J., on June 25, 1942 (Bom. Unrep.).

Brothel.—To establish that premises are used as a brothel, what needs to be proved is that people of opposite sexes come there and have illicit sexual intercourse on the premises.²⁴ ‘Brthel’ has been defined as “any house or place which the occupier or person in charge thereof habitually allows to be used by any other person for the purpose of prostitution”.²⁵

The Calcutta High Court has held that assuming that this section applies to an arrangement made between a manager of a brothel and individual visitors with regard to isolated acts of sexual intercourse, still in order to support a conviction under the section there must be proof of the act of hiring between the manager and the visitors. The mere fact of payment of money to the manager by the visitors is no such proof.¹

Explanation 2.—This Explanation defines the expression ‘illicit intercourse’.

Dev Dasi.—The dedication of girls under eighteen years to the service of a temple as *dasis* will amount to a disposal of such minors, knowing it to be likely that they will be used for the purpose of prostitution, within the meaning of this section.² The Member introducing the Bill amending this section said: “We have not... definitely assumed that employment as *dev dasi* is equivalent to employment for purposes of prostitution, but should such employment actually prove to come within that definition our Bill will enable it to be dealt with more effectively than hitherto”.³

In a Madras full bench case⁴ under the old s. 372 it was suggested:—“The acts imputed to the accused could not constitute an offence because they are sanctioned by the religious usages of Hindus”. But the Court said: “The 372nd and 373rd sections of the Indian Penal Code were intended for the protection of minors. They involve the declaration as a matter of general law that no person under the age of majority shall be devoted to a life of prostitution nor employed in, nor used for, any unlawful or immoral purpose nor placed in a position in which it is likely such person will be employed in, or used for, any such purpose.

“This rule, which is obviously suggested by the highest considerations of justice and morality, must control the exercise of all private law, even in those cases in which the private law assumes to vindicate itself on the specious plea of religion. If the terms in which the law is expressed are sufficient to include within their provisions acts done under colour of religion, those who participate in such acts are liable to the penal consequences, however, laudable their motives according to the peculiar standard of morality adopted by the professors of their religion.

“The point was fully considered and decided by this Court in *Ex-parte Padmavati*⁵...”. The learned Judges observe: ‘The argument that the treatment of such a transaction as criminal is impossible, because the Hindu religion sanctions the practice and the Private Law recognizes private rights as flowing from it, is manifestly of no weight. An offence is every transgression of a Penal Law, and a rule of Penal Law is a rule of Public Law, and necessarily overrides every precept of Private Law, and cannot be affected by any argument derived from that Law... With respect to the argument from religion, it is only necessary to observe that if the precepts of a particular religion enjoin acts which transgress the rules of Penal Law, these acts will clearly be offences. Where the Legislature intended that acts which would otherwise be offences should not be so because connected with religious observances they have expressed that intention.—(Penal Code, Sec. 292).’

“The cases in which persons have been held amenable to the penal law for

²⁴ *Winter v. Woolfe*, (1930) 29 Cox 214; *Justices of Parts of Holland, Lincolnshire*, (1882) 42 J. P. 312.

²⁵ The North-West Frontier Province Anti-Prostitution and Suppression of Brothels Act (N. W. F. P. III of 1937), s. 2.

¹ *Jogueswar Ghosh*, (1936) 40 C. W. N. 1188, 65 C. L. J. 344.

² See (1881) 1 Weir 359, F.B.; *Dasi Marimuthu*, (1884) 1 Weir 364; *Padmavati*, (1870) 5 M. H. C. 415, 1 Weir 356; *Arunachellam*, (1876) 1 Mad. 164; *Basava*, (1891) 15 Mad. 75; *Srinivasa v. Annasami*, (1891) 15 Mad. 41; same

case at a further stage, (1892) 15 Mad. 323; *The Public Prosecutor v. Kannammal*, [1913] M. W. N. 207, 24 M. L. J. 211, 14 Cr. L. J. 33; *Public Prosecutor v. Rajammal*, [1911] 2 M. W. N. 479, 12 Cr. L. J. 566; *Jaili Bhavin*, (1869) 6 B. H. C. (Cr. C.) 60; *Tippa*, (1892) 16 Bom. 737. See *Baku*, (1899) 24 Bom. 287, 1 Bom. L. R. 678, where the question of jurisdiction is discussed.

³ Proceedings of the Legislative Assembly, dated February 11, 1924, pp. 447, 448.

⁴ (1881) 1 Weir 359, 360, F.B.

⁵ (1870) 5 M. H. C. 415, 416, 1 Weir 356.

participation in Sati, in Mariah sacrifices, and in the procuring of slaves, though these acts were sanctioned by the religious law of the parties implicated, show that the plea, that the practice is enjoined or allowed by the religious law of the accused, is not allowed to prevail over the injunctions of the penal law.

"The word 'allowed' is used advisedly, because the Court does not understand that the dedication of minors is anywhere enjoined. A dedication may be made after the girl has attained her age of majority. It is represented to the Court that it is only because it is regarded as a point of honour that a girl should be married before she attains puberty, that the dedication which is deemed equivalent to marriage takes place ordinarily during minority. Where the objection is founded not on a religious injunction but on a usage allowed by religion and suggested merely by sentiment, there can be no reluctance on the part of the Court so to interpret the law as to protect minors from a life considered by civilized nations as shameful".

To put a stop to the practice of dedicating girls as devdasis in the Bombay Presidency the Bombay Devdasis Protection Act (X of 1934) has been passed.

Amendment.—The age-limit was raised to eighteen years from sixteen years and the words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words "minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by the Indian Criminal Law Amendment Act (XVIII of 1924), s. 2. But this Act has now been wholly repealed by the Repealing and Amending Act (VIII of 1980).

PRACTICE.

Evidence.—Prove (1) that the person in question was under eighteen years of age at the time of the offence.

(2) That the accused sold, let to hire, or otherwise disposed of such person.

(3) That he did so with intent that such person should be employed or used at any age for the purpose of prostitution, or for illicit intercourse with any person, or for any unlawful and immoral purpose; or with knowledge that it was likely that such person would be employed or used for any such purpose.⁶

The question whether or not the disposal of the person was effected with the intention or knowledge postulated by this section, is a question of fact which must be determined according to the circumstances of each case.⁷

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, sold (*or let to hire, or disposed of*) a person under the age of eighteen years, to wit—, with intent that such person should at any age be employed or used for the purpose of prostitution *or for illicit intercourse with a person, to wit—, or for any unlawful and immoral purpose, viz. (state the purpose) or [knowing it to be likely that such minor would be employed or used for any such purpose]*, and thereby committed an offence punishable under s. 372 of the Indian Penal Code, and within my cognizance (*or within the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [*by the said Court (omit these words if the case is tried by a Magistrate)*] on the said charge.

373. Whoever buys, hires or otherwise obtains possession¹ of any person under the age of eighteen years² with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit inter-

Buying minor
for purposes of pro-
stitution, etc.

⁶ *Sri Lal*, (1880) 2 All. 694, F.B.; *Khushala*, (1880) P. R. No. 27 of 1880; *Durga Das*, (1904)

P. R. No. 13 of 1904, 1 Cr. L. J. 949.

⁷ (1881) 1 Weir 359, F.B.

course with any person or for any unlawful and immoral purpose,³ or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—‘Illicit intercourse’ has the same meaning as in section 372.

COMMENT.

The age-limit was raised to eighteen years from sixteen by the Indian Penal Code (Amendment) Act (V of 1924), s. 2, and the words “person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be” were substituted for the words “minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be” by the Indian Criminal Law Amendment Act (XVIII of 1924), s. 2, which has now been wholly repealed by the Repealing and Amending Act (VIII of 1930). Explanations I and II were also added by s. 4 of the same Act.

This section applies to a case of buying or hiring or other similar transaction by which possession of a person under eighteen years of age is obtained with the intention of employing or using that person for prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose. It includes both males and females under the age of eighteen years.

Sections 372 and 373.—Both the sections relate to the same subject-matter. The former contemplates an offence committed by the person who ‘sells, lets to hire, or otherwise disposes of’ any person under the age of eighteen years, with the requisite intent or knowledge. The latter relates to the case of the person who ‘buys, hires, or otherwise obtains possession of’ any person under the age of eighteen. Section 372 strikes at any bargain of the nature contemplated by it, whoever may be the party who sells or lets the person, even though it should be the father, mother, or lawful guardian. Section 373 strikes at the bawds, keepers of brothels, and all others, who fatten on the profits arising from the general prostitution of the girls.

Ingredients.—The section requires the following essentials:—

1. Buying, hiring or otherwise obtaining possession of a person.
2. The person should be under the age of eighteen years.
3. The buying, hiring, or otherwise obtaining possession must be with intent or knowledge of likelihood that the person shall at any age be employed or used for
 - (i) the purpose of prostitution, or
 - (ii) illicit intercourse, or
 - (iii) any unlawful and immoral purpose.

1. ‘Buys, hires, or otherwise obtains possession’.—The Bombay⁸ and the Patna⁹ High Courts have held that it is not necessary that the buying, hiring, or otherwise obtaining of the possession of the person should be from a third person. A person taking possession of a girl under eighteen years for the purpose indicated in the

⁸ *Shamsundarbai*, (1920) 22 Bom. L. R. 1234, 45 Bom. 529; *Bhagchand Jasraj Marwadi*, (1934) 36 Bom. L. R. 379, 58 Bom. 498; *Gordhan Kalidas*, (1941) 43 Bom. L. R. 847,

[1942] Bom. 7.

⁹ *Shamsunder Prusti*, (1929) 31 Cr. L. J. 800, 11 P. L. T. 341, [1930] AIR (P) 219.

section will be liable even though there is no one who has given him the possession of the girl but he himself has taken possession of her. An offence under the previous section is not necessary for a conviction under this section. A person who steals a minor girl under eighteen years of age with the requisite intention obtains possession of her.¹⁰ The Madras¹¹ and the Calcutta¹² High Courts have held to the contrary. The language of the section is quite applicable to an agreement or understanding come to with the person without the intervention of a third person, and the vice against which the section is directed is certainly not of any less enormity in the latter case.

'Possession' means possession with a power of disposal. The term "possession" means something more than the obtaining of possession of a girl by a man for a single act of sexual intercourse. It denotes definite control over the person of whom possession is obtained.¹³ When a girl elopes with another of her own accord and there is nothing to show that she cannot leave him at any moment the man cannot be said to have possession of the girl.¹⁴ Where a girl aged seventeen years and a half went with the accused voluntarily and there was nothing to show that the accused had exercised any control over her or prevented her from doing anything she liked, it was held that the accused did not obtain possession of the girl within the meaning of this section, and he could not, therefore, be convicted of an offence under the section.¹⁵

The offence is complete so soon as the obtaining possession, with the requisite intention or knowledge of the girl is accomplished. The phrase "otherwise obtains possession" corresponds to "otherwise disposes of" in s. 372 and is *ejusdem generis* with "buying" and "hiring".¹⁶

This section does not specify the nature of the possession, nor its duration, nor intensity. It merely specifies the object, namely prostitution or illicit intercourse, whether, in each case, the possession is such as to be consistent with the purpose or intention or knowledge of prostitution or illicit intercourse—is the only test which in law is necessary and sufficient.¹⁷

Where the accused is proved to have obtained possession of a female under the age of eighteen years and is proved to be a person who occupies or manages a brothel, then he is to be presumed to have obtained possession of that girl with the intent that he shall use her for the purpose of prostitution. The onus is cast upon the accused under Explanation 1 to rebut the presumption that he had obtained possession of the girl with intent that she should be used for prostitution.¹⁸

2. 'Person under the age of eighteen years'.—The age-limit was raised to eighteen years by Act V of 1924, s. 2.

3. 'With intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose'.—Proof of intention or knowledge is almost entirely a matter of inference from circumstances. Under the old section, the Calcutta and the Allahabad High Courts had held that the offence was not committed if, notwithstanding the existence of the requisite guilty intention or knowledge, the employment that was intended or known to be likely was to take place after the completion of the sixteenth year.¹⁹ The Madras High Court,²⁰ though once of this opinion, subsequently differed from it and decided that the section did not require that the intention with respect to the employment or use of the girl for the purpose of prostitution should relate to her employment or use while she was under sixteen years.²¹ The present

¹⁰ *Bhagchand Jasraj Marwadi*, (1934) 86 Bom. L. R. 379, 58 Bom. 498.

¹¹ *Dowlath Bee v. Shaik Ali*, (1870) 5 M. H. C. 473, 475, 1 Weir 377; *The Public Prosecutor v. Maddila Mutyalu*, (1918) 35 M. L. J. 157, [1918] M. W. N. 484, 8 L. W. 253, 19 Cr. L. J. 965; *Mt. Ganga*, (1897) 11 C. P. L. R. (Cr.) 6.

¹² *Jateendra Mohan Das*, [1937] 2 Cal. 187.

¹³ *Bhagchand Jasraj Marwadi*, *supra*; *Jateendra Mohan Das*, *supra*; *Nga Shwe Thwe*, (1907) U. B. R. (1907-09) (P. C.). 1, 6 Cr. L. J. 30.

¹⁴ *Jateendra Mohan Das*, *supra*.

¹⁵ *Gordhan Kalidas*, (1941) 43 Bom. L. R. 847, [1942] Bom. 7.

¹⁶ *Jateendra Mohan Das*, *supra*.

¹⁷ *Vithabai Sukha*, (1928) 30 Bom. L. R. 618, 52 Bom. 403.

¹⁸ *Chiragh*, (1929) 30 P. L. R. 414, 30 Cr. L. J. 376.

¹⁹ *The Deputy Legal Remembrancer v. Karuna Baistobi*, (1894) 22 Cal. 164, 172; *Khetramani Dasi*, (1922) 35 C. L. J. 451, 24 Cr. L. J. 104; *Ramanna*, (1889) 12 Mad. 273; *Chanda*, (1895) 18 All. 24.

²⁰ *Kamalakshi v. Ramasami Chetti*, (1895) 19 Mad. 127, 135.

²¹ *Kannammal*, [1913] M. W. N. 207, 24 M. L. J. 211, 14 Cr. L. J. 33.

section speaks of employment or use 'at any age'. The Calcutta and the Allahabad cases and the earlier ruling of the Madras High Court are, therefore, no longer of any authority.

'For the purpose of prostitution.'—Prostitution means the surrender of a girl's chastity for money.²² "Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that... is required. The ordinary and commonly understood meaning of the word prostitution is the offering of the person for promiscuous sexual intercourse with men, and that... must be taken to be its meaning in the section, there being nothing in the context opposed to it, but rather the contrary".²³

'Illicit intercourse with any person.'—The meaning of 'illicit intercourse' is explained in Explanation II to s. 372. See Comment on s. 372. Cases which laid down that no offence is committed if employment for prostitution is not habitual are no longer of any authority.²⁴

'Unlawful and immoral purpose.'—Section 372 and this section do not prohibit by punishing a transaction in which the employment or use contemplated is for a purpose that is merely unlawful or for a purpose that is merely immoral, except the purpose of prostitution. No transaction of the kinds described in these sections, with the exception just noted, is an offence under these sections, unless the purpose of the contemplated use of the minor is both unlawful and immoral".²⁵

Explanation.—In order that the presumption under this Explanation should take effect, it is necessary that the accused person should be a prostitute or should be keeping or managing a brothel at the time he or she obtains possession of a girl.¹

As to the meaning of 'prostitute' see Comment on p. 900.

Amendment.—The word 'eighteen' was substituted for 'sixteen' by Act V of 1914, s. 2, before the section was altered by Act XVIII of 1924.

C A S E S .

Selling and buying girl for prostitution.—A, the father of two girl-twins about a year old, sold them to a prostitute for Rs. 23. He and the prostitute confessed to the guilty knowledge and intent with which the transaction was made. It was held that A was guilty of an offence under s. 372 and the prostitute under this section.² In a charge against a dancing girl for having purchased a girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under this section, it was held that there was evidence to support it.³

Obtaining possession of girl for prostitution.—A minor married girl was brought, with the consent of her husband, by accused No. 2 from Kashmir to Bombay at the expense of accused No. 1, a brothel-keeper. On her arrival in Bombay, the girl was kept in the brothel, and her earnings were divided half and half by the two accused. It was held that what took place in Kashmir was only a preparation for committing the offence, which was completed in Bombay, and the accused were guilty under ss. 373 and 114.⁴ Where a brothel-keeper allowed a girl under eighteen years

²² *Frederick Moon*, [1910] 1 K. B. 818, 820.

²³ Per Scotland, C. J., in *Dowlath Bee v. Shaikh Ali*, (1870) 5 M. H. C. 473, 476, 1 Weir 377, 379.

²⁴ *Dowlath Bee v. Shaikh Ali*, *ibid.*; *Noor Jan*, (1870) 14 W. R. (Cr.) 39, 6 Beng. L. R. (Appx.) 34; *Sukee Raur*, (1893) 21 Cal. 96; *Ahmedkhan*, (1898) Unrep. Cr. C. 962, Cr. R. No. 16 of 1898; *Mussammat Bhutia*, (1875) 7 N. W. P. 295; *Hardeo*, (1879) P. R. No. 7 of 1880; *The Public Prosecutor v. Maddila Mutyalu*, (1918) 35 M. L. J. 157, [1918] M. W.

N. 484, 8 L. W. 253, 19 Cr. L. J. 965.

²⁵ Per Plowden, J., in *Mula*, (1888) P. R. No. 13 of 1888, p. 20.

¹ *Banubai Irani*, (1942) 45 Bom. L. R. 281, 44 Cr. L. J. 534, [1943] AIR (B) 150, F.B.

² *The Deputy Legal Remembrancer v. Karuna Baistobi*, (1894) 22 Cal. 164.

³ *Papa Sani*, (1899) 23 Mad. 159; *Bhagirath*, (1900) 20 A. W. N. 133; *Musammat Sunder*, (1904) 1 A. L. J. R. 559, 1 Cr. L. J. 972.

⁴ *Batubai Ganeshu*, (1927) 29 Bom. L. R. 490, 28 Cr. L. J. 465, [1927] AIR (B) 666.

of age to visit the brothel for two or three hours in the night and allowed her to prostitute herself to customers for money, it was held that the brothel-keeper committed an offence punishable under this section.⁵

PRACTICE.

Evidence.—Prove (1) that the person in question was under eighteen years of age at the time of the offence.

(2) That the accused bought, hired, or obtained possession of, such person.

(3) That he did so with intent that such person shall at any age be employed or used for the purpose of prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose; or with knowledge that it was likely that such person would be employed or used for any such purpose.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 372.

374. Whoever unlawfully compels any person¹ to labour against the will² of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Unlawful compulsory labour.

COMMENT.

Object.—This section is intended to prevent abuses arising from forced labour which ryots were sometimes compelled to render to landlords.

Ingredients.—The section requires two essentials:—

1. Unlawful compulsion of any person.

2. Such compulsion must be to labour against the will of that person.

1. ‘Unlawfully compels any person’.—“I do not think that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to labour, because it is the thing which he or she has agreed to do, and although if the employer assault the servant for not working to his satisfaction, he undoubtedly renders himself liable to rigorous imprisonment under s. 352...., I do not think he thereby commits an offence under s. 374.”⁶ Where the accused induced the complainants, who, he alleged, were indebted to him in various sums of money, to consent to live on his premises and to work off their debts, and the complainants were to, and did in fact, receive no pay, but were fed by the accused as his servants, and he insisted on their working for him, and punished them by beating them if they did not do so, it was held that a conviction under this section could not be upheld.⁷

2. ‘To labour against the will’.—The word ‘labour’ will apply either to mental or to bodily labour, though probably the latter was principally contemplated by the framers of the Code.

PRACTICE.

Evidence.—Prove (1) that the accused compelled the person in question to labour.

(2) That such compulsion was unlawful.

(3) That the accused did so against the will of that person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That you, on or about the—day of—, at—, unlawfully compelled AB to

⁵ *Vithabai Sukha*, (1928) 30 Bom. L. R. 663, 52 Bom. 403.

⁶ Per Petheram, C. J., in *Madan Mohan*

Biswas, (1892) 19 Cal. 572, 581.

⁷ So held by Petheram, C. J., and Beverley, J., (Norris, J., dissenting) in *ibid.*

labour against his will, and thereby committed an offence punishable under s. 374 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Rape.

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse¹ with a woman under circumstances² falling under any of the five following descriptions :—

Rape.

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under fourteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

376. Whoever commits rape shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for rape.

COMMENT.

In the definition of rape, the first clause operates, where the woman is in possession of her senses, and therefore capable of consenting; the second, where she is insensible whether from drink or any other cause, or so imbecile that she is incapable of any rational consent; the third and the fourth, where there is consent, but it is not such a consent as excuses the offender, because in the one case it is extorted by putting the woman in fear, and in the other, it is obtained by deception of a particular kind; and the fifth, where the intercourse is with a girl so young that consent is immaterial.

The offence of rape is in law a single act of sexual intercourse. It is not a continuing offence.⁸

English law.—A boy under fourteen years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty.⁹ "The rule at common law is... that in regard to the offence of rape *malitia non supplet ætatem*; a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure*, and judges have time after time refused to receive evidence

⁸ *Ali Hyder (Haider)*, (1938) 68 C. L. J. 238, 40 Cr. L. J. 280.

⁹ *Jordan*, (1839) 9 C. & P. 118.

to shew that a particular prisoner was in fact capable of committing the offence."¹⁰ But a boy under fourteen can be convicted of an indecent assault under the Criminal Law Amendment Act.¹¹ The presumption of English law against the possibility of the commission of the offence of rape by a boy under the age of fourteen years has no application to India.¹²

Ingredients.—This section requires two essentials :—

1. Sexual intercourse by a man with a woman.
2. The sexual intercourse must be under circumstances falling under any of the five clauses in the section.

1. **'Sexual intercourse.'**—The sexual intercourse must be with a woman. The term 'man' is defined as a male human being of any age (s. 10). The term 'woman' is defined as a female human being of any age (s. 10).

2. **'Under circumstances.'**—The five clauses of the section denote the circumstances which render the sexual intercourse an offence under this section.

Second clause.—**'Without her consent.'**—Consent of the woman should have been obtained prior to the act. It is no defence that the woman consented after the fact.¹³ As to the elements which make a consent void, see s. 90, *supra*. The object and effect of s. 90 is not to lay down that a child under twelve years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge such consent must be a real consent, not vitiated by immaturity, misconception, misunderstanding, fear or fraud.¹⁴

The fact that the girl was *virgo intacta* up to the date of the occurrence is very strong proof against the intercourse having taken place with the consent of the girl.¹⁵

Stephen, J., in *The Queen v. Clarence* said : "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. . . . the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act."¹⁶

A sleeping person can never consent. Where, therefore, a man had connection with a woman while she was asleep, he was held to have committed rape.¹⁷

Consent of a girl under ten was held to be quite immaterial where the charge was for attempt to commit rape. Consent means a willing mind on the part of the girl to allow the act to be done. If from her tender years, not knowing what was being done, she merely submits without the exercise of any will by her, it will not amount to a consent.¹⁸

Consent given by a woman of unsound mind is of no avail (s. 90). Where, therefore, a man had carnal knowledge of a girl of imbecile mind, and the jury found that it was without her consent, she being incapable of giving consent from defect of understanding, it was held that his act amounted to rape.¹⁹ But there must be evidence that the connection was against the will or without the consent of the woman.²⁰

¹⁰ Per Lord Coleridge, C. J., in *Waite*, [1892] 2 Q. B. 600, 601.

¹¹ 48 & 49 Vic., c. 69, ss. 4, 9; *Williams*, [1898] 1 Q. B. 320.

¹² *Paras Ram Dube*, (1915) 37 All. 187.

¹³ 1 Hawk. P. C., c. 16, s. 7, p. 122.

¹⁴ *Khalil-ur-Rahman*, (1938) 11 Ran. 213, F.B.

¹⁵ *Sultan*, (1923) 26 Cr. L. J. 1488.

¹⁶ (1888) 22 Q. B. D. 23, 43, 44.

¹⁷ *Mayers*, (1872) 12 Cox 311; *Young*, (1878) 14 Cox 114.

¹⁸ *Beale*, (1865) 35 L. J. (M. C.) 60; *Asad Ali*, (1927) 9 P. L. T. 186, 29 Cr. L. J. 12.

¹⁹ *Fletcher*, (1859) 8 Cox 131; *Pressy*, (1867) 10 Cox 635.

²⁰ *Fletcher*, (1866) L. R. 1 C. C. R. 39.

However, if the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and the accused had connection with her consent, he ought to be convicted.²¹

Similarly, consent given by an intoxicated woman is of no avail. Where the accused made a girl of thirteen years quite drunk, and whilst she was insensible violated her person, he was held to have committed rape.²²

Passive non-resistance or consent obtained by fraud.—If a girl does not resist intercourse in consequence of misapprehension, this will not amount to a consent on her part. Where a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a bona fide belief that he was treating her medically, it was held that he could be convicted of rape.²³ Similarly, where the accused professed to give medical advice for money, and a girl of nineteen consulted him with respect to illness from which she was suffering, and he advised that a surgical operation should be performed and, under pretence of performing it, had carnal intercourse with her, it was held that he was guilty of rape.²⁴ The accused, who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, wilfully and fraudulently induced by the accused, that she was being medically and surgically treated by the accused and not with any intention that he should have sexual intercourse with her. It was held that the accused was guilty of rape.²⁵

“That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.”²¹

Third clause.—The mere fact that a woman submits through fear does not take the offence out of the category of rape.²

The fear must be of death or hurt. ‘Hurt’ is defined in s. 319, *supra*.

Fifth clause.—There may be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. Instances of abuse by the husband in such cases will fall under this clause.

The age-limit was raised from ten to twelve years by the Indian Criminal Law Amendment Act (X of 1891) for the following reasons: “The limit at which the age of consent is now fixed (i.e., ten years) favours the premature consummation by adult husbands of marriages with children who have not reached the age of puberty, and is thus, in the unanimous opinion of medical authorities, productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong.”³

It was raised from twelve to fourteen years by the Indian Penal Code (Amendment) Act (XXIX of 1925), s. 2, for the following reasons: “Books of medical jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen. Even though puberty may be reached at the age, it is obvious that girls are unfit for sexual cohabitation till they are older and more developed in physique and strength. The appalling infant mortality in the country is partially ascribed to early marriages and the consummation which follows with immature girls. It is, therefore, not only for the protection of minor girls as also of their progeny that the age of consent should be raised to at least fourteen years.”⁴

By raising this limit female children are protected (a) from premature cohabitation,⁵ and (b) from immature prostitution.

²¹ *Barratt*, (1873) L. R. 2 C. C. R. 81; *Ryan*, (1846) 2 Cox 115.

²² *Camplin*, (1845) 1 Cox 220; *Ryan*, *ibid*.

²³ *William's Case*, (1850) 4 Cox 220.

²⁴ *Flattery*, (1877) 2 Q. B. D. 410.

²⁵ *Williams*, [1923] 1 K. B. 340.

¹ Per Wills, J., in *Clarence*, (1888) 22 Q. B. D. 23, 27.

² *Akbar Kazee*, (1864) 1 W. R. (Cr.) 21.

³ Statement of Objects and Reasons to Bill No. 3 of 1891, *Gazette of India*, 1891, Part V, p. 5.

⁴ Statement of Objects and Reasons to Bill No. 12 of 1924, *Gazette of India*, 1924, Part V, p. 49.

⁵ Vide *Hurree Mohun Mythee*, (1880) 18 Cal. 49.

The accused, a youth of about eighteen, had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock; it was held that the accused was guilty of rape.⁶ If the girl is less than fourteen years of age her consent is immaterial.⁷

Explanation.—The Explanation says that penetration is sufficient to constitute rape. To constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little.⁸ The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to decide how far they entered.⁹ It is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration¹⁰ even though partial.¹¹ In *Reg. v. Ferroll Green, J.*, directed the jury that vulval penetration only was sufficient, under the law of India, to constitute rape without actual seminal emission. In this case the accused was charged with rape on a child six years old. The child had not complained, and admitted on cross-examination that she had not been hurt. The medical evidence proved that there was no injury to the parts. The child was found to be suffering from gonorrhoea, so was the accused. It was clear that the penetration (if any) had been only vulval. Green, J., directed the jury that this was sufficient to constitute rape, and the accused was convicted of rape.¹² There is a distinction between vulval penetration and vaginal penetration. In order to constitute rape the statute merely requires medical evidence of penetration, and this may occur and the hymen remain intact.¹³

Where no penetration is attempted or intended the act is not punishable under this section.¹⁴

Exception.—The age-limit was raised to thirteen years by Act XXIX of 1925, s. 2.

A man cannot be guilty of rape on his own wife when she is over the age of thirteen years, on account of the matrimonial consent she has given which she cannot retract. But he has no right to enjoy her person without regard to the question of safety to her.¹⁵ A husband can be guilty of abetment of rape by another on his wife. This was held in the notorious case of Lord Audley who held his wife by force while his butler ravished her.¹⁶ A husband suspecting the fidelity of his wife, went about in search of her, with nine companions, and found her in the company of her paramour. By way of punishment the wife was there and then ravished by all the nine companions in succession while the husband was looking on. The nine persons were held guilty of rape.¹⁷

Difference between indecent assault and attempt to commit rape.—An offence of indecent assault on a woman cannot be complete unless there is intention or knowledge that the woman's modesty will be outraged.¹⁸ An indecent assault upon a woman does not amount to an attempt to commit rape, unless the Court is satisfied that there was a determination in the accused to gratify his passion at all events, and in spite of all resistance.¹⁹ An assault with intent to commit a rape is very different from an assault with intent to have an improper connection. The former is with intent to have a connection by force. On an indictment for an assault,

⁶ *Shambhu Khatri*, (1924) 3 Pat. 410.

⁷ *Mohuddin*, (1930) 51 C. L. J. 352, 32 Cr. L. J. 455, [1930] AIR (C) 437.

⁸ *Joseph Lines*, (1844) 1 C. & K. 398.

⁹ *Allen*, (1839) 9 C. & P. 31, 34.

¹⁰ *Jordan*, (1839) 9 C. & P. 118; *Hughes*, (1841) 9 C. & P. 752; *John Cox*, (1832) 5 C. & P. 297; *Russen*, (1777) 1 East P. C. 438, 439; *Maharaj Din*, (1927) 28 Cr. L. J. 244, [1927] AIR (L) 222.

¹¹ *Abdul Majid*, (1927) 28 Cr. L. J. 241 [1927] AIR (L) 735.

¹² Bombay High Court Sessions, February 10, 1879. Referred to by Lyon in his Medical Jurisprudence for India, 9th Edn., p. 370. Followed in *Natha*, (1923) 26 Cr. L. J. 1185.

¹³ *Jantan*, (1924) 36 P. L. R. 35, 36 Cr. L. J. 310.

¹⁴ *Tottitodiyil Ahmed Kutti*, (1891) 1 Weir 383.

¹⁵ *Hurree Mohun Mythee*, (1890) 18 Cal. 49.

¹⁶ *Mervin Lord Audley's Case*, (1631) 3 St. Tr. 401.

¹⁷ *Tatya Tukaram Khabali*, (1930) Cr. App. Nos. 19 and 20 of 1930, decided by Mirza and Broomfield, JJ., on March 5, 1930 (Unrep. Bom.).

¹⁸ *Fatima v. Captain McCormick*, (1219) 6 B. L. T. 21, 14 Cr. L. J. 149, F.B.

¹⁹ *Shankar*, (1881) 5 Bom. 403; *James Lloyd*, (1836) 7 C. & P. 318; *Wright*, (1866) 4 F. & F. 967.

with intent to commit a rape, the prosecutrix stated that the accused, her medical man, being in her bedroom, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the accused was proceeding to have a criminal connection with her, upon which she instantly raised herself up, and ran out of the room. She stated that the accused had penetrated her person "a little." It was held that if it had appeared that the accused had intended to have had a criminal connection with the prosecutrix by force, the complete offence of rape would, upon this evidence, have been proved, but that the getting possession of the person of the woman by surprise was not an assault with intent to commit rape, but was an assault.²⁰ Where the accused stripped a girl nearly naked and was lying upon her when her cries attracted people to the spot, it was held that he was guilty of an attempt to commit rape and not merely of an offence under s. 354.²¹ The accused caught hold of a girl, threw her down, put sand in her mouth, got on her chest and attempted to have intercourse with her. She resisted and cried and her screams attracted a couple of persons seeing whom the accused ran away. It was held that the offence committed was an attempt to commit rape and not merely one under s. 354.²² A female child aged five and a half years was discovered seated on the naked thighs of the accused who was a lad of eighteen years. The accused had taken off his own trousers and that of the girl. On medical examination of the girl it was found that with the exception of fresh redness at the entrance to the vagina, the girl bore no other mark of injury and her hymen was intact. There were no marks of blood or semen on her person and she did not complain of having felt any pain as the result of the accused's assault upon her. It was held that under the circumstances the accused was guilty of an attempt to commit rape and not merely of an indecent assault.²³ The complainant, a milkmaid aged 12 or 13 years, who was hawking milk, entered the accused's house to deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over her mouth to prevent her crying and placed his private parts against hers. There was no penetration. The girl struggled and cried, and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape, but of indecent assault.²⁴

Physical incapacity.—The Bombay High Court has held that a person physically incapable of committing the offence of rape cannot be held guilty of an attempt to commit it.²⁵ The former Chief Court of Lower Burma had expressed its dissent from this view and had laid down that a boy of twelve could be convicted of an attempt to commit rape.¹

Amendment.—The age-limit was raised to fourteen years in cl. (5) and to thirteen in the Exception to the section by Act XXIX of 1925, s. 2. The proviso to s. 376 was also added by s. 3 of the same Act.

PRACTICE.

Evidence.—Prove (1) that the accused had sexual intercourse with the woman in question.

(2) That the act was done under circumstances falling under any of the five descriptions specified in s. 375.

(3) That such woman was not the wife of the accused; or, if she was his wife, she was under thirteen years of age.

(4) That there was penetration.

The best evidence of the age of the person violated ought to be produced.² A doctor is in a better position to form an opinion about the age of a person than a

²⁰ *Stanton*, (1844) 1 C. & K. 415.

²¹ *Khadam*, (1910) 11 Cr. L. J. 611; *Kishen Singh*, (1927) 28 P. L. R. 575, 28 Cr. L. J. 663, [1927] AIR (L) 580.

²² *Bhartu*, (1933) 34 P. L. R. 832, 35 Cr. L. J. 432.

²³ *Mehraj Din*, (1927) 28 Cr. L. J. 244, [1927] AIR(L) 222.

²⁴ *Ahmed Asalt Mirkhan*, (1930) Crim. App. No. 161 of 1930, decided by Mirza and Broomfield, JJ., on June 12, 1930 (Unrep. Bom).

²⁵ *Gopala bin Rama*, (1896) Cr. R. No. 31 of 1896, Unrep. Cr. C. 865.

¹ *Nga Tun Kaing*, (1917) 18 Cr. L. J. 943; *Williams*, [1893] 1 Q. B. 320.

² *Wedge*, (1832) 5 C. & P. 298.

layman, but the statement of a doctor is no more than an opinion. When from his statement it does not appear that he brought any scientific knowledge to bear upon his opinion, where the doctor has relied entirely on certain physical peculiarities, such as teeth, etc., his statement is not a legal proof but a mere opinion.³

The following rules have been adopted in Neapolitan Jurisprudence, namely, that in an accusation of rape there must be full proof of these facts—

(1) That there has been constant and equal resistance on the part of the person violated.

(2) That there is inequality of strength between the parties.

(3) That she has raised cries.

(4) That there may be some marks of violence present.

Three questions relating to this offence have been discussed—(1) Whether the presence of venereal disease in the female violated is in favour of or against her accusation? If marks of disease are recent, in favour of her, but it must be remembered that symptoms of infection do not appear until three days after receiving it; should appearances indicate disease of long-standing they weaken her complaint.

(2) Can a female be violated during her sleep without her knowledge? If sleep has been caused by narcotics, intoxication, or syncope, or excessive fatigue, it is possible.

(3) Does pregnancy ever follow rape? Great diversity of opinion. It was formerly supposed that if a woman conceived it was no rape, it is now admitted that such an opinion has no sort of foundation.

Medical examination of accused.—It is the duty of the prosecution if, according to the medical jurisprudence, medical examination was capable of yielding conclusive results, to ensure that examination within a period of time when conclusive results could be achieved. The accused is entitled to say that if a medical examination of the vital or the material parts of his body had been conducted, he would have been in a position to show that the condition of those parts negatived the possibility of his guilt.⁴

Potency of accused.—In English law there is a conclusive presumption that a boy under fourteen years of age is incapable of committing rape. A boy under that age who is charged with rape must be acquitted on proof merely of his age, without any regard to his sexual development. In Indian law no such presumption exists, and subject to the provisions of ss. 82 and 83 a boy of whatever age who is charged with rape and wishes to avail himself of the defence of want of capacity to do the act must produce evidence to that effect. A boy between thirteen and fifteen years of age, who had the power of erection and probably that of emission according to medical evidence, was held guilty of attempt to commit rape as penetration was sufficient to complete the offence.⁵ The remark of the Bombay High Court in this case that in each case it must be proved by evidence whether or not the accused is potent is not sound.

Evidence of previous connection.—On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, in answer to cross-examination, denies having voluntarily had connection with the accused prior to the alleged assault, evidence to contradict her by proving such prior connection is admissible on his behalf.⁶ The prosecutrix in an indictment for an indecent assault which on the facts alleged amounted to an attempt to rape, was asked in cross-examination whether she had not previously had connection with a man other than the accused, and denied it. It was held that she could not be contradicted.⁷ She can be cross-examined as to particular acts of connection with other men but if she denies it she cannot be contradicted.⁸ When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character [s. 155 (4) of the Indian Evidence Act].

Dying declaration.—The dying declaration of a deceased person is admissible in evidence on a charge of rape.⁹

³ *Qudrat*, [1939] A. L. J. R. 980, 41 Cr. L. J. 142, [1939] AIR (A) 708.

⁴ *Ram Kala*, [1946] A. L. J. 86, 47 Cr. L. J. 611, [1945] O. W. N. 334 (2), [1946] AIR (A), 191; *Conroy*, [1945] Nag. 226.

⁵ *Gopala bin Rama*, (1896) Cr. R. No. 31 of

1896, Unrep. Cr. C. 865.

⁶ *Riley*, (1887) 18 Q. B. D. 481.

⁷ *Holmes*, (1871) L. R. 1 C. C. R. 334.

⁸ *Cockcroft*, (1870) 11 Cox 410.

⁹ *Bissorunjun Mookerjee*, (1866) 6 W. R. (Cr.) 75.

Corroboration to complainant's story essential.—It is a well established practice that in cases of rape the evidence of the complainant must be corroborated. The nature of the corroboration must necessarily depend on the facts of each particular case. Where rape is denied by the accused the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or on the places where the offence is alleged to have been committed; and in all cases importance is attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not is always relevant. Her subsequent conduct by itself, though important, is not enough, for a witness cannot corroborate himself.¹⁰

Evidence of the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge against the accused, be given on the part of the prosecution, not as being evidence on the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negating consent on her part.¹¹ The accused was indicted for an indecent assault on a girl under the age of thirteen years, whose consent to the act was therefore immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the accused, as to why the girl had not waited for the other child at the accused's house. The girl's reply was a complaint of the accused's conduct to her. It was held that the evidence was admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct.¹²

Where a person indecently assaulted makes a complaint, not of her own initiative, but in answer to a question, the particulars of such complaint, though otherwise admissible within the rule laid down in *Lillyman's* case, cannot be given in evidence.¹³ In rape, not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, is evidence.¹⁴ See also illustration (j) to s. 8 of the Indian Evidence Act.

Where the prosecution evidence is not sufficiently strong to warrant a conviction, it is unsafe to convict merely on the accusation of the woman who has been raped.¹⁵ The presiding Judge ought to tell the jury that they ought to scrutinise the uncorroborated evidence of a prosecutrix in a case involving a sexual offence and that it is dangerous to convict a man on such uncorroborated testimony. The Judge should also say that nevertheless, if after proper scrutiny and considering the caution delivered by him, the jury are satisfied with the uncorroborated evidence, they may accept it.¹⁶ Where in a case of rape the Judge does not warn the jury that in cases of this nature it is unsafe to rely on the uncorroborated testimony of the prosecutrix, nor does the Judge properly explain to the jury the ingredients which are necessary for an offence under this section, the charge to the jury is vitiated by non-direction.¹⁷ Where the woman had intercourse with some person but showed no signs of force having been used, and had reported to several persons, this was held to be not substantial corroboration of her evidence.¹⁸ The kind of corroboration required is the same as required for the evidence of an accomplice, that is to say, some independent evidence confirming in material particulars the allegation that the crime was committed and that the accused committed

¹⁰ *Mahadeo Tatya*, (1941) 44 Bom. L. R. 216, 43 Cr. L. J. 621, [1942] AIR (B) 121, F.B.

¹¹ *Lillyman*, [1896] 2 Q. B. 167; *Wood*, (1877)

14 Cox 46; *Kappinaiah*, (1930) 32 Cr. L. J. 751, [1931] AIR (M) 233.

¹² *Osborne*, [1905] 1 K. B. 551.

¹³ *Merry*, (1900) 19 Cox 442.

¹⁴ *Eyre*, (1860) 2 F. & F. 579.

¹⁵ *Kanshi Ram*, (1921) 23 Cr. L. J. 475; *Beli Singh*, (1927) 9 L. L. J. 337; *Gulam Hussain*, (1930) 32 Cr. L. J. 63, [1930] AIR (L) 337; *Louis Simmons*, (1931) 23 Cr. App. R. 25; *Amar Singh*, (1934) 36 Cr. L. J. 428; *Baji*, (1933) 10 O. W. N. 107, 34 Cr. L. J. 496, [1933] AIR (O) 163; *Sikandar Miyan*, [1937] 2 Cal. 345.,

U Toe Sein, (1938) 40 Cr. L. J. 525; *Sachinder Rai*, (1939) 18 Pat. 698; *Feroze Kazi*, (1939) 21 P. L. T. 731, 41 Cr. L. J. 267, [1940] AIR (P) 295; *Karichiappa Goundan*, (1941) 43 Cr. L. J. 576, [1942] AIR (N) 285.

¹⁶ *Sikandar Miyan*, [1937] 2 Cal. 345; *Saratchandra Chakravarty*, (1936) 65 C. L. J. 83, 38 Cr. L. J. 931, [1937] AIR (C) 463; *Harendra Prasad Bagchi*, [1940] 2 Cal. 181; *Taser Pramanik*, (1940) 44 C. W. N. 835, 71 C. L. J. 590, 41 Cr. L. J. 841, [1940] AIR (C) 391; *The People (Attorney General) v. Williams*, [1940] I. R. 195; *Conroy*, [1945] Nag. 226.

¹⁷ *Baldeo*, (1945) 25 Pat. 120.

¹⁸ *Maung Ba Tin*, (1926) 27 Cr. L. J. 1284.

it. What the prosecutrix says to other persons is not corroborative evidence.¹⁹ The first and foremost circumstance that can be looked for in cases of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts.²⁰ The Calcutta High Court has held that the prosecutrix is not corroborated by the fact that she subsequently identified the accused.²¹ The Allahabad High Court has held that where the girl raped identified the accused in jail her evidence established the guilt of the accused.²² Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction which vitiates the conviction.²³

The Nagpur High Court has held that in the case of a rape of a girl of ten years there is no motive for false incrimination which might attract the necessity for corroboration, and where no such motive can be suggested, independent corroboration is not necessary as to the culprit's identity.²⁴

Where the only evidence was that of the complainant and there was no evidence of penetration, the conviction was altered to one under s. 354.²⁵

Collateral evidence in confirmation or otherwise.—It is no mitigation of this offence that the woman at last yielded to the violence, if such consent were forced from her by fear of death or by duress. Nor is it any excuse... that the woman consented after the fact, nor that she was a common strumpet; for she is still under the protection of the law and may not be forced; nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine of the ravisher; for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment.¹ Medical evidence can help the case for the prosecution even if the complainant is pregnant at the time when the rape is alleged to have been committed. But the report of the Chemical Analyser regarding the presence of semen on the complainant's clothing is not sufficient to prove that the complainant is actually raped.²

Procedure.—If the sexual intercourse was by a man with his own wife not being under twelve years of age—Not cognizable—Summons—Bailable—Not compoundable—Triage by Court of Session, Chief Presidency Magistrate or District Magistrate.

If the sexual intercourse was by a man with his own wife being under twelve years of age—Not cognizable—Summons—Bailable—Not compoundable—Triage by Court of Session.

In any other case—Cognizable—Warrant—Not bailable—Not compoundable—Triage by Court of Session.

False charge of rape.—Rape is an offence punishable with transportation for life or with imprisonment for a term which may extend to ten years. The offence, therefore, of making false charge of rape is triable exclusively by the Court of Session.³

Sections 366 and 376.—Where an accused is convicted under ss. 366 and 376, it is not illegal to pass separate sentences for each of the offences inasmuch as the offences are separate and the charge under s. 366 involves elements different from a charge under s. 376.⁴

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed rape on A. B,

¹⁹ *Surendranath Das*, (1933) 62 Cal. 534; *Noor Ahmad*, (1933) 62 Cal. 527; *Abdul Gafur Kotwal*, [1938] 1 Cal. 636; *Baskerville*, [1916] 2 K. B. 658.

²⁰ *Mahla Ram*, (1923) 25 Cr. L. J. 74, [1924] AIR (L) 669.

²¹ *Bhola Nath Dome*, (1939) 43 C. W. N. 1180.

²² *Kunwar Pal*, [1947] A. L. J. 435, 48 Cr. L. J. 851.

²³ *Sachinder Rai*, (1939) 18 Pat. 698.

²⁴ *Bisram Bahorik*, [1945] Nag. 523.

²⁵ *Jalal*, (1929) 30 P. L. R. 662, 31 Cr. L. J. 784, [1930] AIR (L) 193.

¹ See Roscoe's Criminal Evidence, 14th Edn., p. 974; Archbold, 13th Edn., p. 1036.

² *Jalal*, (1929) 30 P. L. R. 662, 31 Cr. L. J. 784, [1930] AIR (L) 193.

³ *Bhikhi*, (1898) Cr. R. No. 4 of 1898, Unrep. Cr. C. 953.

⁴ *Ghulam Muhammad*, (1926) 7 Lah. 484; *Tek Singh*, (1927) 29 Cr. L. J. 248.

and thereby committed an offence punishable under s. 376 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—The offence is capable of degrees. “On the one hand let us take the case of the chaste high caste female, who would sacrifice her life to save her honour, contaminated by the forcible embrace of a man of low caste... On the other hand that of the woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case if the woman, from any motive, refuses to comply with the solicitation of a man and is forced by him, the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former.”⁵ But in a case it has been remarked that the measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime, the conduct of the criminal, and the defenceless and unprotected state of the injured female.⁶ The fact that the family of the injured girl have condoned the offence on being paid a sum of money should not be taken into consideration in determining the heinousness of the offence, or of the punishment to be inflicted.⁷ But where a girl is of unchaste character, a very severe sentence is not called for.⁸ In a case of rape the ordinary sentence varies from three to five years’ rigorous imprisonment. In a very bad case seven years’ imprisonment is sometimes given.⁹

Crimes of violence upon women should be severely dealt with.¹⁰

Under ss. 57, 376 and 511 a sentence of ten years’ transportation, or of fifteen years’ rigorous imprisonment, may be passed for the offence of attempt to commit rape; but a sentence of seven years’ rigorous imprisonment commutable under s. 59 to seven years’ transportation is illegal.¹¹

As to whipping, see the Whipping Act.¹²

As to crimes on the frontier see the Frontier Crimes Regulation, 1901, ss. 6, 11 (3) (d) and 12 (2).

Of Unnatural Offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal,¹ shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration² is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

COMMENT.

This offence consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast.

According to the English law if the party on whom the offence is committed be within the age of discretion, namely, under fourteen, it is not felony in him, but only in the agent. If both be of the age of discretion, it is felony in both.¹³ A man who, as pathic, committed sodomy with a boy of the age of twelve years, was convicted of this offence, though the boy was discharged.¹⁴

A married woman who consents to her husband’s committing an unnatural offence with her is an accomplice.¹⁵

1. ‘Voluntarily has carnal intercourse against the order of nature with any man, woman or animal’.—As to the definition of ‘voluntarily’, see s. 39; of

⁵ Law Commissioners’ First Rep., s. 449.

⁶ *Jhantah Noshyo*, (1866) 6 W. R. (Cr.) 59.

⁷ *Local Government v. Pyarelal*, (1917) 20 Cr. L. J. 647.

⁸ *Ibrahim*, (1927) 28 Cr. L. J. 256, [1927] AIR (L) 772.

⁹ *Mahadeo Tatyia*, (1941) 44 Bom. L. R. 216, 43 Cr. L. J. 621, [1942] AIR (B) 121, F.B.

¹⁰ *Kala*, (1929) 30 P. L. R. 437, 30 Cr. L. J. 499, [1929] AIR (L) 584.

¹¹ *Joseph Merian*, (1868) 10 W. R. (Cr.) 10, 1 Beng. L. R. (A. Cr. J.) 5.

¹² Act IV of 1909, s. 4 (a). A sentence of fifteen stripes for the offence of rape was held to be inadequate in the case of a juvenile offender in *Po Ba*, (1914) 8 L. B. R. 143, 1 Cr. L. J. 538.

¹³ 1 East P. C. 480; 1 Hale P. C. 670.

¹⁴ *Allen*, (1849) 8 Cox 270.

¹⁵ *Jellyman*, (1838) 8 C. & P. 604.

'man', s. 10; of 'woman', s. 10; of 'animal', s. 47.

Coitus per os (the sin of Gomorrah) is punishable under this section.¹⁶ Kennedy, A.J.C., observed in this case: "Is the act here committed one of carnal intercourse? If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible. Intercourse may be defined as mutual frequentation by members of independent organizations. Commercial intercourse provides for the merchants of the state A who wish to come to and trade in the state B, not intending permanently to settle there but with *animus redcandi* to A and similarly for the merchants of the state B. Such is the *magnus intercourse* which regulated the trade of Britian and Flanders in the middle ages. Social intercourse provides the rules under which members of one family may resort to the premises occupied by another family, not intending to reside in such premises but merely to visit them for laudable purposes, reciprocity being of the essence of the bargain. By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that the sin of Gomorrah is no less carnal intercourse than the sin of Sodom. The sin of Lesbos or Tribadism is clearly not such intercourse, and I doubt if mutual cheirourgia would be such. . . And it was this vice in particular which was rendered punishable by the early Christian state, for it was par excellence the vice of the Hellene and the Saracen. By making this vice particularly punishable, therefore, the State not only protected good morals but struck at its enemies. It is this vice, therefore, which attracted the severest censures of State and Church, but in mediæval times all emission other than in *vas legitimum* was considered unchristian because such emission was supposed ultimately to cause conception of demons. It will be seen how little help can be extracted from Christiansources in deciding this question. But why is it that most modern states, now freed from the influence of superstition, still make the sin of Sodom punishable. Partly I suppose because of the desire of Princes to encourage legitimate marriage. Partly because there is an idea, (perhaps erroneous) that the public or tolerated practice of that vice creates a tendency in the citizens of the State, where it is practised, to adopt an unmanly and morbid method of life and thinking, so that a person saturated with those ideas is less useful a member of society, partly because of the danger that men put in authority over other men may use their power for the gratification of their lusts, but principally I suppose because of the danger to young persons, lest they be indoctrinated into sexual matters prematurely. But surely all these ill consequences would equally follow in a city where the sin of Gomorrah was tolerated. . . But we must not allow our disgust at the perpetrators of such acts to blind us to the fact that this vice is less pernicious than the sin of Sodom. It has not been surrounded by the halo of art, eloquence and poetry. It cannot be practised on persons who are unwilling. It is not common and can never be so. It cannot produce the physical changes which the other vice produces. It is, therefore, lightly punishable but the punishment need not be so extremely severe as in the other case."¹⁷

Where the accused forced open a child's mouth, and put in his private parts and proceeded to a completion of his lust, it was held that this did not constitute the offence of sodomy.¹⁸ This decision proceeded upon a special statute which punished the crime of buggery. Under the Penal Code such an act will come under the provision of this section.

The accused was indicted for an unnatural offence committed on board of an East India ship, lying in St. Katherine's Docks. His defence was that he was a native of Baghdad, and his act was not considered to be an offence there. It was held that this was not a good defence.¹⁹

¹⁶ *Khanu*, (1924) 19 S. L. R. 327, 26 Cr. L. J. 945, [1925] AIR (S) 286, 287.

¹⁷ *Ibid.*, pp. 328-331.

¹⁸ *Jacob's Case*, (1817) Russ. & Ry. 331. In a Madras case it is considered doubtful whether the act of having connection with a woman in

the mouth amounts to this offence; *Govindurajulu Naicken*, (1886) 1 Weir 283. Will this not be carnal intercourse against the order of nature? If it is, the act will amount to an offence under this section.

¹⁹ *Esop*, (1836) 7 J. C. & P. 456.

A domestic fowl is an 'animal'; and an attempt to commit an unnatural offence with such fowl will be punishable under this section.²⁰ Sexual intercourse per nose with a bullock is an unnatural offence within the meaning of this section.²¹

2. 'Penetration'.—See s. 375, *supra*. The crime is complete if the Court is satisfied that penetration took place.²² The offence made punishable under this section requires that penetration, however little, should be proved strictly. Thus an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. Where there was an intention on the part of the accused to satisfy his lust by a carnal intercourse against the order of nature, and he made every preparation to satisfy that lust, but before he could thrust his organ in he spent himself, it was held that he had not done any act which might be construed as an attempt to commit the offence of sodomy.²³

PRACTICE.

Evidence.—Prove (1) that the accused had carnal intercourse with a man, woman, or animal.

(2) That such intercourse was against the order of nature.

(3) That the accused did the act voluntarily.

(4) That there was penetration.

It is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reason that testimony is entitled to special weight.²⁴ A charge of attempting to commit sodomy is very easy to bring and very difficult to refute, the evidence in support of such a charge has to be very convincing in order to convict the accused.²⁵ In a charge of sodomy stains of semen constitute important evidence. Great weight must, therefore, be attached to the Chemical Examiner's report.¹

Postcards depicting dirty sexual acts found in the possession of the accused may be admitted in evidence as things which a man intending to commit such an offence might well have about him, and might use as an adjunct to assist him in the commission of the offence. They are not admissible merely to show that he had a dirty mind.²

In the case of an unnatural offence conviction may be based on the uncorroborated testimony of the victim.³

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Insufficient particulars in charge.—Where a person was tried for an unnatural offence, and convicted on a charge which did not allege the time when, the place where, or point to any known or unknown person with whom the offence was committed and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, it was held that the conviction was not sustainable.⁴

Sentence.—In the case of youthful offenders whipping is a most appropriate sentence.⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, had carnal intercourse against the order of nature with a certain man [*or woman*], to wit—, [*or with a certain animal, to wit (specify the kind of animal)*], and thereby committed an offence punishable under s. 377 of the Indian Penal Code, and within my cognizance [*or cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

²⁰ *Brown*, (1899) 24 Q. B. D. 357.

²¹ *Khandu*, (1933) 35 P. L. R. 73, 35 Cr. L. J. 1096.

²² *Robert Reekspear*, (1832) 1 Mood. 342.

²³ *Nowshirwan Irani*, (1934) 36 Cr. L. J. 718, 28 S. L. R. 330.

²⁴ *Ganpat*, (1918) 19 P. L. R. 261, 19 Cr. L. J. 946, [1918] AIR (L) 322; *Bal Mukundo Singh*, (1935) 39 C. W. N. 1051, 61 C. L. J. 583, 38 Cr. L. J. 70.

²⁵ *Sain Das*, (1926) 27 P. L. R. 353, 27 Cr. L. J. 593.

¹ *Devi Das*, (1928) 10 Lah. 794.

² *Gillingham*, [1939] 4 A. E. R. 122.

³ *Sardar Ahmad*, (1914) P. W. R. No. 42 of 1914 (Cr.) P. L. R. No. 185, of 1914, 16 Cr. L. J. 266, [1914] AIR (L) 565; *Kaku*, [1944] Kar. 123.

⁴ *Khairati*, (1884) 6 All. 204; *Ghasita*, (1884) 4 A. W. N. 25.

⁵ *Jiwan*, (1883) P. R. No. 3 of 1883.

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

The following offences affect property :—

- | | |
|---|---|
| 1. Theft. | 7. Cheating. |
| 2. Extortion. | 8. Fraudulent Deeds and Dispositions of Property. |
| 3. Robbery and Dacoity. | 9. Mischief. |
| 4. Criminal Misappropriation of Property. | 10. Criminal Trespass. |
| 5. Criminal Breach of Trust. | |
| 6. Receiving Stolen Property. | |

Of Theft.

378. Whoever, intending to take dishonestly¹ any moveable property² out of the possession of any person³ without that person's consent,⁴ moves that property in order to such taking,⁵ is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

ILLUSTRATIONS.

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession, without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate

was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for theft.

COMMENT.

The offence of theft under the Penal Code differs materially from the offence known as larceny in the English law.

English law.—Larceny is the wilful and wrongful taking away of the goods of another against his consent and with the intent to deprive him permanently of his property.

Differences between larceny and theft.—(1) Under larceny, the stolen pro-

perty should be the property of some one ; whereas under theft, it should be in the possession of some one.

(2) Under theft, everything becomes its object which is movable, i.e., capable of being severed from its place. Hence, it is theft to sever and remove things, which are attached to the ground such as trees, vegetables, etc.¹ In larceny, no offence is committed if the objects removed "savour of the realty, and are, at the time they are taken, part of the freehold". So strict was this rule at common law that a larceny could not be committed of title-deeds.²

(3) Under larceny, it is necessary to show an intention to appropriate a chattel and exercise an entire dominion over it. If it be taken with the intention of making a temporary use of it only, and then of letting the owner have it again, there is no larceny.³ Under theft it makes no difference that the person does not intend to assume entire dominion over the property taken, or to retain it permanently.⁴

(4) Under larceny, it must be shown that the taking was against the person's consent and was not only wrongful and fraudulent, but was also "without any colour of right"; under theft, it will be sufficient to show that it was without his consent.

(5) To constitute theft it is not necessary to prove that the thief ever had the stolen thing in his power, but there can be no larceny, even if there has been an actual removal, if the offender has never had the thing in his power.

(6) Theft may be committed though the person from whom the thing is taken has no title thereto ; in the case of larceny the alleged owner should have some (general or special) ownership of it, and it must have been taken out of the owner's actual or constructive possession.

Ingredients.—In order to constitute theft five factors are essential :—

- (1) Dishonest intention to take property.
- (2) The property must be movable.
- (3) It should be taken out of the possession of another person.
- (4) It should be taken without the consent of that person.
- (5) There must be some removal of the property in order to accomplish the taking of it.

1. Intending to take dishonestly.—Intention is the gist of the offence. It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person.⁵ Where, therefore, the accused, acting bona fide in the interest of his employers, finding a party of fishermen poaching on his master's fisheries took charge of the nets, and retained possession of them, pending the orders of his employers, it was held that the accused was not guilty of theft.⁶ The intention to take dishonestly must exist at the time of the moving of the property (*vide ill. (h)*). If the act done is not done *animo furandi*, it will not amount to theft.⁷ Where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, the detention does not amount to causing wrongful loss in any sense.⁸ Otherwise, a person keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in jest, for the purpose of causing him a little anxiety or in earnest for the purpose of teaching him, the salutary lesson of being careful, will be guilty of theft, a result which the Legislature could never have intended. Where the accused found the complainant's pony at large, not within the compound or the stable of the complainant, it having broken from its tether to which it had been tied the previous night, and mounted it, and took a ride on it, returning home on the following day in the evening, it was held that the accused had

¹ Explanation 1; *Shivram*, (1891) 15 Bom. 702.

² 1 Hale P. C. 510.

³ *Trebilcock*, (1858) 27 L. J. (M. C.) 108; *Holloway's Case*, (1848) 1 Den. 370.

⁴ *Nagappa*, (1890) 15 Bom. 344, 346.

⁵ *Madaree Chowkeedar*, (1865) 8 W. R. (Cr.) 2, 3; *Lal Mohammad*, (1931) 12 P. L. T. 556, 32

Cr. L. J. 739, [1931] AIR (P) 337; *Bhurasingh*, (1934) 29 S. L. R. 121, 36 Cr. L. J. 1310.

⁶ *Nobin Chunder Holdar*, (1866) 6 W. R. (Cr.) 79. See *Sheomeshur Rai*, (1888) 8 A. W. N. 97.

⁷ *Bailey*, (1872) L. R. 1 C. C. R. 347.

⁸ *Nabi Baksh*, (1897) 25 Cal. 416.

not committed theft.⁹ Where a respectable person pinched away the cycle of another person, as his own cycle at the time was missing, and brought it back and there was no criminal intention and he did not intend by his act to cause wrongful gain to himself, it was held that his act did not amount to theft.¹⁰ The accused, the owner of a barge, sold it to the complainant and received part of the sale price as earnest money. The accused called upon the complainant to pay the remainder of the purchase money, and threatened to put an end to the contract unless the money were paid to her within a specified time. On failure of payment, the accused took the barge into her possession for which she was charged with the offence of theft. It was held that inasmuch as the accused believed that the possession of the barge was still in her in law she could not be convicted of theft as she had not shown any dishonest intention in seizing possession of the barge.¹¹

Where in execution of a decree against a certain person, property belonging to another person was wrongly taken away by the bailiff and the owner and his associates took that property, it was held that no offence was committed under this section.¹²

Where there is no proof of 'taking' of the property found in the possession of the accused, the offence committed is not theft but criminal misappropriation.¹³

Taking need not be with intention of retaining property permanently.—It is not necessary that the taking should be permanent or with an intention to appropriate the thing taken.¹⁴ The remarks of Norris, J., in *Adu Shikdar v. Queen-Empress*¹⁵ that "With regard to the charge of stealing . . . there is not only no evidence that the prisoner intended to convert it [the property] to his own use, and make it permanently his own property" are in accordance with the English law on the subject, which is quite different from the definition of theft as given in the Code. The learned Judge seems to have overlooked the fact that under the Code a temporary taking might constitute theft (*vide* ill. (1)). Where the Hindus of a locality apprehended that X, a Mahomedan, who owned a calf, was going to sacrifice that calf and an agreement was come to by which X consented that the calf might be tied up in Y's house, which was close by, but Z, a Hindu, who arrived on the scene subsequently carried away the calf without the consent of X or Y to prevent all chances of the calf being sacrificed and Z was convicted of theft. It was held that the calf, though it was tied up in Y's house, was still in the possession of X when Z removed it and Z's removal of the calf was "dishonest" though his motive was only to save it from being killed, and that the act of Z, therefore, amounted to theft.¹⁶

No wrongful gain is necessary.—It matters not whether the intention of the thief was or was not to derive a profit from his crime.¹⁷ It will suffice if it causes wrongful loss to the owner.¹⁸ Thus, where the accused took the complainant's three cows against her will and distributed them among her creditors, he was found guilty of stealing.¹⁹ Similarly, servants who clandestinely took their master's oats with intent to give them to their master's horses, and without any intent to apply them to their own private benefit, were held guilty of larceny, even though they were not answerable at all for the condition of the horses.²⁰ It makes no difference in the accused's guilt that the act was not intended to procure any personal benefit to himself. Could it be said that a servant would not be guilty of theft if he were to deliver over his master's plate to a pressing tailor, and tell him to pay himself?

Bona fide dispute or claim.—Where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal there-

⁹ *Rup Lal Singh v. Durga Prasad*, (1917) 18 Cr. L. J. 1012, [1917] AIR (P) 459.

¹⁰ *Rameshwar Singh*, (1936) 12 Luck. 92.

¹¹ *Sitabai Purshotam*, (1930) 32 Bom. L. R. 1140, 32 Cr. L. J. 287, [1930] AIR (B) 488.

¹² *Jahana*, (1941) 43 P. L. R. 162, 42 Cr. L. J. 601, [1941] AIR (L) 217.

¹³ *Shivbasha*, (1879) Unrep. Cr. C. 143.

¹⁴ *Sri Churn Chungo*, (1895) 22 Cal. 1017, F.R.; *Nabi Baksh*, (1897) 25 Cal. 416; *Nagappa*, (1890) 15 Bom. 344; (1890) 1 Weir 405; *Tiruvengada Chari*, (1881) 1 Weir 407; *Krishna Aiyar*, (1883) 1 Weir 407; *Shoma Chatur*, (1897) Cr. R. No. 19 of 1897, Unrep. Cr. C. 908;

Jagannath Misra, (1929) 10 P. L. T. 483, 30 Cr. L. J. 546, [1929] AIR (P) 429.

¹⁵ (1885) 11 Cal. 635, 644.

¹⁶ *Jagannath Misra*, (1929) 10 P. L. T. 483, 30 Cr. L. J. 546, [1929] AIR (P) 429.

¹⁷ P. L. C. (1860), p. 1258; *Cabbage's Case*, (1815) Russ. & Ry. 292; *Lal Mohammad*, (1931) 12 P. L. T. 556, 32 Cr. L. J. 739, [1931] AIR (P) 337.

¹⁸ *Madra*, [1946] Nag. 326.

¹⁹ *Madaree Chowkeedar*, (1865) 3 W. R. (Cr.) 2.

²⁰ *Privett*, (1846) 2 C. & K. 114; *Handley*, (1842) Car. & M. 547; *Morjit's Case*, (1816) Russ. & Ry. 307.

of does not constitute theft.²¹ The dispute as to ownership must be bona fide and not a mere pretence.²² Mere assertion of a fair claim of property or right, or the mere existence of a doubt, is not enough. The claim to property must be proved by evidence to be fair and good.²³ It is the duty of the Court to determine what was the intention of the offender, and if it arrives at the conclusion that he was not acting in the exercise of a bona fide claim of right then it cannot refuse to convict him.²⁴ Where in asserting his right to some property which a person believes to be good, he does something which he knows he has no right to do, e.g. by taking the law in his own hands and removing such property from the possession of his opponent who claims the property himself, he may be guilty of theft.²⁵ If there be any fair pretence of property or right in the accused, or if it be brought into doubt at all, the Court should direct an acquittal.¹ In a case of alleged theft of fish from a tank which the accused claimed to have been in their possession and not in the complainant's, it was held that if the accused asserted a claim to the thing alleged to have been stolen by him, he should not be convicted unless the Court was in a position to say that the claim was a mere pretence.² It may be safely laid down as a general proposition, though not as a universal rule, that in cases where the alleged theft consists in the removal of crops grown on land, the most vital question to be investigated is as to which of the parties had grown the crops, and a decision on this point will in the majority of cases enable the Court to come to a definite conclusion as to whether the claim of the accused is made in good faith or is a mere pretence. Hence, a person who removes crops from land which is in the possession of another, knowing that the crops have been raised by the latter, cannot escape liability for theft by merely proving that he has a bona fide claim of title to the land upon which the crops were grown.³ Where civil suits were pending regarding a field and the accused who was in possession of the field, removed the crops grown on it, it was held that he could not be said to have any dishonest intention when he removed the crops and was not guilty of theft.⁴ Where the main question of dispute between two parties was whether the sale of a *mahal* carried within its ambit the sale of certain trees and the servant of one of the parties cut and removed certain trees under his master's orders under the *bona fide* belief that they belonged to his master,

²¹ *Bhicaji*, (1862) Unrep. Cr. C. 22; *Ravi-shankar v. Savailal*, (1925) 28 Bom. L. R. 89, 27 Cr. L. J. 448, [1926] AIR (B) 163; *Khetter Nath Dutt v. Indro Jalia*, (1871) 16 W. R. (Cr.) 68, [78]; *Mahomed*, (1902) 2 S. D. S. S. C. 378; *Algarasawmi Tevan*, (1904) 28 Mad. 304; *Chaithan Charan Maity v. Kala Chand Sharmasta*, (1906) 10 C. W. N. 238n; *Arfan Ali*, (1916) 44 Cal. 66; *Mati Lal De*, (1935) 37 Cr. L. J. 1; *Sadasiva Singh*, (1917) 18 Cr. L. J. 507, [1917] AIR (P) 40; *Shib Das*, (1913) 14 P. L. R. 1109, 14 Cr. L. J. 659; *Lakanaw*, (1916) 2 U. B. R. 124, 18 Cr. L. J. 355, [1917] AIR (UB) 2; *Madhusudan Das*, (1921) 25 Cr. L. J. 546, [1922] AIR (P) 12; *Srinivasulu Reddiar v. Govinda Goundan*, (1922) 44 M. L. J. 188, 17 L. W. 104, [1923] M. W. N. 182, 24 Cr. L. J. 254, [1923] AIR (M) 239; *Bodh Kishen Goala*, (1923) 4 P. L. T. 608, 24 Cr. L. J. 454, [1924] AIR (P) 125; *Harnam Singh*, (1923) 5 Lah. 56; *Tukaram*, (1923) 25 Cr. L. J. 349, [1924] AIR (N) 34; *Sobha Mahton*, (1926) 8 P. L. T. 79, 28 Cr. L. J. 72, [1927] AIR (P) 130; *Ismail*, (1926) 27 P. L. R. 635, 27 Cr. L. J. 1023, [1926] AIR (L) 683; *Ziba*, (1927) 28 Cr. L. J. 949, [1927] AIR (N) 404; *Abdul*, (1928) 10 P. L. T. 57, 30 Cr. L. J. 511, [1929] AIR (P) 86; *Iswar Panda*, (1930) 12 P. L. T. 577, 32 Cr. L. J. 617, [1931] AIR (P) 99; *Perumal Konan*, [1940] M. W. N. 873, (1940) 52 L. W. 347, 42 Cr. L. J. 263 (2), [1941] AIR (M) 71 (2); *Advocate General, Orissa v. Bhikhari Charan*, [1940] P. W. N. 306, (1940) 41 Cr. L. J. 509, [1940] AIR (P) 588; *Ramzani*, (1943) 19 Luck. 399.

²² *Hari Bapuji*, (1897) Cr. R. No. 24 of 1897,

Unrep. Cr. C. 920; *Gudar*, (1932) 9 O. W. N. 1196, 34 Cr. L. J. 547, [1933] AIR (R) 28; *Bhurasing*, (1934) 29 S. L. R. 121, 36 Cr. L. J. 1310; *Nataraja Mudaliar v. Deenanani Ammal*, [1941] M. W. N. 463 (2), (1941) 42 Cr. L. J. 896, [1941] AIR (M) 674; *Harihar Narain Singh v. Bankley Singh*, [1944] P. W. N. 276.

²³ *Nassib Chowdhry v. Nannoo Chowdhry*, (1871) 15 W. R. (Cr.) 47; *Runnoo Singh v. Kali Churn Misser*, (1871) 16 W. R. (Cr.) 18; *Huris Chundra Das v. Bolai Audhicaree*, (1913) 16 W. R. (Cr.) 65 [75]; *Madhab Hari*, (1887) 15 Cal. 390n; *Bhagwat Saran Misir*, (1916) 14 A. L. J. R. 399, 17 Cr. L. J. 295, [1915] AIR (M) 196; *Madan Lal*, [1930] A. L. J. R. 457, 31 Cr. L. J. 1222.

²⁴ *Budh Singh*, (1879) 2 All. 131, referred to in *Sobalsang*, (1902) 4 Bom. L. R. 936, 937; *Pandita v. Rahi-Mulla Akundo*, (1900) 27 Cal. 501.

²⁵ *Rangasawmy*, (1927) 6 Ran. 54; *Ghulam Mohammad*, (1933) 34 P. L. R. 276, 34 Cr. L. J. 843, [1933] AIR (L) 481.

¹ 2 East P. C. 659. See *Harendra Narayan Das v. Ramjan Khan*, (1913) 41 Cal. 433.

² *Dhirendra Mohan Gossain*, (1909) 14 C. W. N. 408, 11 Cr. L. J. 248; *Hari Bhuiamali*, (1905) 9 C. W. N. 974, 2 Cr. L. J. 836; *Ram Lal Singh v. Hari Charan Ahir*, (1909) 37 Cal. 194.

³ *Abdul*, (1928) 30 Cr. L. J. 511, 10 P. L. T. 57, [1929] AIR (P) 86; *Bhan Prasad Chowdhury v. Brahamdeo Chowdhury*, (1927) 9 P. L. T. 375, 28 Cr. L. J. 760, [1927] AIR (P) 385.

⁴ *Jhumak Rai*, (1940) 22 P. L. T. 214, 42 Cr. L. J. 339, [1941] AIR (P) 369.

it was held that the servant could not be convicted of theft.⁵

A went into possession of the disputed land in 1906. B, the complainant, obtained a decree for possession against A and obtained actual possession of the land in September, 1917. Before the execution of the decree, A grew paddy but reaped it on December 14, 1917. It was held that A having been a trespasser on the land at the time the paddy was grown, he had no right to go upon the land after the complainant had obtained possession and removed the paddy. Consequently, when the paddy was cut, A had no right to remove it and there was no bona fide dispute.⁶ Where the accused, acting as tenants, had planted paddy crops on certain land of which possession was given under a civil Court decree to the claimant, and the accused removed the crops planted by them believing they had a right to the same, it was held that they had acted under a claim of right and were not guilty of theft.⁷ Where the accused were convicted of theft for having cut and removed crops which had been sown by the complainant, and in appeal the accused raised the point that the crops stood upon fields which were in the cultivatory possession of themselves, it was held that it was immaterial whether the complainant had or had not good title to cultivate the fields; that it was sufficient that he sowed the crops; and that the accused were rightly convicted.⁸ Where the accused snatched his cooking utensil from the hands of a civil Court bailiff, who had attached it, and asserted that he did so as the utensil was exempt from attachment under s. 60, Civil Procedure Code, it was held that he was not guilty of theft.⁹ Where the accused took away his cattle from a pond where they were taken by a person, who had no right to take them, it was held that he was not guilty of theft.¹⁰

Mistake.—If a person takes another man's property, believing, under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss.¹¹ It is not theft if a person acting under a mistaken notion of law, and believing that certain property is his, and that he has the right to take the same, until payment of the balance of some money due to him from the vendor, removes such property from the possession of the vendee.¹²

Stealing one's own property.—The owner of movable property cannot be found guilty of theft of the property. A person can be convicted of stealing his own property if he takes it dishonestly from another [*vide* *ills. (j) and (k)*].¹³ If A delivers goods to B to keep for him, and then steals them, with intent to charge B with the value of them, this would be felony in A. So if A having delivered money to his servant to carry to some distant place, disguises himself and robs the servant on the road, with intent to charge him, this would be robbery in A.¹⁴ Where the accused took a bundle belonging to himself, which was in the possession of a constable and for which the constable was accountable, it was held that the constable had special property in it and the accused was therefore guilty of theft.¹⁵ But if there is no dishonest intention it will not be theft [*vide* *ill. (i)*]. Thus, retaking of cattle unlawfully distrained will not amount to theft.¹⁶ If goods have been seized by the sheriff under an execution levied on the property of some person other than the owner of the goods, the owner, by taking possession of them, cannot be guilty of larceny.¹⁷

Liability of servant for act done at master's bidding.—A servant is not guilty of the offence of theft when what he does is at his master's bidding, unless it is shown that he participated in his master's knowledge of the dishonest nature of the act. There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred.¹⁸ Where a servant, knowing perfectly well that his master is

⁵ *Ramzani*, (1943) 19 Luck. 399.

⁶ *Abinash Chandra Sarkar*, (1918) 28 C. L. J. 120, 23 C. W. N. 385, 20 Cr. L. J. 38.

⁷ *Sit Pein*, (1923) 25 Cr. L. J. 809, [1924] AIR (R) 72.

⁸ *Muhammad Ata* (1921) 19 A. L. J. R. 961, 23 Cr. L. J. 402, [1942] AIR (A) 168 (1).

⁹ *Lunidomal*, (1915) 9 S. I. R. 75, 16 Cr. L. J. 715, [1915] AIR (S) 25.

¹⁰ *Chittiboyina v. Danduboyina Narappa*, [1939] M. W. N. 470, 40 Cr. L. J. 908.

¹¹ *Nagappa*, (1890) 15 Bom. 344; *Jay Mahto*, (1940) 22 P. L. T. 694, 42 Cr. L. J. 293, [1941]

AIR (P) 383.

¹² *Hamid Ali Bepari*, (1925) 52 Cal. 1015.

¹³ *Lakshmana Goundan*, (1926) 52 M. L. J. 143, 28 Cr. L. J. 248, [1927] AIR (M) 343.

¹⁴ 1 Hale P. C. 513. See *Wilkinson's Case*, (1821) Russ. & Ry. 470.

¹⁵ *Shekh Husan*, (1887) Cr. R. No. 36 of 1887, Unrep. Cr. C. 343.

¹⁶ *Yagamurthi Thevan*, (1888) 1 Weir 422.

¹⁷ *Thomas Knight*, (1908) 1 Cr. App. R. 186.

¹⁸ *Hari Bhumali*, (1905) 9 C. W. N. 974, 2 Cr. L. J. 836.

removing the goods of another without even a pretence of right, assists him in doing so, he acts dishonestly and is equally guilty along with his master of the offence of theft.¹⁹

Cases.—Dishonest intention.—The accused was the brother of a farmer or contractor of a public ferry. He seized a boat belonging to the complainant while conveying passengers across the creek which flowed into the river at a point within three miles from the public ferry. His intention was apparently to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and thereby increase his brother's income derived from fees to be paid by passengers crossing the creek. The accused had no reason to believe that he was justified in seizing the boat. It was held that the accused was guilty of theft, though it was not his intention to convert the boat to his own use, or deprive the complainant permanently of its possession.²⁰ Where the accused was found to have loosened the complainant's cattle at night from a cattle pen, and to have driven them to the pound with the object of sharing with the pound-keeper the fees to be paid for their release, it was held that the offence committed was that of theft.²¹ Where the accused removed cattle from the pound where they were secured, without paying the legitimate fee, it was held that he had the dishonest intention of saving himself the fee, and his act amounted to theft.²² Accused entered into an agreement with the complainant that the latter should advance him money up to a certain sum on the hypothecation of goods to be deposited by him as security. The goods were deposited in a godown, and under the agreement accused was entitled to take advances up to seventy per cent. of the value of the goods. Some time afterwards, the accused removed some of the hypothecated goods from the godown. It was held that the removal of the goods not having been proved to be honest, the accused was guilty of theft.²³

The accused, an employee under a steamer company, whose business it was to check the tickets of passengers, asked to see the complainant's ticket, but the complainant not having got one, the accused took possession of his umbrella as security that he might be compelled to pay his fare, it was held that there being no suggestion that the accused intended either to get any wrongful gain to himself by compelling payment of the fare, or to cause any wrongful loss to the complainant who was bound to pay his fare, a conviction for theft could not be made.²⁴ Where under a hire purchase agreement entered into between Messrs. Singer & Co. and the complainant in respect of a sewing machine, it was provided by one of its clauses that the company or their employees would be entitled to seize and remove the machine or its parts on the complainant defaulting in payment of monthly rents agreed upon, and where the complainant, who was in arrears in respect of the rents for several months, made a payment, on a certain date, of rent for one of those months, but the accused persons who were employees of the company, overlooking that payment, removed parts of the complainant's machine, it was held that there was no dishonest intention on the part of the accused to constitute theft.²⁵ Where property of the accused was distrained for an amount greater than the amount of arrears due, and the accused removed it, it was held that his act did not amount to theft as there was no dishonest intention.¹

Removal of debtor's property by his creditor to enforce payment of debt.—A creditor who took movable property out of his debtor's possession, without his consent, with the intention of coercing him to pay his debt, committed the offence of theft. The Court said: "We think that an intention on the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose, has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of s. 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of his alleged debtor, and would tend to a state of things

¹⁹ *Barhamdeo Rai*, (1925) 7 P. L. T. 272, 26 Cr. L. J. 1559.

²⁰ *Nagappa*, (1890) 15 Bom. 344.

²¹ *Paryag Rai v. Arju Mian*, (1894) 22 Cal. 139.

²² *Veerasami Naicken*, (1930) 82 Cr. L. J. 354, [1930] M. W. N. 529, 33 L. W. 205.

²³ *Kartikeswar Roy v. Bansidhar Byas*, (1923)

25 Cr. L. J. 222, [1923] AIR (C) 594.

²⁴ *Matabar Shekh*, (1910) 14 C. W. N. 936, 11 Cr. L. J. 444; *Daulat Shaw*, (1921) 2 P. L. T. 583, 22 Cr. L. J. 673, [1921] AIR (P) 390.

²⁵ *Mohammed Abdul Khoyer v. Asgar Khan*, (1933) 58 C. L. J. 434, 35 Cr. L. J. 761.

¹ *Muniswami Reddi*, [1934] M. W. N. 889.

in which every man might, if strong enough, take the law into his own hands."² Where the accused unyoked the bullocks belonging to the complainant and took them away on the ground that the complainant's brother owed him Rs. 20 and suggested permission of the complainant to the act, but adduced no evidence, it was held that even if the complainant offered no resistance to the taking through fear of opposing the accused it was dishonest taking which was covered by the provisions of this section.³ Where the accused who was the contractor for payment of grazing dues seized a camel belonging to the complainant in order to put pressure on him to realise the due, it was held that he deprived the complainant of the possession of the animal and was guilty of theft though there was no intention to deprive the owner permanently of the animal.⁴ The complainant pledged some fishing nets with the accused. The nets remained in possession of the complainant, but the accused was at liberty to sell the goods if within three years the debt was not paid. The debt was not paid within the stipulated time and the complainant sold away one of the nets pledged. The accused, in the absence of the complainant, removed the nets. It was held that she could not be convicted of theft as it might fairly be contended that she bona fide supposed that she was justified in her action.⁵ Where the accused, a ship-owner, alleging that money was due to him on account of certain transactions with the complainant, seized the complainant's goods which were in transit to another ship-owner and detained them, it was held that he was guilty of theft.⁶ But where a creditor appropriated payment, which the debtor made under a misapprehension, towards a time-barred debt, he was held not guilty of this offence.⁷

Removal by pledgee of property pledged.—The complainant pledged some fishing nets with his creditor, accused No. 1. The nets remained in possession of the debtor as security for the debt, and the creditor was at liberty to sell the goods if within three years the debt was not paid. On the expiry of three years, the accused took away the nets from the complainant's possession as the debt remained unpaid. It was held that the accused could not be convicted of theft as it might fairly be contended that they bona fide supposed that they were justified in their act.⁸ The complainant borrowed a sum of money from the accused's brother, pledged to him a cart and two bullocks, and passed a rent note agreeing to pay rent for the use of the cart and bullocks. The accused demanded the rent due to his brother, and removed the cart and bullocks. The accused was thereupon charged with the offence of theft, but he was held not guilty.⁹

Obtaining cigarette from automatic box.—Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the centre of one of its sides was a protecting button or knob. The box was so constructed that upon a penny piece being dropped into the slit and the knob being pushed in, a cigarette would be ejected from the box on to a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies"; "To obtain an Egyptian Beauties cigarette place a penny in the box and push the knob as far as it will go." The accused went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc, about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other accused. It was held that the accused were guilty of larceny.¹⁰

2. 'Any moveable property'.—'Moveable property' is defined in s. 22, *supra*. Explanations 1 and 2 state that things attached to the land may become moveable property by severance from earth, and that the act of severance may of itself be theft

² *Sri Churn Chungo*, (1895) 22 Cal. 1017, 1022, F.B., overruling *Prosonno Kumar Patra v. Uday Sant*, (1895) 22 Cal. 669; *Agha Muhammad Yusuf*, (1895) 18 All. 88; *Bakhtawar*, (1923) 25 Cr. L. J. 650, [1925] AIR (L) 131; *Ganpat Krishnaji*, (1930) 32 Bom. L. R. 351, 31 Cr. L. J. 975, [1930] AIR (B) 167; *Bhagya*, [1938] N. L. J. 302; *H. J. Ransom v. Triloki Nath*, (1942) 17 Luck. 663.

³ *Munusawmy Pillai*, (1910) 4 C. L. R. 19.

⁴ *Abdul Khaliq Khan*, (1941) 43 P. L. R. 179, 42 Cr. L. J. 625, [1941] AIR (L) 221.

⁵ *Dhaklu*, (1902) 4 Bom. L. R. 56; (1880) 1 Weir 405; *Nga Shwe Meik*, (1900) 1 U. B. R. (1897-1901) 339.

⁶ *U. Si Noor Mahomed*, (1883) Weir (3rd Edn.) 246.

⁷ *Musammatt Piari Dulaiya*, (1904) 1 A. L. J. R. 508, 1 Cr. L. J. 803.

⁸ *Dhaklu*, (1902) 4 Bom. L. R. 56.

⁹ *Waman Govind Sathye*, (1931) Crim. Rev. No. 228 of 1931, decided by Patkar and Barlee, JJ., on October 14, 1931 (Bom. Unrep.).

¹⁰ *Hands*, (1887) 16 Cox. 188.

(*vide ill. (a)*). Thus, a thief who severs and carries away property is put in exactly the same position as if he carried away what had previously been severed. A sale of trees belonging to others and not cut down at the time of sale does not constitute theft.¹¹

It is not necessary that the thing stolen must have some appreciable value. Theft may be committed with regard to anything over which a person can possess the right of property. But an abuse of this section is guarded against by s. 95, which "will prevent the law of theft from being abused for the purpose of punishing those venial violations of the right of property which the common sense of mankind readily distinguishes from crimes, such as the act of a traveller who tears a twig from a hedge, of a boy who takes stones from another person's ground to throw at birds, of a servant who dips his pen in his master's ink".¹² Where the accused took a fake rupee from the pocket of a person, it was held that he was guilty of theft because although the rupee had no value as a coin yet it had some value as a piece of metal of which it was composed.¹³ A currency note was cancelled by tearing off certain parts, but the further process of cutting it into pieces and then destroying it by burning remained. It was held that such a note though cancelled was not *res nullius* and could be the subject-matter of theft. There is a clear distinction between intention to destroy or abandon and actual destruction or abandonment of property. If the owner of property intending to destroy or abandon property, hands it over to a third person for the purpose of destruction he still maintains his rights as the owner of the property, and taking it out of his possession is theft and improper use of it is breach of trust.¹⁴

Any part of earth whether it be stones or clay or sand or any other component when severed from the earth is movable property and is capable of being the subject of theft.¹⁵

In animals *feræ naturæ* there is no absolute property. There is only a special or qualified right of property—a right *ratione soli* to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil. It was so held in the case of rabbits¹⁶ and of grouse.¹⁷ But before there can be a conviction for larceny for taking anything not capable in its original state of being a subject of larceny, as, for instance, things fixed to the soil, it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel, and so is brought within the law of larceny. If a man kills a rabbit and carries it away at once it is not larceny. It will not be larceny even if he kept it for sometime on the land of the person on whose grounds it is killed, provided the whole transaction can be regarded as a continuous one.¹⁸ Mere cessation of physical possession for a short time does not break the continuity of the whole act. But see *ill. (a)*.

Cases.—Earth and stone.—Cart-loads of earth,¹⁹ or stones,²⁰ carried away from the land of another, are subjects of theft. But not clods of earth worth six pies taken from a channel-bed belonging to Government.²¹ A house cannot be the subject of theft; but there may be a theft of its materials.²²

Crops.—The real test in a case of an alleged theft of crops grown on land is as to which of the parties had grown the crops. Where the complainant is shown to have grown the crops, the accused cutting and removing the same would be guilty of theft.²³ Generally speaking in the case of theft of crops, the question who grew the crops is the first matter to look to, but it is not the only thing in all cases. The question of title though secondary is relevant and so is the state of evidence as regards past possession.²⁴ Growing crops are not movable property. A person who removes such crops attached

¹¹ *Balos alias Hussain Sahib*, (1882) 1 Weir 419.

¹² Note N, p. 162.

¹³ *Francis Manikam*, Criminal Appeal No. 342 of 1910, decided on November 3, 1910, by Batchelor and Rao, JJ. (Unrep. Bom.).

¹⁴ *Moti*, (1923) 17 S. L. R. 260, 26 Cr. L. J. 189.

¹⁵ *Suri Venkatappayya Sastri v. Madhula Venkanna*, (1904) 27 Mad. 531, F.B., overruling *Kotayya*, (1887) 10 Mad. 255, and following *Shivram*, (1892) 15 Bom. 702.

¹⁶ *Blades v. Higgs*, (1865) 11 H. L. C. 621.

¹⁷ *Rigg v. Earlsdale*, (1857) 1 H. & N. 923.

¹⁸ *Townley*, (1871) L. R. 1 C. C. R. 315.

¹⁹ *Shivram*, (1891) 15 Bom. 702.

²⁰ *Suri Venkatappayya Sastri v. Madhula Venkanna*, (1904) 27 Mad. 531, F.B.

²¹ *Public Prosecutor v. Tsandra Ramaswamy*, (1917) 18 Cr. L. J. 632.

²² *Natar Singh*, (1904) U. B. R. (1904-06) (P. C.) 7, 1 Cr. L. J. 558.

²³ *Kailash Singh*, [1941] P. W. N. 601, (1941) 22 P. L. T. 765, 43 Cr. L. J. 294, [1941] AIR (P) 613.

²⁴ *Harihar Narain Singh v. Bankey Singh*, (1944) 46 Cr. L. J. 83, [1944] AIR (P) 274.

by a village Court, which has only power to attach moveables, is not guilty of theft.²⁵ Where certain growing crops were attached in execution of a decree by beat of drum without affixing a copy of the warrant of attachment on the land and another copy on the outer door of the house of the judgment-debtor, as provided by O. XXI, r. 44, Civil Procedure Code, and the accused removed the crops with the consent of the judgment-debtor, it was held that the accused were not guilty of theft as the attachment was irregular and the crops had not passed out of the possession of the judgment-debtor.¹ Where the auction-purchaser at a rent execution sale of a holding took delivery of possession and subsequently the persons who were in possession cut and removed certain bamboo clumps standing on the land, it was held that when the auction-purchaser acquired the land he acquired the bamboos too and the accused were guilty of theft.²

If a person trespasses on land in the possession of another and sows paddy on it that does not entitle him to property in the paddy that results from the sowing; and if the person in possession reaps and removes such paddy he does not thereby commit theft.³ Where a crop on a land was raised by the lessee of the accused after the court-sale, and delivery of the crop was not ordered by the Court, the removal of the crop could not be said to be dishonest and a conviction of the accused for theft was unsustainable.⁴

Trees.—Standing teak trees are immovable property.⁵ But as soon as the trees are cut with the intention of removing them dishonestly, theft is committed.

Where a mortgagee, who is in possession of trees under the terms of a mortgage deed without having a right to cut and appropriate them, cuts and appropriates the trees, he does not commit theft, because he has to recoup the owner of his loss under s. 76 of the Transfer of Property Act.⁶

Salt.—Salt spontaneously formed on the surface of a swamp appropriated by Government,⁷ or in a creek under the supervision of Government,⁸ is a subject of theft; but not that which is formed on a swamp not guarded by Government.⁹

Boat.—A boat may be the subject of theft.¹⁰

Valuable security.—The halves of currency bank-notes, sent in a letter, are goods; and a person who steals them is indictable for larceny.¹¹ Similarly, any valuable security may be the subject of theft.¹²

Human body.—A human body, whether living or dead, is not movable property and therefore stealing a corpse is not theft.¹³ But a different principle would apply in the case of human bodies, or portions of such, or mummies, preserved in museums or scientific institutions. The English law is also to the same effect.

Gas.—A having contracted with a gas company to consume gas and pay according to meter, in order to avoid paying for the full quantity of gas consumed introduced into the entrance pipe another pipe for the purpose of conveying the gas to the exit pipe of the meter, and so to the burners, for consumption without passing through the meter itself. The entrance pipe was the property of A, but he had not by his contract any interest in the gas until it passed through the meter. It was held that he was guilty of larceny.¹⁴ A stole gas for the use of a manufactory by means of a pipe which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day, and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas. It was held that as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings, but that even if the

²⁵ *Nallamadan Chettiar*, (1929) 31 L. W. 719, 58 M. L. J. 509, [1930] M. W. N. 352, 31 Cr. L. J. 1196, [1930] AIR (M) 509.

¹ *Ram Sakal Singh*, (1930) 32 Cr. L. J. 437.

² *Jagmohan Singh*, (1932) 13 P. L. T. 519, 34 Cr. L. J. 355, [1932] AIR (P) 344.

³ *Nga Hmyin*, (1906) 3 L. B. R. 199, 4 Cr. L. J. 465.

⁴ *Venkatasubbarayadu*, [1940] M. W. N. 869, (1939) 52 L. W. 346.

⁵ *U Ka Doe*, (1929) 8 Ran. 13.

⁶ *Tarachand Sah*, [1940] P. W. N. 778,

(1940) 41 Cr. L. J. 795, [1940] AIR (P) 701.

⁷ *Tamma Ghanaya*, (1881) 4 Mad. 228; *Fakira*, (1872) Unrep. Cr. C. 66.

⁸ *Mansang Bhavsang*, (1873) 10 B. H. C. 74.

⁹ *Government Pleader*, (1882) 1 Weir 412.

¹⁰ *Meher Dowalia*, (1871) 16 W. R. (Cr.) 53 [63].

¹¹ *Mead*, (1831) 4 C. & P. 535.

¹² *Kashiraj Martand*, (1870) Cr. R. of 1870, Unrep. Cr. C. 43.

¹³ *Ramadhin*, (1902) 25 All. 129.

¹⁴ *White*, (1858) 6 Cox 213.

pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction.¹⁵

Water.—Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny.¹⁶ The Calcutta High Court has held that water running freely from a river through a channel made and maintained by a person is not a subject of theft.¹⁷ The Madras High Court¹⁸ has ruled that running water in irrigation channels is a subject of theft. It has distinguished the Calcutta case on the ground that there water was not reduced into possession. Similarly, the Allahabad High Court has held that water when conveyed in pipes and so reduced into possession can be the subject of theft.¹⁹

Animals.—In order to render an animal *feræ naturæ* the property of any person there must be a complete capture, the result of which is to reduce the animal completely into possession. Mere pursuit short of capture will not do, and so long as it is possible for the animal to escape it cannot be said that there is such a reduction into possession as makes the animal property of the pursuer.²⁰

Bull.—A bull dedicated to an idol and allowed to roam at large remains the property of the trustees of the temple, and can become the subject of theft;²¹ or mischief²² but not a bull set at large in accordance with religious usage.²³

Peacock.—A peacock tamed but not kept in confinement is the subject of theft.²⁴

Fish.—Fish in an ordinary open irrigation tank,²⁵ or in a tank not enclosed on all sides but dependent on the overflow of a neighbouring channel;¹ or in a public river or creek, the right of fishing in which has been let out,² are *feræ naturæ* and not subject of theft. Fish in an enclosed tank are restrained of their natural liberty and liable to be taken at any time according to the pleasure of the owner, and are, therefore, the subject of theft.³ The test of possession is, whether the fish could escape. If they are unable to escape, they become the subject of theft,⁴ otherwise not.⁵

Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny.⁶

But *chanks* (popularly included among shell-fish, but really large molluscs) are subject of theft as licenses to gather them are granted by the Sovereign.⁷ The word 'fish' is, according to an English case, not confined to vertebrates but includes a wrinkle. Shell-fish are included in the word 'fish'.⁸

Cattle.—The removal of animals grazing in open lands where the owner has driven them is theft.⁹ The illegal seizing of cattle and taking them to the pound

¹⁵ *Firth*, (1869) L. R. 1 C. C. R. 172.

¹⁶ *Perens v. O'Brien*, (1883) 11 Q. B. D. 21.

¹⁷ *Sheikh Arif*, (1908) 35 Cal. 437.

¹⁸ *Chockalingam Pillai*, [1912] M. W. N. 119, 18 Cr. L. J. 181.

¹⁹ *Mahadeo Prasad*, (1928) 45 All. 680.

²⁰ *Raghunandan*, (1912) 15 O. C. 183, 13 Cr. L. J. 556.

²¹ *Nalla*, (1887) 11 Mad. 145. In this case the Court confuses the two terms *feræ bestia* and *res nullius*. The Magistrate regarded the bull a *res nullius*. The High Court held it was not and declined to interfere. The conviction should really have been for theft.

²² *Abdul Qayum*, [1946] A. L. J. 27.

²³ *Romesh Chunder Sannyal v. Hiru Mondal*, (1890) 17 Cal. 852; *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348.

²⁴ *Nanhe Khan*, (1897) 17 A. W. N. 41.

²⁵ *Subba Reddi v. Munshoor Ali Saheb*, (1900) 24 Mad. 81, (1878) 1 Weir 384; *Haji Changal v. Basarmal*, (1911) 5 S. L. R. 122, 13 Cr. L. J. 22. If the water in an open irrigation tank has fallen to such an extent that both the supply and distribution channels are dry, the freedom of fish is circumscribed and the catching of such fish without the consent of Government would be theft: *Subbian Servai*, (1911) 36 Mad. 472.

¹ *Maya Kam Surma v. Nichala Katani*,

(1888) 15 Cal. 402.

² *Bhagiram Dome v. Abar Dome*, (1888) 15 Cal. 388; *Hurimoti Moddock v. Deno Nath Malo*, (1873) 19 W. R. (Cr.) 47; *Revu Poithadu*, (1882) 5 Mad. 390; *Elahi Buz*, (1936) 17 P. L. T. 189, [1936] P. W. N. 153, 37 Cr. L. J. 452.

³ *Shaikh Adam*, (1886) 10 Bom. 193; *Sreenibash Mahata*, (1928) 29 Cr. L. J. 501.

⁴ *Manchu Paidigadu v. Kadimsetti Tammayya*, [1914] M. W. N. 168, 15 Cr. L. J. 77; *Nokolo Behara*, (1927) 51 Mad. 333; *Subbian Servai*, (1911) 36 Mad. 472; *Krishna Reddi v. Muniappa Reddi*, [1942] 2 M. L. J. 556, [1942] M. W. N. 728 (1), 55 L. W. 696, 44 Cr. L. J. 173, [1943] AIR (M) 34.

⁵ *Kaloo Khan Adya Nath Haldar*, (1930) 35 C. W. N. 455; 32 Cr. L. J. 572; *Thakur Jolhan Singh*, (1938) 14 Luck. 322.

⁶ *William Mallison*, (1902) 20 Cox 204.

⁷ *Annakumaru Pillai v. Muthupayal*, (1904) 27 Mad. 551; *Parker v. Lord Advocate*, [1904] A. C. 364.

⁸ *Leavett v. Clark*, (1915) 25 Cox 44.

⁹ *Aradhun Mundul v. Myan Khan*, (1875) 24 W. R. (Cr.) 7; *Karsan Bapu*, (1902) 4 Bom. L. R. 626; *Kasim*, (1879) P. R. No. 19 of 1879; *Nga Thein O*, (1893) 1 U. B. R. (1892-1896) 238; *Paw Din*, [1938] Ran. 63; *Dayal*, [1943] O. W. N. 202, (1943) 44 Cr. L. J. 640, [1943] AIR (O) 280.

is not theft.¹⁰ The Nagpur High Court has held that the taking for the purposes of this section must be "dishonest" within the meaning of s. 24 of the Code. It is not necessary that the taking must cause wrongful gain to the taker; it will suffice for the applicability of the section if it causes wrongful loss to the owner.¹¹ A person who steals cattle which are let loose by the owner with a view to their going to drink water at a river, commits theft.¹² Where certain cattle got scattered from the herd at the time of a cheetah scare in a forest, any person who sees such animal straying anywhere and takes it, cannot be said to do so with a dishonest intent and would not be guilty of theft. But if the person who takes it subsequently retains it intending to treat it as his own, then he will be guilty of criminal misappropriation.¹³

Carcass.—Where a person kills a wild animal on the property of another the carcass does not belong to the killer but to the proprietor of the property, and the latter, either himself or by his duly authorized agent, is entitled to demand and, if refused, seize the carcass from the possession of the killer: and such persons as help him to exercise his right are doing no wrong; but as against any person other than the proprietor of the estate or his authorised agent or those lawfully helping the proprietor or his agent the killer has a right to retain possession of the carcass.¹⁴ Where a man buried the carcass of a bullock suspecting it to have been poisoned and another person dug it up and carried it away, it was held that no theft was committed, because property as well as possession in it were abandoned.¹⁵

Pigeons.—If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, and a party come in the night and steal them out of these boxes, this is larceny.¹⁶ Similarly, pigeons kept in an ordinary dove-cote, having liberty of ingress and egress at all times by means of holes at the top, may be the subjects of larceny.¹⁷

Partridges.—Partridges, hatched and reared by a common hen, while they remain with her, and from their inability to escape are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop or otherwise, but allowed to wander with her brood about the premises of her owner.¹⁸

3. 'Out of the possession of any person'.—No definition is given in the Code of the word 'possession', though it is said that when property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession (s. 27). Stephen¹⁹ says: "A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need." The authors of the Code remark: "We believe it to be impossible to mark with precision, by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists, and about which the language of lawyers and of the multitude would be the same. It will hardly be doubted, for example, that a gentleman's watch lying on the table in his room is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey, and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession; and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawnbroker as a pledge. But between these extreme cases lie many cases in which it is difficult to pronounce, with confidence, either that property is or that it is not in a person's possession... For the purpose of preventing any difference of opinion from arising in cases likely to occur very often, we have laid down a few rules... which we believe to be in accordance with the general

¹⁰ *Jhaman Lal*, (1906) 10 C. W. N. 228n.

¹¹ *Madra*, [1946] Nag. 326.

¹² *Lakshmya*, (1878) Unrep. Cr. C. 136.

¹³ *Venkataswami*, [1943] M. W. N. 580, (1943) 56 L. W. 547, [1943] 2 M. L. J. 334, (1943) 45 Cr. L. J. 220, [1944] AIR (M) 26.

¹⁴ *Artu Rautra*, (1924) 3 Pat. 549.

¹⁵ (1869) 4 M. H. C. (Appx.) 30, 1 Weir 384.

¹⁶ *Brooks*, (1829) 4 C. & P. 131.

¹⁷ *Cheafor*, (1851) 5 Cox 367.

¹⁸ *Shickle*, (1868) L. R. 1 C. C. R. 158; *Cory*, (1864) 10 Cox 23; *Head*, (1857) 1 F. & F. 350; *Garnham*, (1860) 2 F. & F. 347.

¹⁹ Digest of Criminal Law; Art. 306.

sense of mankind as to what shall be held to constitute possession (s. 27)...Much uncertainty will still remain. This we cannot prevent...The provision contained in clause 61 (s. 72) will, we think, obviate all the inconveniences which might arise from doubts as to the exact limits which separate theft from misappropriation and from breach of trust. The effect of that clause will be to prevent the judges from wasting their time and ingenuity in devising nice distinctions. If a case which is plainly theft comes before them, the offender will be punished as a thief. If a case which is plainly breach of trust comes before them, the offender will be punished as guilty of breach of trust. If they have to try a case, which lies on the frontier, one of those thefts which are hardly distinguishable from breaches of trust, or one of those breaches of trust which are hardly distinguishable from theft, they will not trouble themselves with subtle distinctions, but, leaving it undetermined by which name the offence should be called, will proceed to determine what is infinitely of greater importance, what shall be the punishment."²⁰

The property must be in the possession of the prosecutor.²¹ Thus, there can be no theft of wild animals, birds, or fish while at large, but there can be a theft of tamed animals. Similarly, where property dishonestly taken belonged to a person who was dead, and therefore in nobody's possession, or where it is lost property without any apparent possessor, it is not the subject of theft, but of criminal misappropriation (*vide* ill. (g)). Where the owner of bullocks had lost them and could not find them on search and the bullocks were found in the possession of the accused, it was held that they could not be convicted of theft but of criminal misappropriation.²² Where the accused removed some bricks from a heap which had been left lying for eight years, an assumption could be made that the bricks had been abandoned and their removal under the circumstances did not constitute theft.²³ Where certain trees which were the subject of the charge of theft stood on the holding in the possession of the accused, it was held that the charge of theft could not stand because the offence of theft was an offence against possession.²⁴

In a Bombay case it is said that to constitute theft it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title, or even a colour of right, to such property.²⁵ In this case the accused owed the complainant Rs. 60, and during the accused's absence his wife sold his working implements to the complainant for Rs. 25 of the debt. On accused's return he took back the implements against the wish of the complainant's wife, complainant himself not being present. The Magistrate thereupon convicted the accused of theft. But the Sessions Judge referred the case to the High Court on the ground that the offence of theft was not committed because it was not proved that the accused intended to act dishonestly in taking the implements nor was there evidence that he had authorized his wife to give the implements. West, J., said that the complainant held by an apparent title, or at least an assertion of title that was not plainly illusory, and that against even a colour of right a person aggrieved should not take the law into his own hands. The conviction was, therefore, upheld. No doubt the accused made himself liable to a suit for damages by taking the law into his own hands, but as his act in taking away the property was not proved to be a dishonest one within the meaning of ss. 24 and 378 he could hardly be said to have committed theft. In a Calcutta case the accused alleged that certain paddy was grown upon his *jote*, and that he cut and removed it as a matter of right and in an assertion of a bona fide claim to the land. The complainant admitted that there had been a boundary dispute between his landlord and the landlord of the accused, but claimed the paddy as his own as the land was in his possession. It was held that the accused had no justification in taking the law into his own hands, even if he was entitled to hold the land because he was not in actual possession of it.¹ If a

²⁰ Note N, pp. 159, 160, 161.

²¹ *Hossene Sheikh v. Rajkrishna Chatterjee*, (1873) 20 W. R. (Cr.) 80; *Jodha Singh*, (1912) 11 A. L. J. R. 270, 13 Cr. L. J. 298; *Lekhray v. Imambur*, (1911) 5 S. L. R. 130, 12 Cr. L. J. 611.

²² *Nga Shwe Zan*, (1917) 18 Cr. L. J. 300, [1917] AIR (LB) 15.

²³ *Takit Tumi*, (1924) 26 Cr. L. J. 291.

²⁴ *Shikh Garib Haji v. Muchiram Shaha*, (1925) 30 C. W. N. 359, 27 Cr. L. J. 133, [1925]

AIR (C) 1020; *Ram Brich Lal*, (1935) 16 P. L. T. 645, 37 Cr. L. J. 91.

²⁵ *Gangaram Santram*, (1884) 9 Bom. 135. See the judgment of Stevens, J., in *Pandita v. Rahi-Mulla Akundo*, (1900) 27 Cal. 501.

¹ *Pandita v. Rahi-Mulla Akundo*, (1900) 27 Cal. 501; *Jagat Chandra Roy v. Rakhal Chandra Roy*, (1899) 4 C. W. N. 190. See *The Public Prosecutor v. Bullara Gored*, (1897) 1 Weir 426.

person takes a lorry on hire-purchase system from a company which under the agreement has reserved the right of seizing the bus in the event of default in payment of instalments, and default is made, then the company is not entitled to retake possession of the lorry by force or by removing it from the hands of purchaser's servants, who had no authority, express or implied, to give any consent. If the company or its agents do so they are guilty of an offence under this section. The question whether the ownership had or had not passed to the purchaser is wholly immaterial as s. 378 deals with possession and not ownership. The legal possession of the lorry was vested in the purchaser and the company was not entitled to recover possession of the lorry, even though default in payment of any instalments had taken place without the consent of the purchaser. Possession of the driver and the cleaner was the possession of their master and they were not competent to give consent on behalf of their master.²

A bailee entrusted with an article to repair has no lien over it, if he has not completed the repairs within the stipulated time; or when time is not of the essence of the contract, within a reasonable time; and he cannot refuse to part with it, after doing a certain amount of work, till payment for such work, in the absence of an agreement to receive part payment for the work done; and the owner is entitled, in the circumstances, to recover his article without payment for the same. Where an electric kettle was given to a repairer for repairs, and he did not complete the work within the stipulated period, or even within a reasonable time thereafter, and the owner forcibly removed the article from the repairer's shop, without payment of the sum demanded by the latter for work already done to it, it was held that the owner was not guilty of theft, as his intention was not to cause wrongful loss to the repairer, or wrongful gain to himself, but to recover his property after the lapse of a reasonable time.³

There may be theft without an intention to deprive the owner of the property permanently. In this respect the Penal Code differs from the English law. Where, therefore, a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house, it was held that he had committed theft.⁴

It is legally possible for a person to abandon his property. Such property becomes first the property of nobody and then the property of the first person who reduces it into possession. Things of which the ownership has been abandoned are not capable of being stolen.⁵

'Any person.'—For the definition of the word 'person' see s. 11, *supra*. The person from whose possession the property is taken may or may not be the owner of it and may have his possession either rightful or wrongful. Mere physical control of the person over the thing is quite enough (*vide* *ills. (j) and (k)*).

Possession of a trustee,⁶ or a bailee,⁷ or a servant⁸ is a sufficient possession within the definition of theft.

Attachment.—Theft can be committed by the owner of a crop under attachment by removing it.⁹ Here the attachment was by distraint made by a Revenue Court, and the mode and effect of attachment by a civil Court as regards possession was not considered. Hence, where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, it was held that he could not be convicted of theft but of offences under ss. 424 and 403.¹⁰ But where land was attached and taken possession of by the Court under s. 145, Criminal Procedure Code, it was held that the removal of crops standing on the land amounted to theft.¹¹ Proof of dishonest intention is necessary. Such intention is negatived where the removal was in order to save the crop from being washed away,¹² or was in the nature of distraint

² *H. J. Ransom v. Triloki Nath*, (1942) 17 Luck. 663.

³ *Judah*, (1925) 53 Cal. 174.

⁴ *Naushe Ali Khan*, (1911) 34 All. 89.

⁵ *Tan Soon Li v. The Burma Oil Co., Ltd.*, [1941] Ran. 153.

⁶ *Nga Po Saw*, (1887) S. J. L. B. 410.

⁷ *Soukhi Chand Sao*, (1917) 3 P. L. J. 354, 19 Cr. L. J. 884, [1918] AIR (P) 314; *Harding*, (1929) 73 S. J., Part II, 863.

⁸ *H. J. Ransom v. Triloki Nath*, (1942) 17 Luck. 663.

⁹ *Periyannan*, (1888) 1 Weir 423; *Dadala*

Atchigadu, (1881) 1 Weir 420; *Chunnu*, (1911) 8 A. L. J. R. 656, 12 Cr. L. J. 374; *Pinnamaraju v. Potturi Tirapatiraju*, (1930) 32 L. W. 23, [1930] M. W. N. 347, 31 Cr. L. J. 1086, [1930] AIR (M) 670.

¹⁰ *Obayya*, (1898) 22 Mad. 151. See also *P. Subaiya*, (1882) 1 Weir 421. Cf. *Ramasami*, (1892) 16 Mad. 364, in which the accused who harvested and removed certain crops which had been distrained for arrears of revenue were held guilty of theft.

¹¹ *Bande Ali Shaikh*, [1939] 2 Cal. 419.

¹² *Pedda Maddulegadu*, (1892) 1 Weir 423.

by a landlord after it was attached.¹³ Where the warrants of attachment were not signed by the Court and did not bear the seal of the Court as required by Order XXI, r. 24, Civil Procedure Code, it was held that the attachment was illegal and if the procedure prescribed by Order XXI, r. 44, Civil Procedure Code, was not followed, the produce attached could not be deemed to have passed from the possession of the judgment-debtor into the possession of the Court, and if the crops were removed with the consent of the judgment-debtor the person removing the crops could not be said to be guilty of theft.¹⁴

Goods in the shop of the accused were attached in execution of a decree and the decree-holder himself was given possession of the goods on his executing a security bond for the production of the goods when called upon to do so. The accused put in a claim to the goods and the claim was allowed. But the accused without taking delivery of the goods through the Court broke open the lock during the decree-holder's absence and removed the goods. It was held that as the accused only removed his own goods, there was no dishonest intention to cause loss to the complainant or gain to himself, and hence there was no theft.¹⁵

Where property has been taken possession of by a receiver in insolvency in the bona fide belief that it is property belonging to the insolvent, any person who knowing those facts takes such property from the possession of the receiver is guilty of theft, even though he may claim to be the owner thereof.¹⁶ This case has been criticised by the Madras High Court on the ground that in cases of rescue from lawful custody the presence of the element of dishonesty is a necessary condition for a conviction for theft. Where certain buffaloes which had been attached under a decree by a Munsif, and which had been handed over to two persons on their furnishing security, were rescued by the accused who pleaded that they owned the cattle and not the judgment-debtor, it was held that though the accused might have committed an unlawful act in taking the cattle out of the custody of sureties, they were not guilty of theft.¹⁷

Accused having failed to repay an agricultural loan, his property was attached, but the attaching officer had not with him, at the time of the attachment, a warrant of attachment: the property was subsequently ordered to be sold when it was discovered that the accused had removed it, he accordingly was placed on his trial and convicted under this section. It was held that as the attaching officer had not with him the warrant there was no valid attachment and, consequently, the accused was not guilty.¹⁸

Where property is attached in execution of a decree at the instance of the decree-holder, the fact that a claim petition in respect of the property attached is allowed does not warrant a conviction of the decree-holder under this section read with s. 114.¹⁹

Symbolical possession.—Delivery of symbolical possession to a purchaser at a court-sale is effective only against the judgment-debtor but does not in any way affect the possession of a third party who may be on the land. Consequently, when complainant is found to have been in possession of the land and grown the crops thereon, delivery of symbolical possession to a purchaser at an execution sale against a third party who is said to have been the owner of the land cannot be relied upon as having transferred the possession of the crops to the purchaser in answer to a charge of theft of the crops.²⁰

Possessory order.—The order of a Mamlatdar in a possessory suit is operative only as against the parties to the suit. Where, in the execution of such an order passed against a person, symbolical possession of a field with crops standing thereon was given to another, and the former's brothers cut and removed the crops, it was held that they could not be convicted of theft.²¹

The accused were convicted of having committed theft of paddy belonging to

¹³ *Ram Dayal*, (1915) 38 All. 40.

¹⁴ *Beni*, (1934) 57 All. 660.

¹⁵ *Lakshminarayana Chettiar*, (1922) 16 L. W. 15, 42 M. L. J. 490, 24 Cr. L. J. 414, [1922] AIR (M) 405.

¹⁶ *Kamla Pat*, (1926) 48 All. 368.

¹⁷ *Ramaswamy Naicken v. Dandakaran*, (1932) 65 M. L. J. 732, 38 L. W. 875, [1933] M. W. N. 110, 35 Cr. L. J. 463; *Abdul Kabir*,

[1940] Kar. 105.

¹⁸ *Molai*, (1929) 22 Cr. L. J. 107, [1920] AIR (A) 306.

¹⁹ *Sheku Sahib v. Venkataramanayya*, [1941] M. W. N. 671.

²⁰ *Banka Nath v. Abdul Kadir*, (1935) 39 C. W. N. 1306.

²¹ *Sheikh Hussain*, (1896) Cr. R. No. 35 of 1896, Unrep. Cr. C. 866.

the complainant. It appeared that some months previous to the occurrence there had been an order under s. 145 of the Criminal Procedure Code in favour of the complainant in respect of the land in question. It was held that the order under s. 145, Criminal Procedure Code, only showed that the complainant was in possession on the date of the order. It was only a piece of evidence to be taken into consideration in determining who was in possession. It was open to the accused to show that in spite of the order they were actually in possession or regained possession after the order and that they grew the crops and were in possession on the date of the occurrence, the title of either party to the land in question being wholly irrelevant in relation to the charge of theft.²²

Joint possession.—Where there are several joint owners in joint possession, and any one of them dishonestly takes exclusive possession, he will be guilty of theft.²³ Similarly, if a coparcener dishonestly takes the separate property of another coparcener, he will be guilty of theft.²⁴

Cases.—Taking out of possession of another person.—The complainant washed a carpet at the village tank and hung it up there to dry; the accused dishonestly took the same away. It was held that the carpet had never left the complainant's possession, and the accused had committed theft.²⁵

Where certain trees were uprooted by a dust-storm and were removed by tenants, it was held that the removal caused wrongful loss to the zamindar and wrongful gain to the tenants and that they were therefore guilty of theft.¹ Accused Nos. 2 and 3 having made a default in the payment of land revenue, the Mamlatdar proceeded to their house and made a *panchanama* declaring their buffaloes to be under attachment. At the instigation of accused No. 1, the other accused untied and removed the buffaloes. It was held that they were guilty of theft for the Mamlatdar was to be deemed to be in possession inasmuch as he had a statutory right to take possession, he came to the place where the buffaloes were with the intention of taking possession, he made a declaration and a *panchanama* that he had taken possession, and he exercised the right of possession by forbidding the defaulters from removing them.²

English cases.—Where a person, having ordered a tradesman to bring goods to his house, took out a certain quantity, asked their price, separated them from the rest, and then sent the tradesman home on pretence of wanting other articles, and ran away with the goods, it was held that this amounted to larceny.³ Getting goods delivered into a hired cart on the express condition that they would be paid for before they were taken out from the cart, and then getting them from the cart without paying the price was held to be larceny.⁴ The accused put his hand into the prosecutor's pocket, got hold of his purse, and pulled it up to the edge of the pocket when the corner caught on a belt worn by the prosecutor. The prosecutor at that moment grasped the purse and put it back. It was held that the accused was guilty of larceny. Pickford, J., said that "if a man put his hand into another's pocket, and removed a purse from the position in which it was to the edge, and was only prevented from getting full possession of it because it accidentally caught in the belt, there was a sufficient asportation to constitute larceny".⁵

Joint property.—The removal of even the whole of the crop by a ryot in a zamindari holding on a *varam* tenure without delivering to the Zemindar his share

²² So held by Cumming, J., (Graham, J. *dubitante*) in *Rakhal Dolui v. Maham Lal Ghose*, (1927) 31 C. W. N. 964, 28 Cr. L. J. 827, [1927] AIR (C) 701.

²³ (1880) 1 Weir 408; *Virankutti v. Chiyamu*, (1884) 7 Mad. 557; *Kaka*, (1889) P. R. No. 12 of 1889; *Ponnurangam*, (1887) 10 Mad. 186; *Debi Das*, (1881) 1 A. W. N. 115; *Bramley's Case*, (1822) Russ. & Ry. 478; *Girdhari*, (1890) 4 C. P. L. R. 174. See *Phul Singh*, (1912) 10 A. L. J. R. 527, 14 Cr. L. J. 3, where it appeared that a landlord had jointly cultivated land with a non-occupancy tenant and had cut and removed the crops, but the Court held that the landlord must be deemed to be part owner

and in possession and could not be convicted of theft. It may, however, be observed that even a part owner has no right to take away the portion of the other part owner. The facts in the report are meagre.

²⁴ *Sita Ram Rai*, (1880) 3 All. 181.

²⁵ *Mathi*, (1886) Cr. R. No. 70 of 1886, Unrep. Cr. C. 314.

¹ *Dunyapat*, (1919) 42 All. 53.

² *Lallu Waghji*, (1918) 21 Bom. L. R. 251, 43 Bom. 550.

³ *Sharpless*, (1872) 2 East P. C. 675.

⁴ *Pratt's Case*, (1830) 1 Mood. 250.

⁵ *Taylor*, (1910) 27 T. L. R. 108, 109.

of the crop does not constitute theft.⁶ A had in her possession forty baskets of paddy out of which B was entitled, under a decree of a civil Court, to thirty-five baskets. The decree awarded her this specific paddy as being the produce of a specified farm. B took the thirty-five baskets of paddy out of A's possession without A's consent. It was held that the act of B, though irregular and improper, did not amount to theft.⁷

English cases.—H, a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of the management. The accused, also a member of the society, assisted in the shop without salary, and was indicted for stealing money from the till. It was held that he could be convicted of larceny although a member of the society.⁸

4. 'Without that person's consent'.—The thing stolen must have been taken without the consent of the person in possession of it. The primary inquiry to be made is whether the taking were *invito domino*, or without the will or approbation of the owner. Hence, where a debtor gave certain property to his creditor, and subsequently found out that the debt was time-barred, it was held that the charge of theft could not be sustained against the creditor, inasmuch as there was a full unqualified consent on the part of the debtor, at the time of his giving away the property.⁹ Explanation 5 says that consent "may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied" (*vide* ill. (m) and (n)). But a consent given under improper circumstances will be of no avail (*vide* ill. (o)). Where a consent is given under a misconception of fact and the person removing the property knows that the consent was given in consequence of such misconception it is not a valid consent.¹⁰ As to what is valid 'consent' see s. 90, *supra*.

Cases.—A sought the aid of B with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. It was held that as the property removed was so taken with the knowledge of the owner, the offence of theft was not committed, but A would be guilty of abetment of theft.¹¹ Really speaking the owner did not consent to the dishonest taking away of the property. He merely assisted the thief in carrying out the latter's dishonest intention: *cf.* ill. (m) and (o). The thief had no knowledge of the owner's act, and it cannot, therefore, be construed as a consent. In two English cases, on similar facts, the offence of larceny was held to have been committed. The owner of goods, knowing of an intention in the accused to steal them, they having plotted so to do with his servant, directed his servant to carry on the business with a view to the detection of the thieves. The servant with the consent of his master agreed with the accused to open the door of the house and let them in. They broke open inner apartments and took the goods. It was held that they were guilty of larceny.¹²

If a person takes a lorry on hire-purchase system from a company which under the agreement has reserved the right of seizing it in the event of default in payment of instalment and default is made, then the company is not entitled to retake its possession by force or by removing it from the hands of purchaser's servants who had no authority, express or implied, to give any consent. If the company or its agents do so they are guilty of theft. The question whether ownership had or had not passed to the purchaser is wholly immaterial as s. 378 deals with possession and not ownership. The legal possession of the lorry was vested in the purchaser and the company were not entitled to recover possession of the lorry, even though default in payment of any instalments had taken place, without the consent of the purchaser.

⁶ *Subudhi Rantho v. Balarama Pudi*, (1902) 26 Mad. 481; *Annamalai Odayar*, [1914] M. W. N. 106, 15 Cr. L. J. 186, [1914] AIR (M) 286; *Thoppulan v. Sankaranarayana Iyer*, [1914] M. W. N. 483, 15 Cr. L. J. 440, [1914] AIR (M) 61.

⁷ *Maung Po*, (1902) 1 L. B. R. 334.

⁸ *William Webster*, (1861) 9 Cox 13; *Burgess*,

(1863) 9 Cox 302; *Cain's Case*, (1841) 2 Mood. 204.

⁹ *Musammatt Piari Dulaiya*, (1904) 1 A. L. J. R. 508, 1 Cr. L. J. 803.

¹⁰ *Maung Ba Chit*, (1929) 7 Ran. 821.

¹¹ *Troylukho Nath Chowdhry*, (1878) 4 Cal. 366. See *Bannen*, (1844) 1 C. & K. 295, 301.

¹² *Eggington*, (1801) 2 East P. C. 666.

Possession of the driver and the clearner was the possession of their master and they were not competent to give consent on behalf of the master.¹³

The accused suggested to a servant of the prosecutrix a plan for the commission of a robbery by the accused at the shop of the prosecutrix. The servant, pretending to agree to the accused's suggestion, lent the keys of the shop to the accused, who made duplicate keys, with one of which, on a day arranged with the servant, the accused unlocked a padlock attached to the outer door and entered the shop where he was arrested. The prosecutrix had been informed by the servant of the accused's plan and knew that he intended to enter the shop on the day in question. The accused was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein. It was held that the conviction was right, notwithstanding that the prosecutrix knew that the accused had been supplied with the means of breaking and entering by her servant.¹⁴ Removal of official papers without the consent of the official head amounts to theft. A Government *tumar* (correspondence) in which accused Nos. 2 and 3 were interested, was kept by the Mamlatdar at the house of a clerk. During the absence of the clerk from his house, accused No. 1, the record clerk in the Mamlatdar's office, removed the *tumar* without anybody's consent. In the company of accused Nos. 2 and 3 he went with it to a neighbouring town to show it to the pleader of accused Nos. 2 and 3 in connection with some proceeding. There accused No. 1 left the *tumar* with the pleader, and went about the town for some time on his own errand. Later he brought the *tumar* back and stealthily replaced it from where it was taken. It was afterwards discovered that some papers had disappeared from the *tumar*, whilst others had either been mutilated or altered. It was held that accused No. 1 was guilty of theft, as he had removed the correspondence without the consent of its custodian, though such removal was temporary, and as his intention in doing so was dishonest; and that accused Nos. 2 and 3 were guilty of abetment of theft.¹⁵

Unauthorised consent.—Possession of wood by a Forest Inspector who is a servant of Government, is possession of the Government itself, and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, was held to constitute theft, as the consent obtained was unauthorized and fraudulent.¹⁶ Where a licensee who was allowed to remove dead or fallen trees from a Government forest dishonestly cut green trees, and a pass for the removal of the timber was given by the forest authorities under the misconception that it was dead timber, it was held that there was no consent and the licensee was guilty of theft.¹⁷

5. 'Moves that property in order to such taking'.—The least removal of the thing taken from the place where it was before is a sufficient asportation though it be not quite carried off.¹⁸ It is not necessary that the property should have been removed out of its owner's reach or carried away from the place in which it was found. Upon this ground the guest, who having taken off the sheets from his bed with an intent to steal them carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So also was he, who having taken a horse in a close with intent to steal it, was apprehended before he could get it out of the close. And such was the case of him, who, intending to steal plate, took it out of the trunk wherein it was, and laid it on the floor, but was surprised before he could remove it any further.¹⁹

Explanations 3 and 4 state how 'moving' could be effected in certain cases. Illustrations (b) and (c) elucidate the meaning of Explanation 4.

The offence of theft is completed when there is a dishonest moving of the property, even though the property is not detached from that to which it is secured.²⁰

Cases.—The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon and sharing with him certain moneys payable upon them. It was held that he was guilty of theft and of attempt to commit

¹³ *H. J. Ransom v. Triloki Nath*, (1942) 17 Luck. 663.

¹⁴ *Chandler*, [1913] 1 K. B. 125.

¹⁵ *Vallabhram Ganpatram*, (1925) 27 Bom. L. R. 1391, 27 Cr. L. J. 689, [1926] AIR (B) 122.

¹⁶ *Hanmunta*, (1877) 1 Bom. 610.

¹⁷ *Maung Ba Chit*, (1929) 7 Ran. 821

¹⁸ 2 East P. C. 555.

¹⁹ *Ibid.*, p. 556; *Simson*, (1864) Kel. 81.

²⁰ *Nga Po Hle*, (1886) S. J. L. B. 399.

criminal misappropriation of property.²¹ The accused brought a civil suit on the basis of a forged promissory note. The file of the case was sent for by another Court as it was required in connection with a suit pending in that Court. It somehow found its way to the house of an official of that Court. The accused got into the inner verandah of the house and removed the forged promissory note from the file. On being pursued, they tore it to pieces. It was held that they were guilty of an offence of theft and also of an offence under ss. 201 and 511.²²

Where the accused cut the string which fastened a *hass* (neck ornament) round the complainant's neck, and forced the ends of the *hass* slightly apart in order to remove the same from the neck with the result that in the struggle that ensued between her and the accused the *hass* fell from her neck and was found on the bed later on, it was held that there had been sufficient "moving" of the *hass* to constitute the offence of theft.²³

On suspicion of theft of certain articles from a running goods train, a van on the train, in which four coolies were travelling, was searched. The property missed was not found, but, hidden under a heap of clothing belonging to the four coolies, were discovered pieces of cloth, which on investigation were ascertained to have been abstracted from the next van. It was held that none of the four coolies travelling in the van where the pieces of stolen cloth were found could be convicted of theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth.²⁴

English cases.—Where the accused lifted up a bag from the bottom of a boot of a coach but was detected before he had got it out, and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied, it was held that this was a complete asportation.²⁵ Where the servant of a tallow-chandler removed fat belonging to his master from the room in which it was kept, to a room where his master was accustomed to buy fat from persons who had it to sell, and placed it on a pair of scales there, with intent to sell it to his master, and appropriate the proceeds to his own use, this was held to be larceny.¹ Pulling wool from the bodies of live sheep and lambs was held to be larceny.² The accused was a letter carrier and it was his duty to deliver letters given to him, and, if from any cause he was unable to deliver them, to bring them back to the post office in his pouch. He did not deliver a letter containing money which had been sorted to him for delivery, nor did he return it to the post office on the completion of his round; but, on being asked for it soon afterwards, he produced it from his pocket, and gave a false excuse for not having delivered it. It was held that there was a sufficient taking to constitute larceny.³ In an indictment for stealing five pints of porter, it appeared that the accused was discovered standing by a barrel of porter, out of a hole in which the porter was running into a can on the ground, and that above five pints had run into the can. It was held that there was sufficient asportation proved of the porter in the can.⁴

Explanations 1 and 2.—The moving by the same act which effects the severance may constitute theft.⁵ Carrying away of trees after felling them is theft,⁶ but mere sale is not.⁷ In the case of growing grass, a moving by the same act which effects its severance from the earth amounts to theft.⁸ Where certain land, on which there was a standing crop of paddy, was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who

²¹ *Venkatasamy*, (1890) 14 Mad. 229. See, to the same effect, *Egginton*, (1801) 2 East P. C. 666; *Poynton's Case*, (1862) L. & C. 247.

²² *Sheonandan*, (1915) 16 Cr. L. J. 791, [1915] AIR (A) 385.

²³ *Bhisakhi*, (1917) P. R. No. 29 of 191, 718 Cr. L. J. 875.

²⁴ *Ali Husain*, (1901) 23 All. 306.

²⁵ *Walsh's Case*, (1924) 1 Mood. 14; *Cosell's Case*, (1782) 1 Leach 236.

¹ *Hall*, (1849) 3 Cox 245.

² *Martin's Case*, (1777) 1 Leach 171.

³ *Poynton's Case*, (1862) L. & C. 247.

⁴ *Wallis*, (1848) 3 Cox 67.

⁵ (1870) 5 M. H. C. (Appx.) 36, 1 Weir 383; *Jadonath*, [1942] O. W. N. 444 (1942) 43 Cr. L. J. 646, [1942] AIR (O) 423.

⁶ *Bhagu Vishnu*, (1897) Cr. R. No. 36 of 1896, Unrep. Cr. C. 928; *Abdul Ali Fakir v. Netali Fakir*, (1911) 27 C. L. J. 228, 19 Cr. L. J. 334.

⁷ *Balos alias Hussain Sahib*, (1882) 1 Weir 419.

⁸ *Samsuddin*, (1900) 2 Bom. L. R. 752.

would reap it, it was held that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust.⁹

Husband and wife.—**Hindu law**—There is no presumption of law that a husband and wife constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.¹⁰ A Hindu woman, who removes from the possession of her husband, and without his consent, her *palla* or *stridhan*, cannot be convicted of theft.¹¹ She has absolute power of disposal over it even without the consent of her husband, and no charge of theft can, therefore, be based on any such disposal.¹² So also a husband cannot be convicted of robbing his wife, she being completely under his control. He can be convicted if he steals his wife's *stridhan* which is her absolute property.

The proposition that everything acquired by a woman during coverture is the property of her husband has no foundation in Hindu law.¹³

Mahomedan law.—It is laid down that a Mahomedan wife may be convicted of stealing from her husband; because under this system of law, there does not exist the same union of interest between husband and wife which exists between an English husband and wife.¹⁴ The same reasoning would apply in the case of a Mahomedan husband.

English law.—There is such a unity of interest between husband and wife that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery on the part of the wife; and if the wife deliver the goods of the husband to an indifferent person, for that person to convert them to his own use, this is no larceny; but if the person to whom the goods are delivered by the wife be an adulterer it is otherwise, and an adulterer can be properly convicted of theft even though they be delivered to him by the wife. If no adultery has actually been committed by the parties, but the goods of the husband are removed from his house by the wife and the intended adulterer, with an intent that the wife should elope with him and live in adultery with him, this taking of the goods is, in point of law, a larceny.¹⁵ But as a husband and wife are one person in law, the wife cannot steal her husband's goods whether she had committed adultery or not.¹⁶ But a person who receives money stolen by a wife from her husband will be punishable for misdemeanour under the Married Women's Property Act.¹⁷ In order to punish the adulterer the goods should be traced in any way to his personal possession.¹⁸

Under ss. 12 and 16 of the Married Women's Property Act, 1882 (45 & 46 Vic. c. 75) the stealing of her husband's goods by a wife when about to leave or desert him or when living separate from him, is made punishable.

“*Necessitas inducit privilegium quo ad jura privata*”.—Where a man in extreme want of food or clothing steals either in order to relieve his present necessities, the law allows no such excuse to be considered. See the doctrine of self-preservation discussed at page 161 and of necessity at page 196.

Abetment.—The carrying off of certain buffaloes belonging to the complainant by order of the accused, and the retention of them in the custody of the latter's servant, was held to be abetment of theft.¹⁹ Where it was found that theft was actually committed by certain members of an unlawful assembly, but it was not found that the accused himself committed it by removing any property or that he had made any preparation for committing it or aiding anyone in the commission of it, it was held that he could not be convicted under this section read with s. 114, though he could be under this section read with s. 149.²⁰

⁹ *Durga Tewari*, (1909) 36 Cal. 758.

¹⁰ *Butchi*, (1893) 17 Mad. 401.

¹¹ *Natha Kalyan*, (1871) 8 B. H. C. (Cr. C.) 11.

¹² *Sat Narain*, (1930) 53 All. 437.

¹³ *Ramasami Padaiyatchi v. Virasami Padaiyatchi*, (1867) 3 M. H. C. 272.

¹⁴ *Khatabai*, (1869) 6 B. H. C. (Cr. C.) 9.

¹⁵ *Toller*, (1841) Car. & M. 112; *Featherstone*,

(1854) 6 Cox 376; *Thompson's Case*, (1850) 1 Den. Cr. C. 549; *John Mutters*, (1865) 10 Cox 50.

¹⁶ *Kenny*, (1877) 2 Q. B. D. 307.

¹⁷ *Payne*, [1906] 1 K. B. 97.

¹⁸ *Rosenberg*, (1843) 1 C. & K. 233.

¹⁹ *Tarinee Prosaud Banerjee*, (1872) 18 W. R. (Cr.) 8.

²⁰ *Hansa Pathak v. Bansi Lal Das*, (1901) 8 C. W. N. 519, 1 Cr. L. J. 449.

PRACTICE.

Evidence.—Prove (1) that the property in question is moveable property.

(2) That such property was in the possession of a person.

(3) That the accused moved such property whilst in the possession of that person.

(4) That he did so without the consent of that person.

(5) That he did so in order to take the same out of the possession of that person.

(6) That he did so with intent to cause wrongful gain to himself or wrongful loss to that person.²¹

It is not sufficient that the property found in the accused's possession was like the one stolen; there must be a finding to the effect that that property was the stolen property.²²

Presumption.—Possession of stolen goods soon after the theft raises the presumption that the possessor is either the thief or has received the goods knowing them to be stolen.²³ Whether the possession of stolen property is recent enough to warrant a conviction for the substantive offence is a matter entirely for the jury.²⁴ But unexplained possession of non-identifiable matter (such as paddy) alleged to be stolen does not amount to proof of theft.²⁵ In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused.¹ The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were lost, and were in the possession of the accused two months after being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call on the accused to show how he came by the property.² Where a stolen buffalo was not traced to the accused until twelve months after the theft, it was held that this was not recent possession which would justify the presumption, in the absence of an explanation as to the manner in which the accused got the buffalo, that the accused stole it.³ Where circumstances are highly suspicious, and the suspicion is not rebutted when rebuttal may be reasonably expected, if the suspicion is wrong, suspicion becomes confirmed and becomes much more than suspicion. Where mere recent possession of stolen property is relied upon to prove theft or dishonest possession, such possession must be exclusive.⁴

Where the evidence of theft is not direct but circumstantial, such evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused.⁵

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate—Triable summarily, if property not worth more than Rs. 50.

Venue.—The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.⁶

Joint trial.—A and B are both charged with a theft, and B is charged with

²¹ *Madan*, (1882) 1 Weir 411; *Ardool Biswas v. Khater Mondal*, (1899) 3 C. W. N. 332.

²² *Bava Chela*, (1886) Cr. R. No. 5 of 1886, Unrep. Cr. C. 227.

²³ Section 114 of the Indian Evidence Act; *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66; *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73 [109]; *Shuruffooddeen*, (1870) 13 W. R. (Cr.) 26; *Poromeshur Aheer*, (1875) 23 W. R. (Cr.) 16; *Ramjoy Kurmoker*, (1876) 25 W. R. (Cr.) 10; *Ina Sheikh*, (1885) 11 Cal. 160; *Ishan Chandra Chandra*, (1893) 21 Cal. 328, 336; *Kavim*, (1879) P. R. No. 19 of 1879; *Tahu*, (1891) P. R. No. 15 of 1891.

²⁴ *Guzzala Hanuman*, (1902) 26 Mad. 467.

²⁵ (1873) 7 M. H. C. (Appx.) 19, 1 Weir 427,

followed in *Royappan*, (1894) 1 Weir 420; *Sini Tenan*, (1886) 1 Weir 429.

¹ *Malhari*, (1882) 6 Bom. 731; *Mataro*, (1928) 23 S. L. R. 5, 29 Cr. L. J. 924, [1929] AIR (S) 9.

² *Partridge*, (1836) 7 C. & P. 551. See *Poromeshur Aheer*, (1875) 23 W. R. (Cr.) 16; *T. Burke*, (1884) 6 All. 224, 227.

³ *Nga Yauk*, (1885) S. J. L. B. 366; *Narain Singh*, (1928) 29 P. L. R. 441, 29 Cr. L. J. 464, [1928] AIR (L) 687; *Suchit Ahir*, (1930) 12 P. L. T. 350, 32 Cr. L. J. 614.

⁴ *Nga Tha Dne*, (1896) P. J. L. B. 279.

⁵ *Chiraguddin*, (1914) 18 C. W. N. 1144, 15 Cr. L. J. 293.

⁶ Criminal Procedure Code, s. 181 (3).

two other thefts committed by him in the course of the same transaction. A and B may both be tried together on a charge charging both with one theft, and B alone with the other two thefts.⁷

Joinder of charges.—*Theft and concealing stolen property.*—A charge under s. 380 cannot be joined to a charge under s. 414; such joinder, being opposed to s. 233. Criminal Procedure Code, constitutes not merely an irregularity but an illegality.⁸ The Patna High Court has dissented from this decision on the ground that it was decided before the amendment of s. 239, Criminal Procedure Code. It has held that it is not illegal to charge an accused person both under s. 380 and s. 414.⁹

House-breaking and theft.—When offences under ss. 457 and 380 are committed in one transaction, it is very desirable that formal convictions under both sections should be recorded, in order that if the accused subsequently commits another theft technical difficulties may not arise.¹⁰

Theft and receipt of stolen property.—A person committing theft and a person who receives the stolen property may be tried jointly where practicable.¹¹ Where there are several receivers of stolen property this should not be done.¹² Two distinct offences of theft in two separate houses and the alternative charges under s. 411 in respect of each of these transactions cannot be tried at one and the same trial.¹³

Theft and mischief.—See Practice under s. 426.

Conviction for different offences.—A person accused of theft may be convicted of criminal misappropriation, criminal breach of trust, or cheating, and *vice versa*.¹⁴

It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.¹⁵

Where the accused has been convicted of theft (s. 379), it is not competent for an appellate Court, while finding the accused not guilty of theft, to modify the conviction into one of abetment of theft.¹⁶

Repetition.—Every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishments.¹⁷ See s. 75, *supra*.

Single or several thefts.—Removal by one single act of several articles constitutes one offence of theft although the articles belong to different persons.¹⁸

Thefts of different things on different days separated by considerable periods cannot be treated as one theft on the analogy of successive blows constituting one assault.¹⁹

The Central Provinces Rules.—As there appears to be a difference of practice in respect of treating thefts as single or several, if in one transaction things belonging to different owners have been stolen, it is necessary to issue some instructions for the guidance of the Police when registering such cases in the Crime Register or when sending them up for trial and for the guidance of Magistrates when deciding whether a single trial or distinct trials are required. At the same time nothing that is here set out can in any way control the discretion given to Magistrates by s. 235 of the Code of Criminal Procedure with regard to the framing of separate charges or the holding of separate trials, whenever it appears appropriate to do so.

If the property, which it was the thief's intention (as shown by the circumstances or by his admission) to take, consisted of a number of contiguous articles, which were

⁷ See ill. (c) to s. 239, *ibid*.

⁸ *Wassanji Dayal*, (1904) 6 Bom. L. R. 725, 1 Cr. L. J. 834, following *Nathalal Bapuji*, (1902) 4 Bom. L. R. 433. See also *Keshav Krishna*, (1904) 6 Bom. L. R. 361, 1 Cr. L. J. 330; *Balabhai Hargovind*, (1904) 6 Bom. L. R. 517, 1 Cr. L. J. 584. See, however, *Gulzari Lal*, (1902) 24 All. 254.

⁹ *Damodar Ram Mahuri*, (1929) 11 P. L. T. 481, 31 Cr. L. J. 362, [1929] AIR (P) 660.

¹⁰ *Nga Pan Bee*, (1908) 2 B. L. T. 19.

¹¹ *Bhima*, (1916) 38 All. 311; *Superintendent and Remembrancer of Legal Affairs, Bengal v. Raghulal Brahmim*, (1935) 62 Cal. 946.

¹² *Balabhai Hargovind*, (1904) 6 Bom. L. R.

517, 1 Cr. L. J. 584.

¹³ *Boya Lingadu*, [1904] 1 M. L. J. 428, (1939) 51 L. W. 321, [1940] M. W. N. 239, (1939) 41 Cr. L. J. 581, [1940] AIR (M) 509.

¹⁴ Criminal Procedure Code, ss. 236, 237.

¹⁵ *Sita Ram Rai*, (1880) 3 All. 181.

¹⁶ *Singaravelu Pillay*, (1912) 13 Cr. L. J. 203.

¹⁷ *Ram Nhamu*, (1886) Cr. R. No. 41 of 1886, Unrep. Cr. C. 296.

¹⁸ *Krishna Shahaji*, (1879) Cr. R. No. 38 of 1879, Unrep. Cr. C. 927; *Sheikh Monerah*, (1869) 11 W. R. (Cr.) 38; *Har Dial*, (1905) 6 P. L. R. 503, 2 Cr. L. J. 708.

¹⁹ *Becharam Mukharji*, (1943) 45 Cr. L. J. 666, [1944] AIR (C) 224.

reached by one and the same act of trespass or which were the subject of a single enterprise, the moving of each article, in the course of removal of the whole bulk of property, cannot ordinarily be considered to be a distinct theft. The thieving project in such a case was single, although it may have been achieved in detail; and the fact that the spoil taken consisted of several things, whether belonging to the same or the different owners, does not necessarily break up the unity of the transaction.

If, on the other hand, the property taken consisted of a number of articles so distantly or diversely situated as to require a distinct act of trespass or a distinct enterprise for the removal of each, the transaction must ordinarily be held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft.

The following examples will make the distinction clear—

(a) A thief enters a house and removes one by one all the articles of value which he finds there. As all the property is got at by one and the same act of trespass, the theft is single although some of the articles may have belonged to friends of the owner of the house.

(b) A thief goes to a threshing-floor, where the grain of four cultivators is stored, and steals a little from every heap. Unless it is shown that he had distinct designs against the several owners, it is plain that there was but one act of thieving accomplished through one and the same trespass.

(c) A thief snatches from a man's hand a bag containing articles belonging to several persons. The theft thus achieved by a single enterprise is not made multiple by the fact that the things snatched had different owners.

(d) A cattle-lifter drives off a herd of six heads, being the bullocks of half a dozen separate cultivators, which were in charge of a boy. This is a single act of theft, the enterprise being single; and is not six thefts, because there were six owners.

(e) In a crowded public place, a thief picks the pockets of A, B and C in succession. Three thefts have been committed.²⁰

Restoration of stolen property.—The property stolen may be returned to the person from whom it was stolen under s. 517, Criminal Procedure Code, and an innocent purchaser may be compensated for the price paid under s. 519, if any money is found in the possession of the thief. But the property restored should be in existence at the time of the theft. R's cow, having been stolen, the thief after a lapse of a year and a half was convicted. Six months after the theft V innocently purchased the cow, which, while in his possession, had a calf. The Magistrate ordered that the cow and the calf should be delivered up by V to R. It was held that as the calf was not even in embryo at the date of the theft the order to deliver up the calf was illegal.²¹

A difference, however, should be noted when the thing stolen is (a) a negotiable instrument, or (b) a bank-note.

(a) When an instrument, such as a promissory note, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but also as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he had obtained it bona fide for value without notice of theft.²²

(b) A currency note being in legal view money, the property in it passes by mere delivery, and in the interests of commerce and the security of human dealing nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule.²³ A currency note is a 'legal tender' for the amount expressed therein.²⁴ Property in it passes by mere delivery.²⁵

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt even though the money was obtained by committing the offence of cheating.¹

²⁰ C. P. Cr. C. (1929) No. 16, ss. 6 & 7, pp. 47, 48.

²¹ *Vernede*, (1886) 10 Mad. 25. See *Faiz Ahmad*, (1907) P. R. No. 2 of 1908, 7 Cr. L. J. 279, where the owner of a buffalo was held entitled to recover it from an honest purchaser.

²² *Bank of Bengal v. Mendes*, (1880) 5 Cal. 654.

²³ *Goodman v. Harvey*, (1836) 4 Ad. & El. 870,

followed in *The Collector of Salem*, (1873) 7 M. H. C. 233, 2 Weir 664.

²⁴ *Joggesur Mochi*, (1878) 3 Cal. 379.

²⁵ *Pandharinath P. Revankar*, (1915) 17 Bom. L. R. 922, 40 Bom. 186.

¹ *Baij Nath*, (1914) P. R. No. 1 of 1915, 16 Cr. L. J. 460.

Where an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft, he is entitled to recover the property; but if the property found with him is the subject of theft, the stolen thing will not be delivered to him, his acquittal being due to the incompleteness of evidence.² Where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary. The question of ownership should in such cases be left to be decided by the civil Court and the Magistrate should not direct the property seized to be handed over to the complainant merely because he considers him to be the owner.³

Sections 379 and 215.—"Though the ulterior object of a thief in committing theft may be to obtain money illegally in the manner contemplated in s. 215,...still he is not less liable to be *convicted* for the theft as well as for the offence under s. 215,...; but as the fact that the thief has restored the property may well be taken into consideration in punishing him for the theft under s. 379...it is only in very exceptional cases that the punishment for both the theft under s. 379 and the taking an illegal gratification under s. 215...should be allowed to exceed the punishment which could be inflicted for the theft alone, even though s. 71...be taken as inapplicable".⁴

Where a person offers to take any gratification on account of helping a person to recover property stolen from him and, on receipt of the gratification, points out where the stolen property is concealed, he may properly be convicted of theft in the absence of any evidence to show that anyone else had committed theft. If he fails to point out or restore the stolen property, he may properly be convicted of an offence under s. 215.⁵

Where attached properties were removed from the possession of the sureties with whom they were left by an *amin* and a prosecution under this section was launched, it was held that the complaint of the Court was not necessary for the prosecution.⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed the theft of (*specify the thing*) by taking it out of the possession of AB, and thereby committed an offence punishable under s. 379 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.⁷

Punishment.—Imprisonment only is a legal punishment: fine need not necessarily be inflicted in addition.⁸ Nor can fine be substituted in lieu of imprisonment.⁹ The law does not contemplate that a thief should be more severely punished because he renders the recovery of the stolen property impossible.¹⁰ But a deterrent punishment is necessary when an ornament is stolen from a child, because it so often leads to murder.¹¹ A sentence should never be heavier than is necessary to deter the criminal from committing the offence again.¹² In the case of theft of cattle the fine must be such as to make it clear that cattle-lifting is not profitable.¹³

Railway thefts.—In cases of thefts from a railway train where the Magistrate is once satisfied that the accused has committed the offence, the sentence should be of a deterrent nature.¹⁴ In the case of railway employees the sentence should be deterrent.¹⁵

As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (d) and 12 (2).

² *Rasul Khan*, (1926) 44 C. L. J. 205, 28 Cr. L. J. 59, [1927] AIR (C) 61.

³ *Karuppanan Ambalan v. Guruswami Pillai*, (1933) 56 Mad. 651.

⁴ Per Aston, J. C., in *Nga Tun Byu*, (1896) P. J. L. B. 226, 229.

⁵ *Nga Ok Gyi*, (1889) S. J. L. B. 449.

⁶ *Ponnusami Padayachi*, [1941] M. W. N. 675, (1940) 54 L. W. 248, 43 Cr. L. J. 438.

⁷ Vide (1870) 5 M. H. C. (Appx.) 37.

⁸ *Savi*, (1897) Cr. R. No. 7 of 1897, Unrep. Cr. C. 893.

⁹ *Sheikh Dulloo v. Zainah Bebee*, (1871) 16 W. R. (Cr.) 17.

¹⁰ *Nga Aung So*, (1900) P. J. L. B. 633.

¹¹ *Syed Khader Sahib*, [1930] M. W. N. 173.

¹² *Po Nyin*, (1917) 9 L. B. R. 167, 19 Cr. L. J. 655.

¹³ *Miro Ghulam Hussain*, [1940] Kar. 88, 90.

¹⁴ *Ananda Laxman Babaji*, (1912) 14 Bom. L. R. 504, 13 Cr. L. J. 531.

¹⁵ *Ali Bakhsh*, (1941) 43 P. L. R. 420, 42 Cr. L. J. 823, [1941] AIR (L) 312.

Whipping.—An attempt to commit theft is not punishable with whipping and a conviction first of an attempt to commit theft, and then of an effected theft, will not justify a double sentence of imprisonment and whipping.¹⁶

380. Whoever commits theft in any building,¹ tent or vessel,² which building, tent or vessel is used as a human dwelling, or used for the custody of property,³ shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Object.—The object of the section is to give greater security only to property deposited in a house so as to be under the protection of the house and not to property about the person of the party from whom it is stolen. Theft from a person in a dwelling house is, therefore, simple theft under s. 379.¹⁷

Scope.—There is nothing in the section which prevents a person from being convicted under this section for a theft committed by him in his own house. It might at first seem that it was the intention of the Legislature to protect property by this section, not from the owner of the house but from others. The section is nearly identical with s. 60 of 24 & 25 Vic., c. 96, and it has been repeatedly held in England that the essential point in the offence of theft in a building is that the property should be under the protection of the building, and that the offence may be committed by the owner of the building or other person who has lawful access to the building.¹⁸

1. 'In any building'.—The term 'building' means a permanent edifice of some kind. Theft should, under this section, have been committed in any such building.¹⁹ The expression "building", more especially having regard to the expressions "tent" and "vessel" that follow, must be regarded as identical indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building.²⁰ "What is a building must always be a question of degree and circumstances, and it is therefore impossible to lay down a general definition. In *Moir v. William*²¹ Esher, M.R., said 'the ordinary and usual meaning of a building is a block of brick or stonework covered by a roof.' If an open place of land is surrounded by a wall it would probably be impossible to call it a building. In Indian houses generally there is a courtyard which is not covered. It may be a matter of some difficulty in such cases to say that when a man commits criminal trespass and enters the courtyard of the house, he is not guilty of 'house-trespass.' Moreover there may be cases where a man may be living in a house the roof of which has fallen down, but he has put up some sort of a shelter inside within the boundaries. In such cases too it may be difficult to say that the man has not been guilty of 'house-trespass' simply because the roof of the house has fallen down. . . it would depend upon the facts of each case whether the trespass has been committed of a 'building' used for human dwelling so as to come within the definition of the word 'house-trespass.'²²

Theft from a verandah,²³ or the roof of a house,²⁴ or a brake-van,²⁵ or a railway carriage,¹ is not theft in a building. But, where the accused stole some luggage and cash from a railway carriage, when it was at a railway station, it was held that though the railway carriage was not a building, the railway station was, and that the accused had committed an offence under this section.² An entrance half surrounded by a wall

¹⁶ *Abdul Masjid*, (1885) S. J. L. B. 338.

¹⁷ *Tandi Ram*, (1876) P. R. No. 14 of 1876.

¹⁸ *Nga Pan E*, (1885) S. J. L. B. 367.

¹⁹ *Kashinath Bhaushet*, (1871) Cr. R. Sep. 1871, Unrep. Cr. C. 56.

²⁰ *Lakshmana Goundan*, (1926) 28 Cr. L. J. 248, 52 M. L. J. 143, [1927] AIR (M) 343.

²¹ [1892] 1 Q. B. 264.

²² *Per Malik, J.*, in *Mak Khan*, [1945] All. 558, 564.

²³ (1870) 1 Weir 435; contra, *Jabar*, (1880) P.

R. No. 1 of 1881.

²⁴ (1866) 1 Weir 435. This decision is not sound. Entry into a building is not necessary according to this section. Theft from a building comes within the purview of the section.

²⁵ (1880) 1 Weir 436.

¹ *Ali Hussain*, (1901) 23 All. 306; (1880) 1 Weir 436.

² *Sheikh Saheb*, (1886) Cr. R. No. 36 of 1886, Unrep. Cr. C. 293.

in which there are two door-ways, but without doors, which is used for custody of property, is a building.³ A court-yard⁴ is, but a compound⁵ or a cattle-pound, being an open plot of land with a boundary fence,⁶ is not a building.

Where the accused entered the dwelling house of the complainant and in his presence dishonestly took away certain property, in spite of his remonstrances,⁷ where some constables employed to guard a house took away some property from the house;⁸ where a carter removed from the godown of a railway company a bag filled with pilferings from a number of bags consigned to others;⁹ and where a person while inspecting the record of a case removed from it a document with the intention of substituting another fabricated by him in its place and was caught before he was able to substitute the one fabricated by him,¹⁰ it was held that an offence under this section was committed.

Where the owner of a buffalo, which was impounded in an open plot with a mere boundary fence, rescued it after opening a door of the pound by slipping the chain over the lock, it was held that he had committed an offence under ss. 378 and 441, but that he could not be convicted either under this section or s. 454.¹¹

English cases.—The goods of a lodger's guest are under the protection of the dwelling house. Where, therefore, a lodger invited a man to his room, and then stole his goods to the value of forty shillings, when not about his person, he was held guilty of stealing in a dwelling house.¹² A man went to bed with a prostitute, having put his watch in his hat on a table; and she stole the watch while he was asleep. It was held that the offence was that of stealing in a dwelling house.¹³

2. 'Vessel'.—See s. 48, *supra*.

3. 'Used for the custody of property'.—The accused induced the complainant to deposit her moneys in two banks and her ornaments in a third bank and contrived to get accounts opened in their joint names. He subsequently withdrew the money and the ornaments from the banks on various dates without the complainant's knowledge. The accused was prosecuted under this section. It was held that this section did not apply as the money was not in the possession of the complainant but was in the possession of the bank and was taken with the bank's consent.¹⁴

PRACTICE.

Evidence.—Prove points (1) to (6) as those for s. 379, and further—

(7) That such property was at the time of the theft in a building, tent, or vessel. All that is necessary is that the property should be under the protection of the building, it is not necessary to show unlawful entrance into the building.¹⁵

(8) That such building, tent, or vessel, was then being used as a human dwelling, or for the custody of property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate—Triable summarily if the property is not worth more than Rs. 50.

Joinder of charges under ss. 380 and 411.—Offences under this section and s. 411 are not of the same kind. They are not even punishable with the same maximum term of imprisonment. So the charging of one or more persons of offences under this section and s. 411 would amount to a misjoinder of charges.¹⁶

Separate sentences.—Separate consecutive sentences under s. 457 and this section cannot be passed.¹⁷

³ *Dad*, (1878) P. R. No. 10 of 1879.

⁴ *Shera*, (1879) P. R. No. 35 of 1879; *Ghulam Jelani*, (1889) P. R. No. 16 of 1889; *Surja*, (1882) 2 A. W. N. 224.

⁵ *Rama*, (1889) Unrep. Cr. C. 484; *Munshi*, (1928) 26 A. L. J. R. 855, 29 Cr. L. J. 766, [1928] AIR (A) 607.

⁶ *Lakshmana Goundan*, (1926) 28 Cr. L. J. 248, 52 M. L. J. 143, [1927] AIR (M) 343.

⁷ *Kashinath Bhaushet*, (1871) Cr. R. Sep. 1871, Unrep. Cr. C. 56.

⁸ *Baidnath Singh*, (1865) 3 W. R. (Cr.) 29.

⁹ *Soukhi Chand Sao*, (1917) 3 P. L. J. 354, 19 Cr. L. J. 884, [1918] AIR (P) 314.

¹⁰ *Radha Kishan*, (1925) 26 P. L. R. 95, 26 Cr. L. J. 847.

¹¹ *Lakshmana Goundan*, (1926) 52 M. L. J. 143, 28 Cr. L. J. 248, [1927] AIR (M) 343.

¹² *Taylor's Case*, (1820) Russ. & Ry. 418.

¹³ *Hamilton*, (1837) 8 C. & P. 49.

¹⁴ *Becharam Mukherji*, (1943) 45 Cr. L. J. 666, [1944] AIR (C) 666.

¹⁵ *Ishree Persaud*, (1875) 24 W. R. (Cr.) 49.

¹⁶ *Chinnappa Chetty*, [1942] 2 M. L. J. 686, [1942] M. W. N. 726, (1942) 44 Cr. L. J. 413, [1943] AIR (M) 209.

¹⁷ *Khair Jama Khan*, (1980) 31 Cr. L. J. 492, [1930] AIR (P) 385.

Whipping.—In a case of an offence under this section, a Magistrate has two alternatives before him. He may send an offender to prison or, in lieu thereof, he may either cause him to be whipped or send him to Borstal; but the power to order a person to be whipped is only in lieu of another punishment under the Code and once an order of detention in Borstal has been passed there is no power to alter this order to a sentence of whipping. Where a Magistrate has ordered detention in Borstal School of an offender, the Sessions Judge has no power to substitute for it a sentence of whipping as that would be enhancing the sentence.¹⁸

So far as the punishment of whipping is concerned, the offence under this section is held to be a distinct offence from that of theft under s. 378, and is not included under it.¹⁹ An offender in a case of theft under this section can be sentenced to whipping but only in lieu of the punishment of imprisonment or fine to which he is liable under the Code.²⁰ Sentence of whipping passed for the offence under this section read with s. 109 is not legal.²¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed in a building (*or tent, or vessel*) used as a human dwelling (*or for the custody of property*) the theft of (*specify the thing*), belonging to AB, and thereby committed an offence punishable under s. 380 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.²²

381. Whoever being a clerk or servant,¹ or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft by clerk or servant of property in possession of master.

COMMENT.

This section provides for a severe punishment when a clerk or a servant has committed theft because he has greater opportunities of committing this offence owing to the confidence reposed in him. When the possession is with the master this section applies; when it is with the servant, s. 408 comes into operation.

1. 'Clerk or servant'.—A clerk or servant is a person bound either by an express contract of service or by conduct implying such a contract to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact.²³ "What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer so as to be under his employer's control... it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent,—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as a servant."²⁴ "The test is very much this, viz. whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control."²⁵ The allowance of a portion of the profits or goods does not destroy the relation of master and servant.¹ It is necessary that the objects of the service of a

¹⁸ *Kyaw Aye*, [1939] Ran. 744.

¹⁹ *Changia*, (1870) 7 B. H. C. (Cr. C.) 68; contra, *Jeevan v. Boodha*, (1867) P. R. No. 51 of 1867.

²⁰ *Shin Narain*, (1939) 14 Luck. 634.

²¹ *Venappa*, (1937) 38 Cr. L. J. 1013, [1927] AIR (R) 310.

²² (1866) 5 W. R. (Cr. L.) 8.

²³ Stephen's Dig. of Crim. Law, Art. 335;

Sohan Lal, (1905) P. R. No. 50 of 1905, 3 Cr. L. J. 70.

²⁴ Per Bovill, C. J., in *Negus*, (1873) L. R. 2 C. C. R. 34, 36; *Winnall*, (1851) 5 Cox 326; *Pyo Gyi*, (1919) 10 L. B. R. 31, 20 Cr. L. J. 513, [1919] AIR (LB) 60.

²⁵ Per Blackburn, J., in *Negus*, (1873) L. R. 2 C. C. R. 34, 37.

¹ *Lall Chand Roy*, (1868) 9 W. R. (Cr.) 37.

'clerk or servant' should not be criminal but a man may be such a clerk or servant although the objects of his service are in part illegal as being contrary to public policy.²

CASES.

Clerk.—Where the clerk of a toll-contractor illegally levied toll on carts laden when leaving a town, and prevented the carts from passing through the toll-gate, unless the toll demanded was paid, he was held guilty of this offence.³

Servant.—Where some policemen stole a sum of money shut up in a box and placed in the Police Treasury building, over which they were mounting guard as sentinels, they were held guilty of an offence under this section and not under s. 409.⁴ Where a person engaged to cart tamarind fruits from a forest abstracted a portion of it, it was held that he was not the less a servant because his employment was temporary.⁵ But a hired boatman is not a servant,⁶ though an unpaid apprentice is.⁷

English cases.—The following persons were held to be clerks or servants.—An apprentice under the age of eighteen;⁸ a person paid for his services by a commission or share in the profits;⁹ a person who was occasionally employed;¹⁰ a person who was not a general servant but employed for a particular purpose;¹¹ a person employed by different persons at the same time for different purposes;¹² a person acting as a clerk or servant though not expressly appointed as such¹³ and a director of a company.¹⁴

The accused, a servant of B, a horse-dealer, was sent by him to the prosecutor to deliver a horse. The prosecutor asked the accused to sell a pony for him to C for £5 and not less. The accused took the pony to another person, sold it for £3 and absconded with the money. It was held that the pony was in the custody of the accused in the character of a servant to the prosecutor, and that it was not in his possession as bailee, and that he was therefore guilty of larceny.¹⁵

The following persons were held to be not clerks or servants.—The driver of a coach hired for the day of the party hiring;¹⁶ the person employed to collect the sacrament money from the communicants of the ministers to church wardens;¹⁷ a person requested to receive money in a single instance only;¹⁸ a person employed to solicit orders for a particular person only but at liberty to apply for orders whenever he thought most convenient and to be paid by commission;¹⁹ a person employed to get the orders for goods, and to receive payment for them, but who was at liberty to get the orders and receive the money where and when he thought proper and was to be paid by a commission on the goods sold;²⁰ the treasurer of a friendly society who received no payment for filling the office;²¹ an accountant and a debt-collector engaged by the complainant to collect debts on terms of receiving five per cent. on the amount collected;²² and a member of a committee appointed to conduct an excursion and who received no remuneration for his services.²³

PRACTICE.

Evidence.—Prove points 1 to 6 as those for s. 379, and further—

(7) That the accused was at the time a clerk or servant, and was employed in such capacity by the person in whose possession the stolen property was.

² *Stainer*, (1870) L. R. 1 C. C. R. 230.

³ *B. Appalasami*, (1892) 1 Weir 441.

⁴ *Juggurnath Singh*, (1865) 2 W. R. (Cr.) 55;
Baidnath Singh, (1865) 3 W. R. (Cr.) 29.

⁵ (1881) 1 Weir 437.

⁶ *Rawool Manjez*, (1867) 8 W. R. (Cr.) 32.

⁷ *Sohan Lall*, (1905) P. R. No. 50 of 1905, 3 Cr. L. J. 70.

⁸ *Mellish's Case*, (1805) Russ. & Ry. 80.

⁹ *Donald McDonald*, (1861) 9 Cox 10;
Hartley's Case, (1807) Russ. & Ry. 139; *Carr's Case*, (1811) Russ. & Ry. 198; *May*, (1860) 8 Cox 421; *Turner*, (1870) 11 Cox 551.

¹⁰ *Spencer's Case*, (1815) Russ. & Ry. 299;
Thomas, (1852) 6 Cox 403.

¹¹ *Hugh's Case*, (1832) 1 Mood. 370; *Winnall*, (1851) 5 Cox 326.

¹² *Batty's Case*, (1824, 2 Mood. 257; *Tite's*

Case, (1861) L. & C. 29; *Carr's Case*, (1811) Russ. & Ry. 198.

¹³ *Foulkes*, (1875) L. R. 2 C. C. R. 150.

¹⁴ *Stuart*, [1894] 1 Q. B. 310.

¹⁵ *Stanbury*, (1847) 2 Cox 272.

¹⁶ *Haydon*, (1836) 7 C. & P. 445.

¹⁷ *Burton's Case*, (1829) 1 Mood. 237.

¹⁸ *Nettleton's Case*, (1830) 1 Mood. 259.

¹⁹ *Negus*, (1873) L. R. 2 C. C. R. 34.

²⁰ *Bowers*, (1866) L. R. 1 C. C. R. 41. See *Bailey*, (1871) 12 Cox 56, where the accused was to get remuneration by commission but was bound to give the whole of his time and it was held that he was a servant.

²¹ *Tyree*, (1869) L. R. 1 C. C. R. 177.

²² *James Hall*, (1875) 13 Cox 49.

²³ *Bren*, (1863) 9 Cox 398.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if the property is not worth more than Rs. 50.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, being a servant [*or clerk or employed in the capacity of a clerk or servant*] of AB, committed theft by stealing property, to wit—, in the possession of the said AB, and thereby committed an offence punishable under s. 381 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.²⁴

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.

ILLUSTRATIONS.

(a) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(b) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section,

COMMENT.

The possession by a thief at the time of his committing a theft of a knife or other weapon, which, if used on a human being might cause death or hurt, would not of itself justify a conviction under the section. There must be something to show or from which it may properly be inferred, that the offender made preparation for causing one or more of the results mentioned in the section.²⁵

If hurt is actually caused when a theft is committed, the offence is punishable as robbery, and not under this section.¹ In robbery there is always injury. In offences under this section the thief is full of preparation to cause hurt, but he may not cause it. A stole some rice from a house. While carrying it away he was seized by B. He thereupon dropped the rice and then stabbed B with a knife. He was convicted of voluntarily causing hurt while committing robbery under s. 394. It was held that as A dropped the rice before stabbing B, he could not have caused the hurt for the purpose of carrying away the rice, and the offence was therefore not robbery, but one under this section and s. 324.²

PRACTICE.

Evidence.—Prove points (1) to (6) as those for s. 379; and further—

(7) That the accused, when committing such theft, made preparation for causing death, hurt, or restraint, or fear of death, hurt or restraint.

(8) That he did as above in order (a) to the committing of such theft, or (b) to effect his escape after having committed such theft, or (c) to retain property taken by such theft.

²⁴ (1865) 2 W. R. (Cr. L.) 15.

²⁵ Per Fox, J., in *Nga Shan Gale*, (1903) 10 Burma L. R. 87, 89, 1 Cr. L. J. 378, 379.

¹ *Hushrut Sheikh*, (1866) 6 W. R. (Cr.) 85.

² *Nga Paing alias Kya Byu*, (1907) 4 L. B. R. 147, 7 Cr. L. J. 446.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed theft of (*specify the article*) the property of AB, after having made preparation for causing death [*or hurt or restraint*] by (*specify the mode of preparation made*) in order to the committing of the said theft, and thereby committed an offence punishable under s. 382 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901). As to enhanced punishment in the case of a criminal tribe, gang, or class, see the Criminal Tribes Act, 1897, s. 6. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (b) and sch. II.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Of Extortion.

383. Whoever intentionally puts any person in fear of any injury to that person, or to any other,¹ and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security² or anything signed or sealed which may be converted into a valuable security,³ commits “extortion.”

ILLUSTRATIONS.

(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z signs and delivers the note. A has committed extortion.

(c) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

384. Whoever commits extortion shall be punished with imprisonment for either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This offence occupies a middle place between theft and robbery.

Theft and extortion.—Extortion is distinguished from theft by the obvious circumstance that the consent is obtained by putting the person in possession of property in fear of injury to him or to any other. The offence is carried out by overpowering the will of the owner.³ In theft the offender's intention is always to take without that person's consent. Besides, the property which is obtained by extortion is not limited, as in theft, to movable property only. As the word ‘movable’ is omitted in the definition, immovable property may be the subject of extortion.

Ingredients.—The ingredients of extortion are:—

1. Intentionally putting a person in fear of injury to himself or another.

³ *Meqjan*, (1865) 4 W. R. (Cr.) 5.

2. Dishonestly inducing the person so put in fear to deliver to any person any property or valuable security.

1. 'Puts any person in fear of any injury to that person, or to any other'.—The injury may be intended to the person put in fear, or to any other. No tie of relationship is necessary between that person and the person put in fear. The word 'injury' is defined in s. 44, *supra*. The injury contemplated must be one which the accused himself can inflict or cause to be inflicted, and a threat of divine punishment is not such.⁴ No injury can be caused or threatened to be caused unless the act done is either an offence or such as may properly be made the basis of a civil action.⁵

Extortion as defined in s. 383 includes putting any person in fear of injury and covers s. 385, which is a less serious offence punishable with two years' imprisonment as against three years' imprisonment for an offence under s. 384.⁶

The Law Commissioners observe: "We conceive that it will be a question for the Court whether the injury threatened was such as was likely to produce the effect intended, and whether under the circumstances the party was really put in fear, believing the injury to be inevitable if he did not comply."⁷

The age, sex and situation of the person threatened may properly be taken into consideration. To constitute the offence it seems necessary that the person threatened should be actually put in fear; upon the whole of the facts, however, if there is reason enough to say that similar circumstances would ordinarily excite fear in persons of the same age, etc., as the person threatened, the Court will not too easily listen to suggestions or evidence adduced to show that the passion of fear was not in truth aroused. Nor, on the other hand, considering that the proof that he was put in fear will often mainly be the evidence of the person threatened, and that exaggerated, if not false, versions of the occurrence are not improbable, should the charge of extortion be considered as established without a cautious investigation.⁸

The 'fear' must be of such a nature and extent as to unsettle the mind of the person on whom it operates, and takes away from his acts that element of free, voluntary action which alone constitutes consent. Where the threats are not necessarily of a character to excite such alarm, it becomes a question for the jury whether they were made under such circumstances of intimidation as to have that effect.⁹ Thus, threatening to expose a clergyman, who had had criminal intercourse with a woman in a house of ill-fame, in his own church and village, to his own bishop, and to the archbishop; and also to publish his shame in the newspaper was held to be such a threat as a man of ordinary firmness could not be expected to resist.¹⁰

In *The Queen v. Tomlinson*,¹¹ Wills J., said: "With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody." The rule, that a threat is not of a criminal character, unless it be such as may overcome the ordinary free will of a firm man, has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed.¹²

Threat of criminal accusation.—The terror of a criminal charge, whether true or false, amounts to a fear of injury.¹³ The guilt or innocence of the party threatened is immaterial. Therefore, although the prosecutor may be cross-examined with a view to show that he is really guilty of the offence imputed to him, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor is really guilty.¹⁴ But it is material in considering the question whether, under the circumstances of the case, the intention of the accused was to extort money, or merely to compound a felony.¹⁵

⁴ *Doraswamy Ayyar*, (1924) 48 Mad. 774; *Tanumal*, [1944] Kar. 146.

⁵ *Tanumal*, [1944] Kar. 146.

⁶ *Mansharam Gianchand*, (1940) 42 Cr. L. J. 460, [1941] AIR (S) 86.

⁷ First Report, s. 517, p. 306.

⁸ M. & M. 844.

⁹ *Walton*, (1863) 9 Cox. 268.

¹⁰ (1844) 1 Cox 22.

¹¹ [1895] 1 Q. B. 706, 710.

¹² *Smith's Case*, (1849) 1 Den. Cr. C. 510.

¹³ *Mobarruk*, (1867) 7 W. R. (Cr.) 28; *James Gardner*, (1824) 1 C. & P. 479.

¹⁴ *Horatio Cracknell*, (1866) 10 Cox 498.

¹⁵ *Richards*, (1868) 11 Cox 43.

Extortion may be committed even though the threat may be to accuse a person of misconduct not amounting to an offence against the criminal law.¹⁶ Even the threat need not be a threat to accuse before a judicial tribunal: a threat to charge before any third person is enough.¹⁷

Though to threaten to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of more than is due is illegal, and such a threat made with such an object is a threat of injury sufficient to constitute extortion. Where, therefore, the accused, whose goat had been injured by the complainant, demanded of her a sum in excess of his value, and by threatening to prosecute her, succeeded in obtaining payment of that amount, it was held that the accused was rightly convicted of the offence of extortion and the fact that the offence with which the complainant was liable to be charged was compoundable could make no difference in respect of his criminal liability.¹⁸

2. 'Dishonestly induces the person so put in fear to deliver to any person any property or valuable security'.—The element of dishonesty is the essence of this offence.¹⁹

Delivery by the person put in fear is essential. Where a person through fear offers no resistance to the carrying off of his property, but does not deliver any of the property to those who carry it off, the offence committed is robbery and not extortion.²⁰

An intent to extort money may be implied from circumstances, and does not require an express demand of money. But, if it appear that the object is to compel the delivery of accounts of moneys honestly believed to be due and owing, there is no evidence of the intent.²¹ Where the accused forcibly removed certain property from the possession of the complainant claiming that the same belonged to himself and placed it in trust with a shop-keeper, and it appeared that there was some evidence to show that the property did in fact belong to the accused it was clear that the accused had no dishonest intention in removing the property, and no offence under this section was established against him.²²

'To any person'.—It is not necessary that the threat should be used, and the property received, by one and the same individual. It may be a matter of arrangement between several persons that the threat should be used by some, and the property received by others; and they all will be guilty of extortion.²³

'Valuable security' is defined in s. 30, *supra*. There is no distinction between an unstamped or an unregistered document and a document executed by a minor. In both cases the document purports to be a document whereby a legal right is created or a person acknowledges that he lies under a legal disability. Where a minor boy was forced to execute a handnote, it was held that it amounted to a valuable security within the meaning of this section read with s. 30.²⁴

The forcible taking of the victim's thumb impressions on a blank piece of paper which can be converted into a valuable security does not necessarily involve inducing the victim to deliver papers with the thumb impressions. Hence, where the victim is assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper, the offence of extortion cannot be said to have been established. The offence is no more than the use of criminal force or an assault punishable under s. 352.²⁵

3. 'Anything signed or sealed which may be converted into a valuable security'.—These words denote that incomplete deeds may be the subject of extortion under this expression. For instance, A signs his name to a blank paper or to a promissory note in which date, sums, etc., are not filled up; or A having caused a deed or a bond to be prepared, has signed and sealed it, but has not yet delivered it as his deed, this act of delivery being that which gives full legal effect and operation to the instru-

¹⁶ *Tomlinson*, [1895] 1 Q. B. 706.

¹⁷ *Robinson*, (1837) 2 Mood. & Rob. 14.

¹⁸ *Sakireddi Appalasami*, (1895) 1 Weir 441;

Nga Kan Tha, (1912) 14 Cr. L. J. 413.

¹⁹ *Padati Chenchu Reddi*, (1882) 1 Weir 440.

²⁰ *Duleelooddeen Sheikh*, (1866) 5 W. R. (Cr.) 19.

²¹ *Coghlan*, (1865) 4 F. & F. 316; *Ganeshmal Sait*, [1948] M. W. N. 361.

²² *Ujagar Singh*, (1925) 26 Cr. L. J. 794, 26 P. L. R. 97.

²³ *Shankar Bhagwat*, (1866) 2 B. H. C. 394, 395.

²⁴ *Ramnarain Sahu*, (1933) 15 P. L. T. 66, 35 Cr. L. J. 123.

²⁵ *Jadunandan Singh*, (1940) 21 P. L. T. 970, 42 Cr. L. J. 361, [1941] AIR (P) 129.

ment. In each of these cases the blank paper and the incomplete deed are subjects of extortion.¹

CASES.

Threat of loss of appointment.—The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal, of loss of an appointment, amounts to extortion.²

Money extorted by threat of wrongful confinement.—The accused arrested one J., wrongfully confined him, and extorted from him Rs. 200 under a threat that he would not be relieved unless the money were paid. This money was paid by P, a money-lender, who lent it to J. It was held that the accused was guilty under s. 384, but P could not be regarded as an accomplice.³

Where a policeman, late at night, met the prosecutor, who had just parted from a female in a street, to whom he had been talking, and told him that he had been talking to a prostitute, and that he must go with him to the Bridewell and that the prosecutor was under a penalty of £.1 for talking to a prostitute in the street, and if the prosecutor would give him 5s. he might go about his business, it was held that this amounted to extortion.⁴ A acted as auctioneer at a mock auction. A knocked down some cloth for 26s. to B, who had not bid for it, as A knew. B refused to take the cloth or to pay for it; A refused to allow her to leave the room unless she paid. Ultimately, she paid the 26s. to A, and took the cloth. She paid 26s. because she was afraid. It was held that A was guilty of larceny.⁵ Under the Code this would be extortion.

Threat of incendiarism.—A letter written to a banker, stating that it was intended by a cracksmen to burn his books and cause his bank to stop, and that, if £.250 were put in a certain place, the writer of the letter would prevent the mischief, but if the money was not put there, it would happen, was held to be a letter demanding money by threat.⁶

Threat of criminal charge.—Where the accused threatened A's father that he would accuse A of having committed an abominable offence upon a mare, for the purpose of putting off the mare and forcing the father, under terror of the threatened charge, to buy and pay for her at the accused's price, it was held that the accused was guilty of extortion.⁷

Threat of divine displeasure.—The applicant, a contractor, wrote a post-card to the widow of one K demanding balance of ten rupees due to him for work executed in K's lifetime saying that if it was not paid through Court it would be recovered from her husband in the next world. He was prosecuted on the charge of attempting to enforce payment from the widow by threats of divine displeasure, if payment was not made. It was held that the accused was not guilty of extortion under s. 385.⁸

Money extorted by frightening person.—The prosecutrix gave L, a travelling grinder, six knives to grind for her, the ordinary charge for grinding which would be 1s. 3d. L ground the knives, and then demanded with threats 5s. 6d. as his charge from the prosecutrix. The prosecutrix, being thus frightened, in consequence of her fears, paid L the sum demanded. It was held that this was obtaining money by threat.⁹ Where some vaccinators threatened to cause pain to children while taking lymph from their arms unless they received some money, it was held that they were guilty of this offence.¹⁰

Illegal exaction of money.—A cloth-seller was threatened with the imposition of a fine if he continued to sell foreign cloth. He continued to sell such cloth, and, to enforce payment of the fine, his shop was picketed for two hours and he lost a certain amount of business and ultimately paid the fine. It was held that the person responsible for the picketing, who had been convicted under s. 385, was rightly convicted, and

¹ M. & M. 346.

² *Meer Abbas Ali v. Omad Ali*, (1872) 18 W. R. (Cr.) 17.

³ *Akhoy Kumar Chuckerbutty v. Jagat Chunder Chuckerbutty*, (1900) 27 Cal. 925.

⁴ *James Robertson* (1864) 13 Cox 9.

⁵ *McGrath*, (1869) L. R. 1 C. C. R. 205.

⁶ *Smith*, (1849) 2 C. & K. 882.

⁷ *Redman*, (1865) L. R. 1 C. C. R. 12.

⁸ *Tanumal*, [1944] Kar. 146.

⁹ *Lovell*, (1881) 8 Q. B. D. 185.

¹⁰ *Hari Har*, (1886) 1 C. P. L. R. 24.

might very well have been convicted under this section.¹¹ Where a person, without any right, took away cattle belonging to another and declined to release them until he was paid a certain sum and it was on receipt of that sum that he released them, it was held that he was guilty of extortion.¹² A village *chaukidar* arrested one A who was stealing a few wisps of sarson stalks outside his circle and after detaining him for the whole night released him upon payment of a bribe of ten rupees for forbearing to report to the police. It was held that he was guilty under this section.¹³ Where a police-officer arrested certain persons, refused to accept bail, threatened that they would not be released from lock-up until they paid a certain amount of money and released them only on payment of the money, it was held that the officer was guilty of extortion.¹⁴

No extortion.—The mere issue of an order to collect statistical information by a police-officer;¹⁵ a refusal to allow people to carry away firewood collected in a Government forest without payment of proper fees;¹⁶ a payment taken from the owners of trespassing cattle under the influence of a threat that the cattle would be impounded if the payment were refused;¹⁷ and a bond obtained under the threat of refusing service as *Vakil*,¹⁸ were held not to constitute extortion. Instituting a false criminal complaint against a debtor in order to bring pressure on him to pay his debt is not an attempt to commit the offence of extortion under this section read with s. 109, except where the debt is not legally due or recoverable, e.g. where it has been discharged by the Debt Conciliation Board.¹⁹

A *nikah khawan* is not bound to read a *nikah* for a person unless he chooses to do so, and it is no offence for him to demand any fee he likes for doing so.²⁰

Money extorted by picketer.—Where the charge against the accused was that he put the complainant in fear of picketing, that is, that he threatened to request third persons in a peaceable manner to abstain from doing what they were legally entitled to abstain from doing and it was not alleged that the accused proposed illegally to coerce third persons to abstain from drinking and where the complainant was induced to pay the accused a certain amount to abstain from picketing, it was held that the accused was not guilty of extortion.²¹

Mere presence is not abetment.—The mere fact that the offence of extortion is committed in the presence of a village watchman, without eliciting any disapproval on his part, does not render him liable as an abettor of the offence.²²

PRACTICE.

Evidence.—Prove (1) that the accused put the complainant in fear of some injury.

- (2) That such injury was either to the complainant or to some other person.
- (3) That the accused did so intentionally.
- (4) That he thereby induced the person so put in fear to deliver to some person some property or valuable security, or something signed or sealed, which was convertible into a valuable security.
- (5) That the accused acted dishonestly in doing as above.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Where it is doubtful whether property is obtained by fraudulent inducement or by putting in fear of injury, the accused can be punished either for extortion or for cheating.²³

Place of trial.—See ill. (c) to s. 179, Criminal Procedure Code.

¹¹ *Chaturbhuj*, (1922) 45 All. 187; *Local Government v. Nanmant Rao*, (1923) 25 Cr. L. J. 60, [1924] AIR (N) 19.

¹² *Habib-ul-Razaq*, (1923) 46 All. 81.

¹³ *Bhagwan Din*, (1929) 52 All. 203.

¹⁴ *Jagdish Narain*, [1941] O. W. N. 1255, (1941) 43 Cr. L. J. 139, [1942] AIR (O) 163.

¹⁵ *Meayyan*, (1865) 4 W. R. (Cr.) 5.

¹⁶ *Abdul Kadar*, (1866) 3 B. H. C. (Cr. C.) 45.

¹⁷ (1880) 1 Weir 438; *Pethiredla Virappa*, (1883) 1 Weir 440.

¹⁸ (1870) 5 M. H. C. (Appx.) 14, 1 Weir 438.

¹⁹ *Bhai Lal Chand*, (1942) 44 P. L. R. 429, 43 Cr. L. J. 849, [1942] AIR (L) 253.

²⁰ *Nizam Din*, (1923) 4 Lah. 179.

²¹ *Bartam Jagga Rao*, [1940] P. W. N. 194.

²² *Gopal Chunder Sirdar*, (1882) 8 Cal. 728.

²³ *Ramnarin Chowkeedar*, (1865) 3 W. R. (Cr.) 32.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, committed extortion by putting AB in fear of a certain injury, to wit——, and thereby dishonestly induced the said AB to deliver to you a certain property, to wit——; and that you thereby committed an offence punishable under s. 383 of the Indian Penal Code, and within my cognizance [*or the cognizance of the Court of Session (or the High Court)]*.

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)]* on the said charge.

Punishment.—For enhanced punishment in the case of members of a tribe, gang or class, see the Criminal Tribes Act (II of 1897), s. 6.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

385. Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury¹, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Putting person in fear of injury in order to commit extortion.

COMMENT.

By this section a distinction between the inchoate and the consummated offence is recognised. The attempt to commit extortion has proceeded so far towards completion that a person has been put in fear of injury, or that there has been an attempt to excite such fear; but the offence is incomplete because there has been no delivery of property, etc. The Court must be satisfied that the putting in fear was with the intention of extorting a delivery of property.²⁴ Where a Mukhtyar on behalf of the accused threatened to put questions to the complainant and the ladies of his household (who were witnesses) which were entirely irrelevant, scandalous and indecent with a view to extort money, it was held that the Mukhtyar was guilty of an offence under this section.²⁵

1. 'Injury'.—See s. 44, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused put the complainant in fear, or attempted to put him in fear.

(2) That the fear was regarding some injury.

(3) That the accused did as above to commit extortion.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Extortion by putting a person in fear of death or grievous hurt.

COMMENT.

If the fear caused is that of death or of grievous hurt it naturally causes great alarm. The section, therefore, provides for severe penalty in such cases.

²⁴ M. & M. 347.

²⁵ *Fazlur Rahman*, (1929) 9 Pat. 725.

PRACTICE.

Evidence.—Prove the same points as those required for s. 384, but prove in point (1) that the fear was of death or of grievous hurt.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Punishment.—Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt¹ to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Putting person in fear of death or of grievous hurt, in order to commit extortion.

COMMENT.

The relation between this section and s. 386 is the same as that between ss. 385 and 384.

1. ‘In fear of death or of grievous hurt’.—It is not necessary that the fear of death or of grievous hurt should be instantaneous.¹

See s. 46 as to the meaning of ‘death’ and s. 320 as to ‘grievous hurt’.

The feigning of an attempt to commit suicide in order to extort money is an offence under this section.²

PRACTICE.

Evidence.—Prove that the accused put or attempted to put the complainant in fear of death or of grievous hurt to him or to some other person in order to commit extortion.³

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Separate convictions.—Separate convictions cannot be passed under both s. 365 and this section.⁴

Charge.—See s. 385. For the expression “in fear of injury” substitute “in fear of death or grievous hurt”.

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901). ss. 11 (3) (d), 12 (2). As to Burma, see the Burma Laws Act (XIII of 1898), s. (3) (b) and sch. II.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

388. Whoever commits extortion by putting any person in fear of an accusation¹ against that person or any other, of having committed or attempted to commit any offence² punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

¹ *Tun Baw*, (1912) 6 L. B. R. 100, 13 Cr. L. J. 864, F.B.

² *Gregory*, (1866) 1 Ind. Jur. N. S. 423.

³ *Vide* s. 384, sup.

⁴ *Po Lan*, (1912) 6 L. B. R. 160, 14 Cr. L. J. 167.

punishable under section 377 of this Code, may be punished with transportation for life.

COMMENT.

The aggravating circumstance under this section is the threat of an accusation of an offence punishable with death, transportation for life or with imprisonment for ten years. If the accusation is of unnatural offence (s. 377) then the penalty provided is severer.

1. 'Fear of an accusation'.—It is immaterial whether the person against whom the accusation is threatened be innocent or guilty if the accused intended to extort money.⁵

2. 'Offence'.—The word 'offence' here means a thing punishable under the Code or any special or local law (s. 40).

PRACTICE.

Evidence.—Prove the same points as those required for s. 384, showing that the fear was occasioned by a threat of an accusation of having committed, or having attempted to commit, or induced some one else to commit, an offence punishable with death, or with transportation for life, or ten years' imprisonment, or unnatural offence (s. 377).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed extortion by putting AB in fear of an accusation against him or against—of having committed [*or attempted to commit*] an offence punishable with death [*or with transportation for life, or with imprisonment, etc.*], to wit, the offence of (*specify the name of the offence*), and thereby dishonestly induced the said AB to deliver to you (*mention the thing or property*); and that you thereby committed an offence punishable under s. 388 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

389. Whoever, in order to the committing of extortion, puts

Putting person in fear of accusation of offence, in order to commit extortion.

or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence¹ be punishable under section 377 of this Code, may be punished with transportation for life.

COMMENT.

This section bears the same relation to s. 388 as s. 385 bears to s. 384.

1. 'Offence'.—The word "offence" here denotes a thing punishable under the Code or any special or local law (s. 40).

PRACTICE.

Evidence.—Prove (1) that the accused put, or attempted to put, a person in fear.

⁵ *James Gardner*, (1824) 1 C. & P. 479; *Richards*, (1868) 11 Cox 43.

(2) That the fear was of an accusation of an offence, or an attempt to commit it.

(3) That such offence was punishable with death, transportation for life or imprisonment for at least ten years.

(4) That he did so in order to commit extortion (see s. 384).

For the last provision, prove further that the accusation was of an unnatural offence (s. 377).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 385, *supra*.

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (XIII of 1898), s. 4 (3) (*d*) and sch. II.

Of Robbery and Dacoity.

Robbery. **390.** In all robbery there is either theft or extortion.

Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away¹ or attempting to carry away property obtained by the theft, the offender, for that end,² voluntarily causes³ or attempts to cause to any person⁴ death or hurt or wrongful restraint, or fear of instant death⁵ or of instant hurt,⁶ or of instant wrongful restraint.⁷

Exortion is “robbery” if the offender, at the time of committing the extortion, is in the presence⁸ of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person,⁹ and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

ILLUSTRATIONS.

(a) A holds Z down, and fraudulently takes Z’s money and jewels from Z’s clothes, without Z’s consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b) A meets Z on the high road, shows a pistol, and demands Z’s purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z’s child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(d) A obtains property from Z by saying—“Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees”. This is extortion, and punishable as such: but it is not robbery, unless Z is put in fear of the instant death of his child.

COMMENT.

Robbery is a special and aggravated form of either theft or extortion. 'Robbery' means a felonious taking from the person of another or in his presence against his will, by violence or putting him in fear.⁶

The authors of the Code say: "In one single class of cases, theft and extortion are in practice confounded together so inextricably, that no judge, however sagacious, could discriminate between them. This class of cases therefore has, in all systems of jurisprudence, ... been treated as a perfectly distinct class; ... we have therefore made robbery a separate crime.

"There can be no case of robbery which does not fall within the definition either of theft or of extortion; but in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft or an extortion. A seizes Z, threatens to murder him, unless he delivers all his property, and begins to pull off Z's ornaments. Z in terror begs that A will take all he has, and spare his life, assists in taking off his ornaments, and delivers them to A. Here, such ornaments as A took without Z's consent are taken by theft. Those which Z delivered up from fear of death are acquired by extortion. It is by no means improbable that Z's right-arm bracelet may have been obtained by theft, and left-arm bracelet by extortion; that the rupees in Z's girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed, something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this should be ascertained. For though, in general, the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought, therefore, to be made known to the Courts, yet the consent which a person gives to the taking of his property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial".⁷

The chief distinguishing element in robbery is the presence of imminent fear or violence.

The Explanation and illustrations (c) and (d) mark the distinction between simple extortion and extortion which is robbery.

The section contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property, and should for that purpose either hurt him or place him under wrongful restraint.⁸

1. 'Carrying away'.—Even if death, hurt, or wrongful restraint, or fear of any of these, is caused after committing the theft in order to carry away the property obtained by theft, this offence would be committed. According to English law the force which converts theft into robbery must be used before or at the time of taking, and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen. Thus, if a man walking after a woman in the street were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.⁹

2. 'For that end'.—The essence of the offence is that the offender for the end of committing theft, or carrying away or attempting to carry away properties obtained by theft, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint.¹⁰ Death, hurt, or wrongful restraint, must be caused in committing theft, or in carrying away property obtained by theft.¹¹ The words "for that end" cannot be read as meaning in those circumstances as that would widen the application of the section.¹² The hurt contemplated must be a conscious and voluntary act

⁶ *Karali Prasad Dutta v. The East Indian Railway Company*, (1928) 48 C. L. J. 32, 35, [1928] AIR (C) 498.

⁷ Note N, p. 162.

⁸ *Mir Baz*, (1934) 36 Cr. L. J. 894.

⁹ *Thomas Gnosil*, (1824) 1 C. & P. 304.

¹⁰ *Mathura Thakur*, (1901) 6 C. W. N. 72, 79;

Bishambhar Nath, [1941] O. W. N. 1262, (1941) 43 Cr. L. J. 530, [1941] AIR (O) 476.

¹¹ *Ruhman Khan*, (1865) 3 W. R. (Cr.) 14; *Kalio Kerio*, (1872) Cr. R. June 27 of 1872, Unrep. Cr. C. 65.

¹² *Karuppa Gounden*, (1916) 18 Cr. L. J. 346, [1918] AIR (M) 821.

on the part of the thief for the purpose of overpowering resistance on the part of the victim quite separate and distinct from the act of theft itself.¹³ The use of violence will not convert the offence of theft into robbery unless the violence be committed for one of the ends specified in this section. Where the accused abandoned the property obtained by theft and threw stones at his pursuer to deter him from continuing the pursuit, it was held that the accused was guilty of theft and not of robbery.¹⁴

Hurt independent of theft does not amount to robbery.—Where hurt or fear of instant hurt was caused by five or more persons for the purpose of dispossessing persons already in possession of some premises and had no relation to the commission of theft, although the theft might have been committed at the same time as a perfectly independent act, it was held that this did not amount to robbery.¹⁵

Where a child of four years of age was stripped of its ornaments and when the child threatened to tell its mother it was beaten, it was held that the offence committed was one of theft and not of robbery.¹⁶

A had set wires in which game was caught. B, a game-keeper, found them and took the game and wires for the use of the lord of the manor. A demanded them with menaces, and B gave them up. The jury found that A acted under a bona fide impression that the game and wires were his property. It was held that A had not committed robbery.¹⁷

3. 'Voluntarily causes'.—These words denote that an accidental infliction of injury by a thief will not convert his offence into robbery. Thus, where a person while cutting a string, by which a basket was tied, with intent to steal it, accidentally cut the wrist of the owner, who at the moment tried to seize and keep the basket, and ran away with it, it was held that the offence committed was theft and not robbery.¹⁸ But, where, in committing theft, there is indubitably an intention, seconded by an attempt to cause hurt, the offence would be robbery.¹⁹

See s. 39, *supra*, as to the meaning of 'voluntarily'.

4. 'To any person'.—The 'person' need not be the one from whose possession the thing is taken.

5. 'Fear of instant death'.—See s. 46, *supra*, as to the meaning of 'death'. It is not necessary that fear should be caused to the owner of the house after the robbers have entered the house. If the robbers scare away the owner on account of the fear caused in his mind before they are able to make an entry into the house, the offence of robbery would be quite complete. On the other hand, where the owner of the house is scared away by a crowd of persons and the house is subsequently robbed by another crowd, acting independently of the first crowd, the offence would not be robbery.²⁰

6. 'Hurt'.—See s. 319, *supra*. Where A and B were stealing mangoes from a tree, C surprised them, on which A knocked him down senseless with a stick;²¹ and where a person, in snatching a nose-ring, wounded the woman in the nostril, and caused her blood to flow,²² this offence was committed.

7. 'Wrongful restraint'.—See s. 339, *supra*. The accused stopped the complainant's boat in a stream representing themselves to be persons in authority and saying that the boat was required by a Magistrate to carry treasure, and then they plundered it. It was held that they were guilty of robbery.²³ Where a bailiff handcuffed a prisoner under pretence of carrying him to prison with greater safety, and by means of this violence extorted money, he was held guilty of robbery.²⁴

'Restraint' implies abridgement of the liberty of a person against his will. Where a person is deprived of his will-power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint. Where the accused locked from outside the room in which the watchmen of a building were asleep, and committed

¹³ *Karmun*, (1933) 35 P. L. R. 186, 35 Cr. L. J. 297.

¹⁴ (1865) 1 Weir 442; *Kalio Kerio*, (1872) Cr. R., June 27, 1872, Unrep. Cr. C. 65; *Nga Po Thet*, (1917) 19 Cr. L. J. 27, [1917] AIR (LB) 1.

¹⁵ *Otaruddi Manjhi v. Kafiluddi Manjhi*, (1900) 5 C. W. N. 372.

¹⁶ *Padam Singh*, (1892) 6 C. P. L. R. (Cr.) 36.

¹⁷ *Hall*, (1828) 3 C. & P. 409.

¹⁸ *Edwards*, (1843) 1 Cox 32.

¹⁹ *Teekai Bheer*, (1866) 5 W. R. (Cr.) 95.

²⁰ *Yamin*, (1924) 26 Cr. L. J. 145.

²¹ *Hushrut Sheikh*, (1866) 6 W. R. (Cr.) 85.

²² *Teekai Bheer*, (1866) 5 W. R. (Cr.) 95.

²³ *Duleeloodeen Sheikh*, (1866) 5 W. R. (Cr.) 19.

²⁴ *Gastoigne's Case*, (1783) 1 Leach 280.

theft, it was held that the accused could not be held to have caused wrongful restraint to the watchmen, and could not consequently be convicted of dacoity.²⁵

Where a police-officer obtained Rs. 7 from two prisoners on a promise of releasing them and threatened them that unless they gave him Rs. 200, he would confine them in the lock-up and keep them there for months while a charge of bribery against them, in respect of Rs. 7, was being investigated, and on his threat he was allowed to take certain ornaments, it was held that the offence committed was that of robbery.¹

8. 'Presence'.—The Explanation says that the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, or of instant hurt, or of instant wrongful restraint.

9. 'Fear of instant death,...to some other person'.—Imminent fear of death, hurt, etc., is necessary to bring the section into operation. If a man holds another's child over a river and threatens to throw it in unless the other gives him money, this will amount to robbery.² The principle of robbery is violence; where the money is delivered through fear, that is constructive violence.

CASES.

Where the accused forced an earring from the ear of a lady;³ where the accused tore some hair from a lady's head in snatching a diamond pin from it;⁴ where the accused took goods from the prosecutrix of the value of eight shillings, and by threats compelled her to take thirteen pence as payment for them;⁵ where the accused, while the complainant was proceeding in a street, caught hold of the seals and chain of the complainant's gold watch and pulled the watch out of his *jab* and by giving two or three jerks broke the steel chain with which it was attached and then made off with it;⁶ and where a person ran up against another for the purpose of diverting his attention while he picked his pocket,⁷ it was held that the force was sufficient to constitute the offence of robbery.

391. When five or more persons conjointly commit or attempt to commit a robbery,¹ or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

COMMENT.

Dacoity is robbery committed by five or more persons. Abettors who are present and aiding when the crime is committed are counted in the number. The number of persons concerned in the robbery must not be less than five.

The essentials of the offence of dacoity are that the theft should be perpetrated by means either of actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that the force or menace should be displayed by any overt act. It cannot avail the accused to say, or reduce the gravity of their offence, that no actual hurt was caused as no one dared to resist the overwhelming show of force, which was sufficient to terrify, and did in fact terrify, those whose business it was to protect the property.⁸ In a case of dacoity the circumstance that the inmates of the house, seeing the large number of the dacoits, do not offer any resistance and no force or violence is required or used does not reduce the dacoity to theft.⁹

The authors of the Code say: "We have provided punishment of exemplary severity for that atrocious crime which is designated in the Regulations of Bengal

²⁵ *Fateh Muhammad*, (1927) 29 P. L. R. 90, 29 Cr. L. J. 602, [1928] AIR (L) 445.

¹ *Basant Rai*, (1896) P. R. No. 12 of 1896.

² 2 East P. C. 735, 736.

³ *Lapier's Case*, (1784) 1 Leach 320.

⁴ *Mqore's Case*, (1784) 1 Leach 335.

⁵ *Simons*, (1773) 2 East P. C. 712.

⁶ *Mason's Case*, (1820) Russ. & Ry. 419.

⁷ *Anon.*, (1825) 1 Lewin 300.

⁸ *Chandra Krishna*, (1908) 10 Bom. L. R. 632, 7 Cr. L. J. 192.

⁹ *Ram Chand*, (1932) 55 All. 117.

and Madras by the name of Dacoity. This name we have thought it convenient to retain, for the purpose of denoting, not only actual gang-robbery, but the attempting to rob when such an attempt is made or aided by a gang".¹⁰ The popular notion of dacoity was that of an outrage committed, at the very dead of night, by a band of ruffians, whose heads were covered and whose faces were disguised by chalk or some other mixture, and who had no private enmity with the peaceable and unfortunate house-holder, whom some one of the gang had previously, by secret inquiries, marked out for a prey.

Under this section the number of persons committing robbery must be five or more. Where the evidence showed that there were six robbers but at the trial three were acquitted, it was held that a conviction under this section was not sustainable, and that the accused should be convicted under s. 392.¹¹

1. 'Conjointly commit or attempt to commit a robbery'.—A man is not guilty of dacoity unless he has committed, attempted to commit, or aided in committing robbery.¹² Where the accused did not actually take part in the dacoity but was with others before the dacoity and went with one of the dacoits to borrow a boat, and during the dacoity was left in the boat at a place some five or six miles from the place of the dacoity and was told to wait for other dacoits, it was held that the accused's action did not come within the definition of dacoity as he was not present though he might have been aiding such commission or attempt.¹³ A dacoity begins as soon as there is an attempt to commit robbery and a shot fired thereafter in order to keep off a rescue party and to allow the theft to be committed is an act committed in committing the dacoity within the meaning of this section.¹⁴

Dacoity is either theft or extortion.—If no property is carried off, there is no dacoity¹⁵ but an offence under s. 402.¹⁶ Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing wrongful gain to themselves or wrongful loss to the owner of the cattle but for the purpose of preventing the killing of the cows, it was held that they could not be convicted of dacoity but only of riot.¹⁷ But in a subsequent case the principle of this decision has been held to be limited to the particular facts of that case. Where, therefore, a large body of Hindus acting in concert and apparently under the influence of religious feeling attacked certain Mahomedans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring the cattle to the Mahomedans, it was held that they were guilty of dacoity. The Court said: "The Indian Penal Code is a statute of the Legislature applicable to Muhammadans, Hindus, Christians and all other sects alike. It is necessary in every civilized state that in order to protect the lives and property of the members of the community penal laws should exist and be enforced, and should be enforced no matter whether the person who commits an offence against them is a Christian, or a Muhammadan, or a Hindu or member of any other religious denomination. Penal laws are made for the protection of all classes alike, and they do not recognise any exception in the case of any particular denomination. A theft or a dacoity would not be any the less a theft or a dacoity if committed by members of one denomination upon the members of another; for example, no Christian or Muhammadan could plead in a Court of justice that he was not liable to be punished for theft because he acted under the incentive of some religious motive, if the facts showed that theft had in reality been committed. There must, in all states in which law and order are to abide, be penal laws equally enforceable against every denomination; and it is further necessary, unless we are to return to barbarous times, that persons who choose to wage a species of civil war on their neighbours should be adequately punished, not only as a punishment to themselves, but as a warning to deter others from

¹⁰ Note N, p. 163.

¹¹ *Pidda Enumundugaru*, (1910) 11 Cr. L. J. 249, [1910] M. W. N. 52; *Ikram-ud-din*, (1917) 39 All. 348; *Girdhar*, (1927) 28 Cr. L. J. 547, [1927] AIR (L) 519; *Abbas Ali Sahib*, (1927) 53 M. L. J. 732, [1927] M. W. N. 853, 29 Cr. L. J. 5, [1928] AIR (M) 144.

¹² *Ram Das*, [1945] All. 651.

¹³ *Ibrahim*, (1925) 42 C. L. J. 496, 26 Cr. L. J. 1146.

¹⁴ *Sitaram*, (1925) 26 Cr. L. J. 1364.

¹⁵ *Ram Sewan*, (1944) 45 P. L. T. 163.

¹⁶ (1868) 9 W. R. (Cr. L.) 5.

¹⁷ *Raghunath Rai*, (1892) 15 All. 22.

committing similar offences. A cow is an animal which in this country, a Muhammadan is entitled to hold as his property and over which he is entitled to exercise all the lawful rights of an owner, and so long as that Muhammadan in dealing with his own property does not, in the exercise of his rights of ownership, commit an offence against the Indian Penal Code, the law must and will protect him in the exercise of his rights. Similarly the law will protect a Hindu or a member of any other denomination in the exercise of his rights of property. If a Muhammadan, a Hindu or a Christian or a member of any other denomination commits an offence against the Penal Code, the law can be put in force against him by the process of the Criminal Code and by that process only. If he does not commit an offence in exercising his rights of property the law does not allow any one to interfere with him in the exercise of those rights, and people who take upon themselves either to take the law into their own hands, or to override or exceed the law, must expect the punishment which the law awards for criminal acts."¹⁸ Where it was established that the common object of certain Mahomedan rioters was both to hurt any member of the Hindu community whom they might happen to find and to rob the shops and houses of the Hindus, it was held that any person who was proved to have taken a part in the disturbance must be found guilty not only of the offence of riot but of the offence of dacoity.¹⁹

Good faith.—When all that is done is done under a claim of right in good faith entertained by the accused, however erroneously, the charge cannot be sustained.²⁰ Where there was illegal distraint of cattle and the accused forcibly rescued the cattle inflicting injuries it was held that as the distraint was illegal the accused could not be said to be acting dishonestly when they went to recover the cattle and therefore no offence was committed.²¹

Abetment.—Knowing of a design to commit a dacoity, and voluntarily concealing the existence of that design, with the knowledge that such concealment will facilitate the commission of dacoity, does not amount to an abetment of the dacoity.²²

Fear of instant death, or of hurt, or of wrongful restraint.—Imminent fear of death, hurt, etc., will be sufficient to bring the section into operation. Where several persons attacked a house and took away property, but the inmates obtaining information beforehand had fled before the attack, it was held that the fact of the inmates running away was sufficient proof of the fear of hurt or of wrongful restraint and the accused were guilty of dacoity.²³

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Punishment for robbery.

COMMENT.

This section specifies the punishment which can be inflicted in case of simple robbery. The next section punishes attempt to commit robbery.

If hurt is caused in committing robbery, s. 394 applies; if there is an attempt to cause death or grievous hurt, s. 397 applies; and if the offender is armed with a deadly weapon, s. 398 applies.

PRACTICE.

Evidence.—Prove (1) that the accused committed theft (*vide* s. 379 for the points to be proved.)

(2) That he caused or attempted to cause to some person (a) death, hurt, or wrongful restraint; or (b) fear of instant death, or of instant hurt, or of instant wrongful restraint.

¹⁸ *Ram Baran*, (1893) 15 All. 299, 301.

¹⁹ *Daulat*, (1926) 2 Luck. 264.

²⁰ *Karaka Nachiar* alias *Vellia Nachiar*, (1866)

3 M. H. C. 254; *Nura*, (1933) 34 P. L. R. 956,

34 Cr. L. J. 1258.

²¹ *Chitravelu Thevar*, [1941] M. W. N. 679 (2),

[1941] 2 M. L. J. 207, (1941) 54 L. W. 482, 43 Cr. L. J. 106, [1941] AIR (M) 763.

²² *Jhugroo*, (1865) 4 W. R. (Cr.) 2.

²³ *Kissoree Pater*, (1867) 7 W. R. (Cr.) 35. [53].

(3) That he did as above (a) in committing such theft ; or (b) in order to commit such theft ; or (c) in carrying away, or attempting to carry away, the property obtained by such theft.

(4) That he acted as in (2) voluntarily.

Or prove—

(1) That the accused committed extortion (*vide* s. 384 for the points to be proved).

(2) That he was, at the time of committing it, in the presence of the person so put in fear.

(3) That he committed it by putting that person or some other person in fear of instant death, or of instant hurt, or of instant wrongful restraint.

(4) That he thereby induced the person so put in fear to deliver up then and there the thing extorted.

As an example of relevant facts, see ill. (a) to s. 7, and ill. (f) and (k) to s. 8 of the Indian Evidence Act.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under ss. 323, 392 and 394.²⁴

Where persons are committed on three separate and distinct charges of three separate and distinct robberies committed on the same night in three different houses, they must be tried separately on each of the three charges.²⁵

Jurisdiction.—It is not open to a Magistrate to split up a graver offence into a number of smaller offences which, when combined, constitute that offence, in order to give himself jurisdiction.¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, robbed (*state the name*), and thereby committed an offence punishable under s. 392 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I thereby direct that you be tried (by the said Court) on the said charge.²

Punishment.—In robbery, the Legislature has provided three different degrees of punishment which may be inflicted. Under s. 392, the punishment may be extended to fourteen years' imprisonment. It is not permissible to award a sentence of fine only without imprisonment for the offence of robbery.³ Under s. 394, it may be extended to transportation for life, and under s. 397, it cannot be less than seven years. Section 392 is the general section, and the two other sections specify the same offence under aggravated circumstances. This section no doubt allows the Court discretion as regards the minimum punishment to be awarded, but when the offence is attended with circumstances which would make the attempt to commit it punishable with the minimum sentence of seven years, it would not be a proper exercise of discretion to award a lesser sentence when the offence has been accomplished.⁴

Highway robbery is a very heinous offence for which deterrent sentence should be passed. In such a case the value of the stolen property should not be the criterion whereby the amount of punishment is to be determined.⁵

As to sentence of whipping, see the Whipping Act (IV of 1909), s. 4. A sentence of whipping may be imposed where, in the commission of robbery, hurt is caused. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (n) and sh. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6 and 11 (3) (d) and 12 (2). As to members of a criminal tribes or gang, see the Criminal Tribes Act, 1897, s. 6, schedule.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

²⁴ Illustration (m), s. 235, Criminal Procedure Code.

²⁵ *Itcaree Dome*, (1866) 6 W. R. (Cr.) 83.

¹ *Otaruddi Manjhi v. Kafiruddi Manjhi*, (1900) 5 C. W. N. 372.

L. C.—61

² Criminal Procedure Code, sch. V, xxviii (9).

³ *Badri Prasad*, (1922) 44 All. 538.

⁴ *Chandra Nath*, (1931) 7 Luck. 543.

⁵ *Jagannath alias Khairati*, (1914) 17 Luck. 516.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Attempt to com-
mit robbery.

COMMENT.

This is a specific section for punishing attempt to commit robbery. A present intent to rob combined with an act in execution of such intention which falls short of the offence intended, is an attempt to rob.

PRACTICE.

Evidence.—Prove that the accused attempted to commit robbery.

As to what constitutes an attempt, see s. 511, *infra*.

As to the points requiring to be proved for robbery, see s. 392.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, and which amounted to an attempt to rob AB, and thereby committed an offence punishable under s. 393 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session, or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b), sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d), and 12 (2).

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or settlement has been made (s. 19).

394. If any person, in committing or in attempting to commit robbery, voluntarily¹ causes hurt,² such person, and any other person jointly concerned³ in committing or attempting to commit such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily caus-
ing hurt in com-
mitting robbery.

COMMENT.

The offence of voluntarily causing hurt of either description in committing, or attempting to commit robbery, is punishable under this section. Section 397 is merely a rider to this section with reference to cases in which the hurt committed is grievous.⁶

1. 'Voluntarily'.—See s. 39, *supra*. 2. 'Hurt'.—See s. 319, *supra*.

3. 'Jointly concerned'.—The guilty act of one is imputed to all who are joint with him, provided the act is done in committing the offence of robbery. Violence or hurt entirely unconnected with that offence or used to gratify personal spite or passion is not contemplated.

This section, and not s. 397, will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon.⁷

PRACTICE.

Evidence.—Prove (1) that the accused, or someone jointly concerned with him, committed or attempted to commit robbery.⁸

⁶ *Mohna alias Kohara*, (1901) P. R. No. 16 of 1901.

186, [1912] M. W. N. 35, 13 Cr. L. J. 42.

⁸ *Vide* s. 392, *supra*.

⁷ *Arunachella Thevan*, (1911) 22 M. L. J.

(2) That the accused, or such other person, voluntarily caused hurt⁹ in doing so.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

As an offence punishable under this section necessarily includes the offence punishable under s. 392, an accused person who is convicted under both these sections can be legally punished only under this section and in such a case it would be sufficient to convict him under this section alone.¹⁰ But see ill. (m) to s. 235 of the Code of Criminal Procedure which says: "A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under ss. 323, 393, and 394 of the Indian Penal Code."

Separate convictions are, according to this illustration, justifiable.

In cases where the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hurt or wrongful restraint, a charge cannot be framed against him under this section. Section 392 would be the only section applicable. But when the fact which transmutes theft into robbery is the voluntarily causing hurt, then, while s. 392 still applies, in so much that a charge under that section should be framed, a Magistrate is not justified in disregarding the application of this section: a charge of voluntarily causing hurt in committing robbery should be added under that section. That section imposes a specific penalty for a specific act; and if there is *prima facie* ground for believing that the accused has committed that act, he should be charged with it.¹¹

Where hurt is caused in the commission of a theft, the causing of hurt changes the theft into robbery, and the charge should be held under this section for causing hurt in the commission of robbery.¹²

Commitment.—If a Magistrate finds that an accused person had caused grievous hurt in committing robbery, he is bound to commit him to the Court of Session for an offence under s. 397; it is illegal to treat the grievous hurt as simple hurt and convict the accused under this section.¹³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed [(*or attempted to commit*) (*or were jointly with XY concerned in committing*)] (*or attempting to commit*) robbery of the property of AB, and that as such you (*or XY*) voluntarily caused hurt to AB (*or——*), and that you thereby committed an offence punishable under s. 394 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).¹⁴

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b) and sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (d) and 12 (2).

Whipping.—Before a sentence of whipping in addition to imprisonment can be passed on the accused, there must be a finding that he himself caused hurt while committing the robbery.¹⁵

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for dacoity.

⁹ Vide s. 323, *sup.*

¹⁰ *Durga*, (1890) Cr. R. No. 31 of 1890, Unrep. Cr. C. 511; *Mootkee Kora*, (1865) 2 W. R. (Cr.) 1.

¹¹ *Nga Po Lon*, (1902) 1 L. B. R. 232.

¹² (1865) 2 W. R. (Cr. L.) 6.

¹³ *Jobania*, (1889) Unrep. Cr. C. 476, Cr. R. No. 36 of 1889. But see *Surji Doss*, (1888) 1 Weir 449.

¹⁴ (1865) 2 W. R. (Cr. L.) 6.

¹⁵ *Po Thaug*, (1927) 6 Ran. 48.

COMMENT.

This section prescribes punishment for simple dacoity; s. 396, for dacoity accompanied with murder; s. 397, for dacoity with attempt to cause death or grievous hurt; s. 398, for attempt to commit dacoity when the offender is armed with a deadly weapon; s. 399, for making preparation to commit a dacoity; s. 400, for belonging to a gang of dacoits; and s. 402, for assembling for the purpose of committing dacoity.

PRACTICE.

Evidence.—Prove (1) that robbery was committed or attempted.¹⁶

(2) That five or more persons committed or attempted to commit robbery; or that the whole number of persons committing or attempting to commit robbery was five or more.¹⁷

If out of the persons charged with dacoity some are acquitted and five or less than five are convicted, the conviction does not become illegal. The mere fact that the evidence was not sufficient to convict the accused actually charged would not in any way affect the question of the number of persons engaged.¹⁸

(3) That such persons were acting conjointly.

As to the nature of evidence requisite to be taken in a case of dacoity, see the cases of *Queen v. Modhoo Manjee*,¹⁹ *Queen v. Ram Sagor*²⁰ and *Queen v. Kamal Fukeer*.²¹ In dacoity cases evidence adduced as to the identification of dacoits ought not to be accepted too readily, but should be looked at with great caution.²²

The statement of an approver along with the evidence of recovery of stolen property is sufficient proof to bring home to the accused the offence of dacoity.²³

In cases of dacoity and cognate offences where it is alleged that substantial property has been stolen, it is entirely unnecessary to consider motive. The taking of the booty itself provides a sufficient motive.²⁴

Presumption.—When a prisoner is apprehended eight days after a dacoity with part of the plunder in his possession, there is as good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.²⁵ When persons are found within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is that they are participators in the dacoity.¹

Where eight persons were each of them separately charged with dacoity, but the jury acquitted four of them but found the other four guilty, the evidence before them being that there were more than five persons concerned in the offence, even if the four who were acquitted were not there, it was held that the charge as against each of dacoity was sufficient notice to each of the accused that they were charged with four or more others and the conviction by the jury of dacoity would import a finding that there were four or more others engaged with each dacoit. The mere fact that the evidence was not sufficient to convict four of the accused actually charged would not in any way affect the question of the number of persons engaged.²

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

A person convicted of dacoity under s. 395 cannot be convicted also of dishonestly receiving stolen property under s. 41, or of receiving property transferred by commission of dacoity under s. 412, when there is no evidence of the commission of more than one offence.³

Direction to jury.—In a case of dacoity the Judge should direct the jury to convict only if they find that all the prisoners had the intention of causing wrongful gain or loss to the prosecutor.⁴ The jury must be distinctly instructed that unless

¹⁶ *Vide*, s. 392, sup.

¹⁷ *Shera*, (1868) P. R. No. 18 of 1868.

¹⁸ *Narayan Dinba*, (1946) 47 Cr. L. J. 822, [1943] N. L. J. 566.

¹⁹ (1866) 5 W. R. (Cr.) 51.

²⁰ (1867) 8 W. R. (Cr.) 57.

²¹ (1872) 17 W. R. (Cr.) 50.

²² *Kallu*, (1917) 18 Cr. L. J. 456.

²³ *Shera*, (1942) 44 P. L. R. 545, 44 Cr. L. J.

62, [1943] AIR (L) 5.

²⁴ *Arjun Panda*, (1941) 21 Pat. 130.

²⁵ *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66.

¹ *Cassy Mul*, (1865) 3 W. R. (Cr.) 10.

² *Rashidazaman*, (1911) 15 C. W. N. 434, 12 Cr. L. J. 193.

³ *Shahabut Sheikh*, (1870) 13 W. R. (Cr.) 42.

⁴ *Bonomally Ghose*, (1864) W. R. (Gap No.) (Cr.) 8.

they are satisfied that there were five or more persons committing the robbery or that the persons present and aiding in the commission of the robbery numbered five or more persons, there could be no dacoity.⁵

Attempt.—Section 511 of the Code does not apply to a case of dacoity. An attempt to commit dacoity should be charged under this section as the definition of 'dacoity' includes attempt.⁶

Abettor.—An abettor of dacoity is punishable under this section and s. 109 without any reference to s. 397 which is applicable only to persons actually committing a dacoity in which one of the acts specified in it is done.⁷

Joinder of charges.—Where the accused were charged under this section and also under ss. 148 and 460 and the charges in respect of offences under ss. 148 and 460 were not based on any facts other than the acts which it was necessary for the prosecution to establish to prove the offence under this section, it was held that the charges under ss. 148 and 460 should not have been framed at all. It is against the spirit of the law to adopt such a course for the purpose of depriving the accused of the benefit of the verdict of the jury on the charge of dacoity.⁸

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused person*) as follows :—

That you, on or about the——day of——, at ——, committed dacoity, an offence punishable under s. 395 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.⁹

Alternative charges.—Alternative charges under this section and s. 457 are not bad in law.¹⁰

Punishment.—Dacoity is a most serious crime which it is difficult to detect in the sense of bringing home the offence to the culprits and it is an offence which gives rise to a great deal of misery. In ordinary circumstances a sentence of rigorous imprisonment for a period of seven years is the least sentence which should be passed.¹¹ The crime of robbery in all cases must be considered as a serious crime and although this section does not provide for a graver punishment in the case of dacoity committed on the highway between sunset and sunrise, as in the case of robbery, nonetheless a dacoity committed on the highway between sunset and sunrise is an aggravation of the offence and a sentence of seven years is not excessive.¹² Where the dacoity is a very serious one the maximum sentence under this section, or something approaching the maximum sentence, should be passed upon the persons concerned.¹³ Where the circumstances indicated that the dacoits might have been under the influence of liquor at the time of the occurrence and possibly the dacoity committed by them was committed under the influence of liquor and no serious injuries were caused to anybody in the commission of the dacoity, the High Court reduced the sentence from seven years to two years rigorous imprisonment.¹⁴

A sentence of fine only is illegal.¹⁵ Sentence of transportation under this section must be either for life or for a period not exceeding ten years if given in lieu of imprisonment.¹⁶

The fact that the accused returned a part of the stolen property to the complainant the next day would not justify the High Court in reducing the sentences.¹⁷

Where a person, notwithstanding a previous conviction of dacoity and consequent punishment and after having a *locus penitentie* afforded him, again, after com-

⁵ *Mookkandi Maniaram*, (1903) 1 Weir 446.

⁶ *Koonce*, (1867) 7 W. R. (Cr.) 48.

⁷ *Chatar Singh*, (1901) P. R. No. 15 of 1901.

⁸ *Arjun Panda*, (1941) 21 Pat. 130.

⁹ Criminal Procedure Code, sch. V, xxviii (1) (10).

¹⁰ *Bikram Ali Pramanik*, (1929) 50 C. L. J. 467, 31 Cr. L. J. 610, [1930] AIR (C) 139.

¹¹ *Lakhan Singh*, [1936] A. L. J. R. 739, 37 Cr. L. J. 959, [1936] AIR (A) 311.

¹² *Adhik Lal Pathak*, (1941) 43 P. L. T. 475, [1941] P. W. N. 653, (1941) 43 Cr. L. J. 615,

[1942] AIR (P) 156; *Debi Charan*, [1942] A. L. J. R. 376, (1942) 43 Cr. L. J. 867, [1942] AIR (A) 339.

¹³ *Bansi*, [1941] A. L. J. R. 490, (1941) 43 Cr. L. J. 97, [1941] AIR (A) 359.

¹⁴ *Nabi Rasool*, [1942] 2 Cal. 136, 142.

¹⁵ *Bhoja*, (1866) 6 W. R. (Cr.) 54; *Dwarka Singh*, (1946) 47 Cr. L. J. 780.

¹⁶ *Arura*, (1903) P. R. No. 31 of 1903, 1 Cr. L. J. 89.

¹⁷ *Darao*, (1944) 46 Cr. L. J. 525, [1945] AIR (A) 100.

pleting a previous term of sentence, commits the same offence, he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and therefore may be punished on the second occasion with stripes in addition.¹⁸

In awarding sentences in a case of communal riot and dacoity committed while the accused were smarting with indignation against the outrages upon their sacred places, every allowance should be made for their feelings and comparative leniency should be shown. At the same time they must be adequately punished, and this act must be taken into consideration that the persons injured and robbed had no share in desecrating the holy places and were made to suffer for the sins of others.¹⁹

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b) and sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (b) and 12 (2).

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity,¹ every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Object.—In providing this section the object of the Legislature seems to be that the penalty of death or transportation for life may be inflicted on a person convicted of taking part in a dacoity in the course of which a murder is committed, even though there is nothing to show that he himself committed the murder or that he abetted it.

Ingredients.—The first essence of an offence under this section is that the dacoity is the joint act of the persons concerned; and the second essence of the offence is that the murder is committed in the course of the commission of the dacoity in question.²⁰

1. 'Conjointly committing dacoity, commits murder, etc.'—The Allahabad High Court once ruled that in order to support a conviction under this section it was necessary to establish, not only that the accused had committed dacoity conjointly with others, but it must also be shown that the murder had been committed in his presence.²¹ But it has subsequently held that when, in the commission of a dacoity, a murder is committed, it matters not whether the particular dacoit was inside the house where the dacoity is committed, or outside the house (as in the above case of *Queen-Empress v. Umrao Singh*), or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity.²² This ruling has been followed by the Bombay High Court²³ and the former Chief Court of the Punjab.²⁴ If a dacoit in the progress of, and in pursuance of, the commission of a dacoity commits a murder, all of his companions, who are participating in the commission of the same dacoity, may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity.²⁵ It is not necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted, its commission. Indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the

¹⁸ *Udai Patnaik*, (1869) 4 Beng. L. R. (A. Cr. J.) 5, 12 W.R. (Cr.) 68; *La Saing*, (1907) U. B. R. (1907-09) (Whipping) 1, 7 Cr. L. J. 212.

¹⁹ *Daulat*, (1926) 2 Luck. 264.

²⁰ *Mathura Thakur*, (1901) 6 C. W. N. 72.

²¹ *Umrao Singh*, (1894) 16 All. 437.

²² *Teja*, (1895) 17 All. 86.

²³ *Girya Laxmappa*, (1904) 6 Bom. L. R. 248, 1 Cr. L.J. 258.

²⁴ *Chittu*, (1900) P. R. No. 4 of 1900, 1 P. L. R. 44.

²⁵ *Chittu*, *ibid.*; *Bechan Chero*, (1943) 45 Cr. L. J. 577, [1944] AIR (P) 413.

members of the gang in commission of the dacoity.¹ The common object of an assembly was to commit a dacoity, and there was a general purpose to resist all opposers even, if necessary, to the point of death. This unlawful assembly did actually commit dacoity, and while retreating on the advent of villagers in superior force, one of its members shot and killed one of the villagers. It was held that as the murder was committed in effecting a safe retreat it should be ascertained whether the retreat was so separated by time or space from the offence which formed the common object of the assembly as not to form part of it; but as there was no such separation in that particular case and the retreat was an essential part of the common criminal purpose, it was a continuation of the actual dacoity, and the murder must be taken to have been committed in prosecution of the common object of the assembly.² Where certain persons who had committed dacoity were pursued in hot haste after the act of dacoity and being brought to bay, one of the dacoits stabbed and murdered a man who was pursuing him, it was held by a full bench of the Calcutta High Court that the act of murder was not a separate transaction but an offence committed 'in committing the dacoity' within the meaning of this section.³ Murder committed by dacoits while carrying away stolen property is 'murder committed in the commission' of dacoity.⁴

Where, after the commission of a dacoity, in which the dacoits, being interrupted by villagers, did not get any plunder, the dacoits, while attempting to escape, and one or more of them in order to facilitate the escape, attacked and killed one of the pursuing party, it was held that this section did not apply, but only the person or persons actually taking part in the killing were liable therefor.⁵ This case does not lay down sound law in view of the abovementioned decisions.

If a person concerned in a dacoity unintentionally commits murder he is liable to punishment under this section, but he cannot be separately convicted of murder under s. 302 and of dacoity under s. 395.⁶

PRACTICE.

Evidence.—Prove (1) the commission of dacoity.⁷

If this was not the object of the accused there would be no conviction under this section.⁸

(2) That one of the accused committed murder.⁹

(3) That the murder was committed during the commission of dacoity.

Where dacoits set out armed with lethal weapons and spears and murder was committed in the course of the dacoity, it is hardly relevant to say that the primary object of the dacoits was to obtain loot and that they only intended to commit murder if this was found to be desirable in their own interests.¹⁰

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

If, when a dacoity is planned, murder is contemplated from the first and is committed in the dacoity, any person, who joins in the conspiracy, is liable under s. 302 read with s. 109 to transportation for life, even if he does not eventually join in the commission of the dacoity with the other conspirators.¹¹

"If an accused takes part in any dacoity accompanied with murder, the proper section of the Penal Code to apply to him is s. 396 in addition to s. 400, and he is liable to be sentenced to death, or transportation for life, or 10 years' rigorous imprisonment and fine. If he has not rendered himself liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organized band, have only recently joined it, and have perhaps not taken part in more than one or two

¹ *Punjab Singh*, (1933) 15 Lah. 84, 106.

² *Sakharam Khandu*, (1900) 2 Bom. L. R. 325; *Sitaram*, (1925) 2 O. W. N. 550, 26 Cr. L. J. 1364.

³ *Monoranjana Bhattacharjya*, (1932) 33 Cr. L. J. 722, F.B.

⁴ *Vitti Thevan v. Vitti Thevan*, (1906) 17 M. L. J. 118, 5 Cr. L. J. 201; *Lashkar*, (1921) 2 Lah. 275; *Karim Baksh*, (1923) 25 Cr. L. J. 31, [1923] AIR (L) 329; *Sundar*, (1924) 25 Cr. L. J. 700 [1925] AIR (L) 142; *Bishunath*, [1935]

O. W. N. 145.

⁵ *Chandar*, (1906) 26 A. W. N. 47, 3 Cr. L. J. 294.

⁶ *Rughoo*, (1864) W. R. (Gap No.) (Cr.) 30.

⁷ *Vide* s. 395, sup.

⁸ *Mathura Thakur*, (1901) 6 C. W. N. 71; *Arshed Molla*, (1919) 29 C. L. J. 325, 20 Cr. L. J. 525, [1919] AIR (C) 85.

⁹ *Vide* s. 300, sup.

¹⁰ *Ishar Singh*, [1939] Lah. 67.

¹¹ *Sukhra*, (1896) 10 C. P. L. R. (Cr.) 20.

dacoits at the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who have belonged to the worst gangs, who go about armed defying the authorities and inflicting grievous hurt upon the people, and those smaller and less dangerous gangs who dacoit only because driven to do so by want and starvation, and because they are afraid to surrender, and who inflict no injury upon the people beyond that of depriving them of a few fowls and baskets of paddy, the food they are in search of".¹²

Where it is fully established that a dacoity was committed by a party of five persons one of whom committed a murder, and the identity of four of them is established beyond question, the fifth remaining unidentified, the four accused are equally guilty under this section, though it is not possible to trace and identify one of the culprits.¹³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, committed dacoity, and that, in the commission of such dacoity, murder was committed by one of your number, and that you thereby committed an offence punishable under s. 396 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.¹⁴

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b) and sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (b) and 12 (2).

The offence of conspiracy is a separate offence from the offence of participation in a particular dacoity or the dishonest reception of property stolen in a dacoity knowing it to be stolen. Separate sentences can of course be awarded to run consecutively for participation in separate dacoities and to these can also be added a consecutive sentence of participation in conspiracy.¹⁵

As this section covers the offence under s. 395 it is improper to pass a separate sentence in respect of that offence inasmuch as a man is not to be punished twice for the same criminal act.¹⁶

Upon a conviction under this section it is not a general rule that a sentence of death should necessarily follow. This section differs from s. 302 in this respect that whereas under s. 302 the rule is that a sentence of death should follow unless reasons are shown for giving a lesser sentence, no such rule applies to this section. So, where in the course of a dacoity one man was shot dead, and the accused person who was tried had a gun and the other dacoits also had guns, and there was no evidence that the accused was the man who fired the fatal shot, the sentence was altered from one of death to one of transportation for life.¹⁷

The Rangoon High Court has, however, held that where fire-arms are used in the course of a dacoity and a person is murdered in order to intimidate a house-owner and villagers, extreme sentence should be inflicted.¹⁸ It has also held that where death penalty is not inflicted, reasons for not imposing it must be given.¹⁹ Although reasons must be given for not passing the death sentence that does not mean that the death penalty is the normal sentence for an offence under this section.²⁰

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt¹ to any person,² or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Robbery or dacoity, with attempt to cause death or grievous hurt.

¹² Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B. 441, 442.

¹³ *Mohammad Ahsan*, (1929) 31 Cr. L. J. 112, [1930] AIR (L) 263.

¹⁴ Vide *Mutirulappan*, (1878) 1 Weir 447.

¹⁵ *Hazari Beria*, (1928) 5 O. W. N. 985, 30 Cr. L. J. 473, [1928] AIR (O) 507.

¹⁶ *Sharif*, [1943] Kar. 371.

¹⁷ *Lal Singh*, [1938] All. 875.

¹⁸ *Nga Tha Hmwe*, (1935) 37 Cr. L. J. 267, [1935] AIR (R) 504.

¹⁹ *Nga Sein Tun*, (1932) 34 Cr. L. J. 699, [1933] AIR (R) 61 (1).

²⁰ *Hla San*, [1941] Ran. 595.

COMMENT.

Object.—This section is intended to cover the case of a person who displays a deadly weapon to frighten his victim or their neighbours or who makes use of any deadly weapon for other similar purposes and its operation is not confined to cases where the weapon is used actually for causing injury or for attempting to cause an injury to another.²¹

This section is merely a rider to s. 394. It does not create any substantive offence. It is complementary to ss. 392 and 395 which create the substantive offences. It merely regulates the punishment already provided for dacoity, by fixing a minimum term of imprisonment when its commission has been attended with certain aggravating circumstances, viz., (1) use of a deadly weapon, or (2) causing of grievous hurt, or (3) attempting to cause death or grievous hurt. The provisions of this section are obligatory as “the imprisonment with which such offender shall be punished shall not be less than seven years.”²²

1. ‘The offender uses any deadly weapon, or causes grievous hurt’.—

A very wide interpretation was put upon the expression ‘uses a deadly weapon’ by the former Chief Court of Lower Burma. It held that this expression must include the carrying of a weapon for the purpose of overawing the person robbed. “It may be argued”, observed Twomey, J., “that to ‘use’ a stabbing weapon is to stab some person with it, to ‘use’ a cutting weapon is to cut some person with it, and to ‘use’ a gun is to shoot at some person with it. According to this narrow interpretation, brandishing a dagger or levelling a gun at a man might be regarded as merely *threatening* to use or *preparing* to use it, not as actually using it. But it is not clear that the word ‘uses’ in s. 397 should be interpreted with such strictness. The very next s. 398 imposes a minimum punishment of seven years’ punishment on persons convicted of merely carrying a deadly weapon when attempting to rob. It seems probable that the Legislature intended to impose the same minimum where the robbery is actually completed. I am inclined to think, therefore, that the word ‘uses’ in s. 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed. It is no doubt at first sight remarkable that wider language is employed in s. 397 (‘uses any deadly weapon’) than in s. 398 (‘is armed with any deadly weapon’). The explanation is apparently that in attempted robberies it is often difficult to prove any ‘use’ of the deadly weapon except the mere fact that the accused carried it, whereas in a case of completed robbery it generally happens that the accused not only carries the deadly weapon but also overawes the person robbed or even stabs, cuts or shoots at him. The wider view of s. 397 is supported by a passage in Maxwell’s Interpretation of Statutes²³ :—‘If he a man walks with a gun with intent to kill game, he ‘uses’ the gun for that purpose without firing, within the statute which makes using a gun with that intent penal’. English and American authorities are given for this interpretation...If the accused had merely attempted to take the complainant’s property by overawing him with a dagger but (owing to infirmity of purpose on his own part or resistance on the part of the complainant) had not carried out his design, he would undoubtedly be liable to the minimum punishment provided in s. 398. The Legislature cannot have intended that if the criminal goes a step further and actually accomplishes his purpose he should thereby establish a claim to more lenient treatment. It cannot have been intended that a criminal should be urged to complete his criminal purpose by the reflection that if he stops short at an attempt he must get seven years, while if he completes the offence he may get off with imprisonment for two or three years.”²⁴ If a person levels his revolver against another in order to overawe him, he ‘uses’ it as a ‘deadly weapon’. It is not necessary that he must fire it.”²⁵

²¹ *Inder Singh*, (1934) 35 P. L. R. 555, 36 Cr. L. J. 253; *Thevar Serrai*, [1938] M. W. N. 215, 39 Cr. L. J. 323.

²² (1867) 7 W. R. (Cr. L.) 2; *Wadhawa Singh*, (1923) 25 Cr. L. J. 259, [1923] AIR (L) 389; *Maru*, (1937) 39 Cr. L. J. 119.

²³ 7th Edition, p. 240.

²⁴ *Nga I*, (1911) 6 L. B. R. 41, 42, 13 Cr. L. J. 267; *Nazar Shah*, (1925) 20 S. L. R. 46, 27 Cr. L. J. 334, [1926] AIR (S) 150; *Nagar*, (1932) 33 P. L. R. 1081, 34 Cr. L. J. 45, [1933] AIR (L) 85; *Vellachami Thevan*, [1933] M. W. N. 727.

²⁵ *Chandra Nath*, (1931) 7 Luck. 543.

According to the Bombay,¹ the Calcutta,² the Madras,³ the Patna⁴ and the Rangoon⁵ High Courts the liability to an enhanced punishment is limited to the offender who actually causes grievous hurt or uses a deadly weapon, and not to the case of persons associated with such offender in the commission of the offence. The words "offender" and "such offender" refer only to the persons who are proved to have actually 'used' deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity. Section 34 has no application in the construction of this section though it may be read with ss. 392 and 395 to determine the substantive offence which is created.⁶ In one case the Allahabad High Court held that the words "such offender" include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34.⁷ But in subsequent cases it has laid down that the punishment provided for by this section applies only to those persons taking part in a dacoity who themselves used deadly weapons or themselves caused grievous hurt. It does not apply to such persons taking part in a dacoity as may be liable for grievous hurt, committed by one of the party only in virtue of s. 34.⁸ It has also held that if a gun is used at a dacoity by a person or persons unknown, all of the dacoits must be punished with at least seven years' imprisonment. In other words the section does not provide for joint liability as s. 149 does.⁹

The former Chief Court of the Punjab¹⁰ adopted the view expressed in *Queen-Empress v. Mahabir Tiwari*.¹¹ The Lahore High Court followed in the footsteps of the former Chief Court of the Punjab in one case¹² but in subsequent cases¹³ it has adopted the later view of the Allahabad High Court. It has definitely said: "All the High Courts in India have now taken the same view as to the application of s. 34 in dealing with punishment which may be awarded under s. 397, Indian Penal Code, and it now may be said to be finally established that s. 34 of the Code has no application in the construction of s. 397."¹⁵

The Chief Court of Oudh has adopted the later view of the Allahabad High Court.¹⁶

'Deadly weapon'.—See s. 448, *infra*. A *lathi* is not a deadly weapon within the meaning of this section.¹⁷ The section does not require the user of the deadly weapon to be against the person robbed. It is enough if it was used at the time of committing robbery. Where the accused uses a knife, which is a deadly weapon, at the time of committing robbery, by threatening the companions of the person robbed by frightening them and it strikes and causes injury to the person robbed, the accused should be convicted under s. 392 read with this section.¹⁸

'Grievous hurt'.—See s. 319, *supra*.

2. 'Person'.—See s. 11, *supra*.

¹ *Deoji Keru*, (1872) Unrep. Cr. C. 65, Cr. R. August 1, 1872; *Bhura Ahir*, (1903) 16 C. P. L. R. 97; *Bala Huddar*, (1931) 35 Cr. L. J. 594.

² *Ali Mirza*, (1923) 51 Cal. 265.

³ *Arunachella Thevan*, (1911) 22 M. L. J. 186, [1912] M. W. N. 35, 13 Cr. L. J. 42; *Komali Viswasam*, (1886) 1 Weir 450.

⁴ *Labadan Sain*, (1930) 32 Cr. L. J. 476, [1931] AIR (P) 49.

⁵ *Nga Pu*, (1926) 27 Cr. L. J. 1285, [1926] AIR (R) 20; *Nga Sein*, (1905) 3 L. B. R. 121, 3 Cr. L. J. 354; *Po Win*, (1913) 7 L. B. R. 26, 14 Cr. L. J. 432; *Po Myaing*, (1920) 10 L. B. R. 269, 22 Cr. L. J. 593, [1920] AIR (LB) 116.

⁶ *Ali Mirza*, (1923) 51 Cal. 265.

⁷ *Mahabir Tiwari*, (1899) 21 All. 263. In *Ghassu*, (1924) 25 Cr. L. J. 1181, [1925] AIR (N) 136, the Court of Judicial Commissioner, Nagpur, adopted this view differing from an earlier decision, *Bhura Ahir*, (1903) 16 C. P. L. R. 97.

⁸ *Senta*, (1899) 19 A. W. N. 186; *Nanhe*, (1930) 32 Cr. L. J. 567, [1931] AIR (A) 367; *Nageshwar*, (1906) 28 All. 404; *Danna*,

(1927) 29 Cr. L. J. 449; *Naubat*, [1945] All. 527.

⁹ *Abdul Salam*, (1934) 36 Cr. L. J. 617; *Hazara Singh*, (1946) 25 Pat. 227.

¹⁰ *Mohna*, (1901) P. R. No. 16 of 1901; *Chatar Singh*, (1901) P. R. No. 15 of 1901.

¹¹ (1899) 21 All. 263.

¹² *Dangar Khan*, (1922) 23 Cr. L. J. 593.

¹³ *Ilahia*, (1922) 24 Cr. L. J. 405; *Mohar Singh*, (1925) 26 P. L. R. 398, 26 Cr. L. J. 1144.

¹⁴ *Abdullah alias Dullah*, (1926) 27 P. L. R. 627, 628, 27 Cr. L. J. 949. See also *Fazal*, (1926) 27 Cr. L. J. 1098; *Bachna*, (1926) 28 Cr. L. J. 17, [1927] AIR (L) 149; *Khuda Dad*, (1926) 28 Cr. L. J. 156, [1927] AIR (L) 791.

¹⁵ *Abdul Karim*, (1927) 4 O. W. N. 459, 28 Cr. L. J. 520, [1927] AIR (O) 193, following *Nageshwar*, (1906) 28 All. 404; *Bhagwant*, (1900) 3 O. C. 263.

¹⁷ *Lad Khan*, (1912) 13 P. L. R. 351, 13 Cr. L. J. 182.

¹⁸ *Public Prosecutor v. Nagappan Servai*, [1941] 1 M. L. J. 965, [1941] M. W. N. 382, (1941) 53 L. W. 718, 42 Cr. L. J. 868, [1941] AIR (M) 718.

Violence should have been used in committing robbery or dacoity.—The accused fractured one of the arms of a woman by striking one or two blows with a stick, and thereby causing her to fall to the ground, his object being to steal the pony on which she was riding. He then attempted to mount and ride off on the pony but was prevented from doing so by the girth of the pony's saddle breaking. It was held that this section was applicable.¹⁹

The accused and another attacked a man and beat him with clubs. There was no evidence as to which of them it was who struck the blow which broke his finger. It was held that the accused were not liable to enhanced punishment under this section.²⁰

Where several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested, it was held that they could not properly be convicted under this section read with s. 511.²¹

Burma amendment.—In Burma the words “uses any deadly weapon or” are omitted by Burma Act IV of 1940, s. 1. This Act has no retrospective effect, and consequently the provisions of this section as they existed prior to the amendment will be applied to offences committed before the date of the amendment.²²

P R A C T I C E .

Evidence.—Prove (1) the commission of robbery²³ or dacoity;²⁴

In the case of robbery a conviction under this section is equally good, whether the number of the accused be five or under.²⁵

(2) That the accused used a deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt.

(3) That the above acts were done during the commission of robbery or dacoity.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where, in a case of robbery, there is no intention of causing death or such bodily injury as is likely to cause death, the conviction must be under this section of “voluntarily causing grievous hurt in committing robbery”.¹

Charge.—In the charge the carrying of arms must be distinctly alleged. Where the accused are charged with, and convicted of, an offence punishable under s. 395, they cannot be punished under s. 398 of the Code.² This section does not create a substantive offence and a Court, therefore, should not frame a charge under it but under s. 392 read with s. 397, or s. 395 read with s. 397, as the case may be.³

The charge should be for the substantive offence of robbery or dacoity, and the following clause should be added to the charge:—

And that at the time of committing the said robbery (or dacoity) you used a deadly weapon, to wit—(mention the deadly weapon), [or caused grievous hurt to AB, or attempted to cause death or grievous hurt to AB], and thereby committed an offence punishable under s. 397 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

Punishment.—The maximum term of imprisonment that can be passed under this section cannot exceed ten years (see s. 396).⁴ The minimum is seven years.⁵ The Allahabad High Court has held that this section imposes a minimum sentence of seven years where a dacoit has used a deadly weapon or has caused grievous hurt, but that does not mean that a sentence of less than seven years should be passed on persons against whom it is impossible to prove that they used dangerous weapons themselves or caused grievous hurt.⁶

¹⁹ *Harnaman*, (1900) P. R. No. 6 of 1901.

²⁰ *Bhagwant*, (1900) 3 O. C. 263.

²¹ *Beni*, (1900) 23 All. 78.

²² *Shwe Hla U*, [1941] Ran. 58.

²³ *Vide* s. 392, sup.

²⁴ *Vide* s. 395, sup.

²⁵ *Dwarka Aheer*, (1865) 2 W. R. (Cr.) 49.

¹ *Chakor Haree*, (1866) 6 W. R. (Cr.) 16.

² *Punya Sakharan*, (1897) Cr. R. No. 25 of 1897, Unrep. Cr. C. 921; *Durgya bin Ramappa*, (1899) 1 Bom. L. R. 513.

³ *Bhagwant*, (1900) 3 O. C. 263; *Tha Hmu*, (1904) 2 L. B. R. 206, 1 Cr. L. J. 475; *Dangar Khan*, (1922) 23 Cr. L. J. 503; *Po Myang*, (1920) 10 L. B. R. 269, 22 Cr. L. J. 593, [1920] AIR (LB) 116.

⁴ *Nama Dulab*, (1908) Criminal Revisional Application No. 223 of 1908, decided on July 30, 1908 (Unrep. Bom.).

⁵ *Radhia*, (1927) 9 P. L. T. 572, 29 Cr. L. J. 85.

⁶ *Bansi*, [1941] A. L. J. R. 490, (1941) 43 Cr. L. J. 97, [1941] AIR (A) 359.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Attempt to commit robbery or dacoity when armed with deadly weapon.

COMMENT.

This section does not by itself create a substantive offence, but only regulates the measure of punishment when certain facts are found to exist in the commission of the substantive offence of robbery.⁷ It is applicable only to a case of an attempt to commit robbery and has no application to a case in which the robbery has actually been committed. It can regulate the punishment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has already accomplished his purpose and robbery has actually been committed.⁸

To such of the offenders as are armed with deadly weapons, though they do not use them in the attempt to rob or commit dacoity, an imprisonment of not less than seven years must be awarded. It is the terror which the possession of a deadly weapon naturally creates that has led the Legislature to provide for a severe sentence where the offender has such a weapon.

It is necessary to show that at the time of committing robbery the accused was armed with a deadly weapon and not merely that one of the robbers who was with the accused at the time carried one.⁹ The words "offender" and "such offender" refer only to the persons who are proved to have actually been "armed with" deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity. Section 34 has no application in the construction of this section, though it may be read with ss. 392 and 395 to determine the substantive offence which is created.¹⁰

Burma amendment.—In Burma this section has been repealed by Burma Act IV of 1940, s. 2.

PRACTICE.

Evidence.—Prove (1) the attempt to commit robbery or dacoity.

(2) That the accused was armed with a deadly weapon.

(3) That he was so armed when the robbery or dacoity was committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Abetment.—A person cannot be convicted of abetting an offence under this section. The appropriate sections for abetment should be ss. 393, 114. Where a person was convicted under this section for abetment and the charge was not amended by the Sessions Court, the charge was altered on appeal into one under ss. 393, 114.¹¹

Charge.—See the last section.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b) and sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d), and 12 (2).

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

⁷ *Nabibux*, (1927) 30 Bom. L. R. 88, 52 Bom. 168.

⁸ *Chandra Nath*, (1931) 7 Luck. 543.

⁹ *Bhavjya*, (1895) Cr. R. No. 54 of 1895, Unrep. Cr. C. 795; *Deoji Keru*, (1872) Unrep. Cr. C. 65; *Bhan Singh*, (1932) 34 P. L. R. 449,

33 Cr. L. J. 460.

¹⁰ *Ali Mirza*, (1923) 51 Cal. 265; *Nabibux*, (1927) 30 Bom. L. R. 88, 52 Bom. 168; *Bhan Singh*, (1932) 34 P. L. R. 449, 33 Cr. L. J. 460.

¹¹ *Nag, Pu*, (1926) 27 Cr. L. J. 1285, [1926] AIR (R) 207.

399. Whoever makes any preparation¹ for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Making preparation to commit dacoity.

COMMENT.

Under the Code, mere preparation to commit an offence is punishable in three cases: (1) preparation to wage war against the King (s. 122); (2) preparation to commit depredation on territories of a power at peace with the King (s. 126); and (3) preparation to commit dacoity. Preparation to commit any other offence, such as house-breaking or robbery, is not an offence.¹²

1. 'Makes any preparation'.—It is ordinarily no offence to make preparation for committing a crime until the stage of preparation has passed and that of attempt is reached. But it is an offence under this section to "make preparation for committing dacoity." No hard and fast rule can be laid down that any particular act or any particular kind of steps towards the commission of an offence are necessary to constitute "preparation." The essential thing is that the prosecution must show that there were persons who had conceived the design of committing dacoity. Once the existence of such a conspiracy has been established then any step taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been preparation within the meaning of this section.¹³ The words "makes any preparation" point to acts done prior to a commencement of the execution of the guilty purpose and it may be before any particular dacoity is planned. It will be enough if there is a general design to commit dacoity, or to engage in an expedition for this purpose, though the plans of the dacoits are not yet matured. The making of 'preparation' should be shown to the satisfaction of the Court by some act, such as the collection of men, arms, provisions, etc., which, coupled with other circumstances, plainly manifest the intention to commit dacoity.¹⁴ A man may in conjunction with others make preparation for committing dacoity without having any intention of taking an active part himself in the actual dacoity.¹⁵ A mere assembling without further preparation is not a preparation within the meaning of this section. Mere assembling without proof of other preparation is punishable under s. 402. A person may not be guilty of dacoity, yet guilty of preparation, and not guilty of preparation yet guilty of assembling.¹⁶ In order to constitute preparation it is not necessary that an overt act towards the commission of dacoity should have been done. The law requires that the accused should have done some act to get ready for committing dacoity. Where it is found that the members of a gang had taken in their possession instruments for house-breaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of the contemplated dacoity, the Court is justified in holding that there was not a mere assemblage but that the members of the assemblage had got ready for the actual commission of a dacoity.¹⁷ Where a band of armed men some of them with unlicensed fire-arms, who were moving about many miles from their village attempting to conceal their presence threatened those who enquired who they were, resisted pursuit and fired at those who pursued them, the only reasonable inference that can be drawn is that the men were dacoits and had made preparations to commit dacoity.¹⁸

In order to establish an offence under this section, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. Otherwise it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law.¹⁹

As to the distinction between preparation and attempt, see s. 511, *infra*.

¹² *Shera*, (1868) P. R. No. 18 of 1868.

¹³ *Jain Lal*, (1942) 21 Pat. 667.

¹⁴ *M. & M. 357*; *Karmun*, (1915) P. R. No. 6 of 1916, 17 Cr. L. J. 280, [1916] AIR (L) 334.

¹⁵ *Nga Lin*, (1935) 36 Cr. L. J. 1384, 1386.

¹⁶ *Ramesh Chandra Bannerjee*, (1913) 41 Cal. 350.

¹⁷ *Karmun*, (1915) P. R. No. 6 of 1916, 17 Cr. L. J. 280, [1916] AIR (L) 334; *Indar Singh*, (1926) 27 P. L. R. 752, 27 Cr. L. J. 1161; *Bhagwan Bakhsh*, [1935] O. W. N. 770, 36 Cr. L. J. 1003.

¹⁸ *Haji*, [1943] Kar. 139.

¹⁹ *Khawaja Hassan*, (1922) 24 Cr. L. J. 136.

PRACTICE.

Evidence.—Prove (1) that the act of the accused amounted to preparation.
(2) That it was preparation to commit dacoity.

Where one of the prosecution witnesses in a case under this section had been in the company of the accused persons at the time when plans for committing dacoity were made and took part in the preparation therefor, he was held to be an accomplice and his evidence was not accepted as sufficient, without corroboration.²⁰

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, made preparation, to wit——, for committing dacoity, and thereby committed an offence punishable under s. 399 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b) and sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d) and 12 (2).

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

400. Whoever, at any time after the passing of this Act, shall belong¹ to a gang of persons associated for the purpose of habitually committing dacoity,² shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for belonging to gang of dacoits.

COMMENT.

Object.—This section was intended by the Legislature to provide for the punishment of those who belong to a gang of persons who make it their business to commit dacoity; and it is not essential for the purpose of conviction that the evidence should show the same degree of particularity as to the commission of each individual dacoity as is required to support a simple and substantive charge of that crime. It is sufficient to establish that the person accused belongs to a gang whose business is the habitual commission of dacoity, or, in other words, that he was associated with others for the habitual pursuit of that offence.²¹ It is not necessary that the person belonging to a gang must have taken part in any one dacoity. But actual participation by that person in any given dacoity is sufficient evidence both of his association with the gang and of his object in such association.

Association for the habitual pursuit of dacoity is the gist of the offence under this section.²² A conviction can be had even where no actual commission of a dacoity is proved.²³ The offence is of a very special character.

1. 'Belong'.—The word 'belong' implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity.²⁴ Where

²⁰ *Karim Baksh*, (1927) 9 Lah. 550.

²¹ *Kure*, (1896) 6 A. W. N. 65, 66; *Kader Sundar*, (1911) 16 C. W. N. 69, 13 Cr. L.J. 39; *Murli Brahman*, (1924) 26 Cr. L. J. 1412, 27 O. C. 385.

²² *Kader Sundar*, (1911) 16 C. W. N. 69, 13 Cr. L. J. 39.

²³ *Murli Brahman*, (1924) 26 Cr. L. J. 1412, 27 O. C. 385; *Suresh Chandra Bannerjee*, (1927)

47 C. L. J. 471, 29 Cr. L. J. 705, [1928] AIR (C) 309.

²⁴ *Hira Lal*, (1910) 13 O. C. 243, 11 Cr. L.J. 554; *Bachchu*, (1930) 7 O. W. N. 862, 32 Cr. L. J. 162, [1930] AIR (O) 455; *Bhabuti*, (1921) 19 A. L. J. R. 725, 22 Cr. L. J. 663, [1921] AIR (A) 32; *Suresh Chandra Bannerjee*, (1927) 47 C.L. J. 471, 29 Cr. L. J. 705, [1928] AIR (C) 309.

at the trial of a gang of habitual dacoits who were charged with the commission of ten dacoities, the evidence against an individual was no more than that he had joined them in the commission of one dacoity and that he must have known that they were a gang of habitual dacoits, it was held that it was not established that he belonged to the gang within the meaning of this section.²⁵ The mere fact that women lived as wives or mistresses with men who were dacoits is not sufficient for a Court to hold that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of this section, unless it be proved that the women themselves were associated with their husbands or protectors for the purpose of themselves habitually committing dacoities.¹ A person cannot be said to belong to a gang of dacoits in respect of whom the Court is satisfied that his connection with the gang was limited and was always intended to be limited to a series of acts, none of which amounted either to dacoity or to abetment of dacoity, though they might be punishable under s. 216A.² Generally speaking, only those persons can be convicted under this section, who have either taken active part in the crime or been employed for the purpose of scouting or in other ways facilitating the commission of the crime.³

2. 'Associated for the purpose of habitually committing dacoity'.—The word 'habitual' means constant.⁴ The element of the offence under this section is association with the knowledge that the gang is formed for the purpose of committing dacoities habitually and conviction can be had under this section even where no actual commission of dacoity by a particular accused person is proved.⁵

PRACTICE.

Evidence.—Prove (1) that the accused belonged to the gang in question.

(2) That such gang was associated for the purpose of habitually committing dacoity.⁶

One of the chief points to establish in a case of gang dacoity is association in the crime, and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities, the former fact is strong evidence of criminal association and is relevant to show that they are members of the gang. If a gang can be shown to have been associated for the habitual commission of dacoities, evidence as to other crimes committed by the gang, e.g. burglaries, may very well be relevant against the accused.⁷

It is not necessary that the person convicted must have taken part in any one dacoity. Evidence, showing the actual participation by an accused in any given dacoity, is evidence both of his association with the gang and of his object, in such association, Evidence which though not believed for the purpose of a conviction under s. 395 may yet be relied upon for the purpose of a conviction under this section. A conviction under this section cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under s. 395.⁸

The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred. Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association.⁹ It is not sufficient to prove simply that the accused gave shelter and assistance to dacoits.¹⁰ The special conspiracy must be proved.¹¹

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under this section, and the fact

²⁵ *Bhabuti*, (1921) 19 A. L. J. R. 725 22 Cr. L. J. 663, [1921] AIR (A) 32.

¹ *Yelli kom Yella*, (1896) Cr. R. No. 26 of 1896, Unrep. Cr. C. 863.

² *Gaya Din*, (1908) 13 O. C. 235, 11 Cr. L. J. 551.

³ *Nidhi*, (1924) 1 O. W. N. 660, 26 Cr. L. J. 123.

⁴ See *Baburam Kansari*, (1891) 19 Cal. 190.

⁵ *Murli Brahman*, (1924) 26 Cr. L. J. 1412, 27 O. C. 385.

⁶ *Naba Kumar Patnaik*, (1897) 1 C. W. N. 146; *Walita*, (1910) 11 P. L. R. 42, 11 Cr. L. J.

364; *Mooktaram Sirdar*, (1875) 23 W. R. (Cr.) 18; *Kure*, (1886) 6 A. W. N. 65; *Arumugam*, (1937) 48 L. W. 639, [1938] M. W. N. 595, 40 Cr. L. J. 855.

⁷ *Nidhi*, (1924) 1 O. W. N. 660, 26 Cr. L. J. 123.

⁸ *Bachchu*, (1930) 7 O. W. N. 862, 868, 32 Cr. L. J. 162, [1930] AIR (O) 455.

⁹ *The Public Prosecutor v. Bonigiri Pottigadu*, (1908) 32 Mad. 179.

¹⁰ *Vithu Rayaji*, (1899) 1 Bom. L. R. 156.

¹¹ *Tirumal Reddi*, (1901) 24 Mad. 523, 546.

that members of the tribe generally were alleged to have been implicated in several dacoities within a period of ten years preceding the trial was not sufficient proof against the persons under trial when it appeared that the tribe contained within it thousands of human beings.¹²

Where association for the purpose of habitually committing dacoity had not been made out, the mere fact that some of the accused had been previously convicted of dacoity or theft or had been bound down to be of good behaviour under s. 110 of the Criminal Procedure Code, was of no consequence.¹³ The accused were charged under this section with belonging to a gang of persons associated for the purpose of habitually committing dacoity. The prosecution sought to prove against some of the accused that they had been previously convicted of theft or had been ordered to give security for good behaviour on the ground of being habitual thieves. It was held that evidence regarding previous conviction or bad livelihood was not admissible under s. 14 of the Evidence Act, because the offence for which the accused were being tried was the particular one of belonging to a gang of dacoits and simple theft or bad livelihood, in which the order for giving security was based on evidence that the accused habitually committed thefts, was not evidence indicating an intention to commit the particular crime of which the accused were charged.¹⁴

But where there is sufficient evidence to establish association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit, and for this purpose, convictions of bad livelihood are more cogent than those of isolated thefts.¹⁵ Evidence that the accused were bound down under s. 110 of the Code of Criminal Procedure is admissible.¹⁶

Previous conviction of the accused for dacoity along with other dacoities is relevant against him under Explanation 2 to s. 14 of the Indian Evidence Act. But the propriety of the conviction of the accused must be judged exclusively by reference to the evidence adduced by the prosecution at the trial.¹⁷ The fact that some of the persons undergoing trial for an offence under this section had once been sent up on a charge of dacoity of which they were acquitted could not be relied on to prove that they were habitual dacoits. No adverse inference can be drawn against accused persons after their acquittal.¹⁸

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under s. 400 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—“There are...many points which have to be considered...in determining what is an adequate sentence to pass upon an accused convicted of an offence falling under s. 400...Among these may be noted the following:—

- (1) How long has the accused belonged to the gang?
- (2) What dacoities have been committed by the gang since the accused joined it?
- (3) In how many of these dacoities did the accused actually take part? (If the accused are being separately prosecuted for every dacoity in which they have been concerned as members of the gang, this point must be left out of consideration).
- (4) What was the character of the dacoities in which the accused actually took part? Were they accompanied with murder, culpable homicide, grievous hurt, torture,

¹² *Kader Sundar*, (1911) 16 C. W. N. 69, 12 Cr. L. J. 39.

¹³ *Ibid.*

¹⁴ *Haji Sher Mahomed*, (1921) 25 Bom. L. R. 214, 46 Bom. 958.

¹⁵ *Bhona*, (1911) 38 Cal. 408; *Ledu Molla*,

(1925) 52 Cal. 595.

¹⁶ *Ledu Molla*, *ibid.*

¹⁷ *Walha*, (1910) 11 P. L. R. 42, 11 Cr. L. J. 364.

¹⁸ *Kader Sundar*, (1911) 16 C. W. N. 69, 13 Cr. L. J. 39.

or with any acts of a specially brutal character, or were they only dacoities of the ordinary character ? ”¹⁹

In the case of a gang consisting of desperate men prepared to proceed to all lengths in carrying out their crimes, the heaviest possible sentences should be passed. In awarding sentences the Court ought to consider not so much whether particular offenders were concerned in only one or more of the dacoities committed by the gang, as whether it was clearly established that they did in fact join a recognized gang.²⁰

Separate sentences can be passed on an accused person, who has been proved to have taken part in a particular dacoity and also to have been a member of a gang of dacoits. The limit of punishment prescribed by s. 71 does not apply to such a case. The provisions of s. 397 of the Code of Criminal Procedure will apply to such a case and then it will be at the discretion of the criminal Court whether the two sentences should run concurrently or not.²¹

As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11(d) and 12 (2). As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (b) and sch. II.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons¹ associated for the purpose of habitually committing theft or robbery,² and not being a gang of *thugs* or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The principle enunciated in the last section is extended by this section to a gang of thieves or robbers. The gist of an offence under this section is association for the purpose of habitually committing theft or robbery.

Technically the offence of being a member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them, but looked at from a practical point of view, unless the activities materialise into active burglaries or attempt at burglaries nobody will be any the wiser or take any action.²²

The ‘association’ referred to in the section must be a conscious association with the primary object of committing the offences mentioned therein.²³

Scope.—This section “no doubt has excellent objects and uses; but it ought not to be resorted to when the person sought to be brought within its four corners, might have been made responsible for distinct and individual offences: nor is it intended to affect them, unless an association for the habitual commission of theft or robbery is clearly made out”.²⁴

1. ‘Belong to any wandering or other gang of persons’.—The word “belong” is very comprehensive, but the expression “to belong to a gang of persons, etc.”, conveys the same idea as “to be one of a gang of persons, etc.” “Gang” is derived from the Anglo-Saxon word “gangan” to go, and its dictionary meaning is “a number going in company, hence a company or number of persons associated for a particular purpose”. If it could be said that a person belongs to a gang of persons associated for the purpose of habitually committing theft because he receives stolen property from them, then this section would apply to all who may in some way or other be connected with the gang, for instance, the wives and children of the men constituting the gang, and persons who may give them shelter or provide food for them. The object of the section obviously is to punish the persons who organize thieving expeditions and form a party to commit theft. A person who receives stolen property from them, for instance, a *saraf* (merchant) cannot be said to belong to their gang.

¹⁹ Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B. 441, 442.

²⁰ *Ghulam Mustafa*, (1911) 12 P. L. R. 297, 12 Cr. L. J. 260.

²¹ *Murli Brahman*, (1924) 26 Cr. L. J. 1412, 27 O. C. 385.

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²² *Surjan Singh*, (1931) 33 P. L. R. 602, 33 Cr. L. J. 251.

²³ *Ajita*, (1911) 9 A. L. J. R. 565, 12 Cr. L. J. 204.

²⁴ Per Straight, J., in *Jahangira*, (1886) 6 A. W. N. 16.

The habitual receiver of stolen property is punishable under s. 413 and not under this section.²⁵

2. 'Associated for the purpose of habitually committing theft or robbery.'—Habit is to be proved by the aggregate of acts, and though the charge is a charge of a single offence, the period over which the association extends is often very long; and the longer the period the better it is to establish habit.¹ It is not necessary to prove that each individual member of the gang has habitually committed theft or any particular act of theft. Once it is proved that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in committing one more theft come within the purview of this section.²

CASES.

Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting *melas* (assemblies) together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses, it was held that they could not be convicted under this section, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft.³ In a trial on a charge of belonging to a gang of persons associated for the purpose of habitually committing theft, the evidence against the accused was of three kinds, viz. (1) that they were seen together at midnight in a certain place with implements of house-breaking on a certain night; (2) that some of them were seen together in different places where house-breaking and theft were immediately afterwards committed; and (3) that they had been each convicted at different times of theft, etc. It was held that the above circumstances were not sufficient proof of the association and of the association being for the habitual committing of theft which are required to be established to support a charge under this section.⁴ Where the accused were arrested together in one village and there was no doubt that each of the accused had individually committed theft or robbery, but it was not shown that there had been any association among the accused for the purpose of committing theft or robbery, much less for the purpose of *habitually* committing such offences, it was held that conviction under this section was not sustainable.⁵

PRACTICE.

Evidence.—Prove (1) that there existed a gang of persons.

(2) That those persons were associated for the purpose of committing theft or robbery.

(3) That theft or robbery was to be committed habitually.⁶

(4) That the accused was a member of such gang.⁷

A prosecution under this section is of a peculiar nature differing from an ordinary case in the number of accused involved and the extent of time covered by their operations. There can be no definite rule of limitation barring responsibility for stolen property after a certain time. Each case must be judged on its own facts, the important factors being the number of articles recovered and the way in which the information led to the recovery.⁸

Aggregate of acts will prove the habit.⁹ It is not necessary to prove that each individual member of the gang has habitually committed theft or has committed any particular theft in company with other members. Once it is proved that a gang, however small, was formed for the purpose of habitually committing theft, all persons

²⁵ *Abdulla*, (1926) 28 P. L. R. 19, 23, 28 Cr. L. J. 179, 180, [1927] AIR (L) 524; *Arjan Das*, (1932) 33 P. L. R. 736, 33 Cr. L. J. 584.

¹ *Kasam Ali*, (1919) 47 Cal. 154, 159.

² *Darya Singh*, (1923) 25 Cr. L. J. 520, (1923) AIR (L) 666.

³ *Mankura Pasi*, (1899) 27 Cal. 139.

⁴ *Suban*, (1894) 1 Weir 452.

⁵ *Afridi*, (1879) P. R. No. 9 of 1880.

⁶ *Shriram Venkatasami*, (1871) 6 M. H. C. 120, 1 Weir 452; *Mankura Pasi*, (1899) 27 Cal.

139; *Naba Kumar Patnaik*, (1897) 1 C. W. N. 146; *Dwarka Bania*, (1899) 3 C. W. N. cccxxxviii (338n); *Ajita*, (1911) 9 A. L. J. R. 565, 12 Cr. L. J. 204; *Peera*, (1869) P. R. No. 37 of 1869; *Ishar Das*, (1912) 13 P. L. R. 813, 13 Cr. L. J. 799.

⁷ *Pir Baksh*, (1923) 24 Cr. L. J. 703, [1923] AIR (L) 327.

⁸ *Andumiyar*, [1937] Nag. 315.

⁹ *Savaladas*, (1888) Unrep. Cr. C. 418.

who thereafter joined that gang in committing one or more thefts, come within the purview of this section.¹⁰ Any person who knowing of the existence of such a gang joins that gang for the purpose of committing even one theft is guilty under this section. At the same time a person may have taken part in a theft with one or more members of a gang without himself becoming a member of that gang.¹¹ Evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association.¹² Merely being seen getting on board a boat with four persons, who have on their own admission been convicted of belonging to a gang of dacoits, is held not sufficient evidence against those so seen.¹³

Evidence of the commission of several thefts, of meeting together at different places, before and after the commission of thefts and burglaries in bazaars, boats and houses, of being seen on various occasions carrying away stolen articles or found in company under circumstances suggesting complicity in thefts and burglaries, and evidence of systematic thefts of cattle by individual accused are sufficient to support a conviction under this section.¹⁴

The possession of stolen property by the gang, and the fact that the country through which the gang passed was free from petty crimes when they were not about, are admissible facts.¹⁵ Similarly, evidence of previous convictions of some of the accused for theft, house-breaking, receiving or concealing stolen property both prior and subsequent to the year when the gang was found to have been first formed, is admissible.¹⁶

Evidence of character of accused.—The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, evidence of bad character or reputation of the accused is inadmissible.¹⁷ This case has been doubted in a subsequent case in which it is held that where other evidence establishes association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit; and for this purpose convictions of bad livelihood are more cogent than those of isolated thefts.¹⁸ For the purpose of determining whether a party of accused persons constituted a gang of persons associated for the purpose of habitual theft, the evidence that each individual of that party is a convicted thief is relevant. Such evidence can be tendered before or after the prosecution have established the association.¹⁹ At the trial of an accused in 1923 for the offence of belonging to a gang of thieves, a former judgment convicting him of dacoity in 1897 was held admissible in evidence. The former judgment is, however, only useful for showing that the accused is a person of criminal tendencies to theft who may be a member of the alleged gang. It by no means goes to show that he had any habit of committing thefts in the period under consideration.²⁰

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge to jury.—The Judge should put clearly to the jury—(1) the necessity of proof of association; and (2) the need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts.²¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, belonged to a (wandering) gang of persons associated for the purpose of habitually committing theft (*or robbery*), and that you thereby committed an offence punishable under s. 401 of the Indian

¹⁰ *Beja*, (1913) P. R. No. 13 of 1914, 16 Cr. L. J. 33, [1914] AIR (L) 539.

¹¹ *Wasawa Singh*, (1916) 17 P. L. R. 282, 17 Cr. L. J. 443, [1916] AIR (L) 447.

¹² *Lale*, (1929) 5 Luck. 101.

¹³ *Kamal Fukeer*, (1872) 17 W. R. (Cr.) 50.

¹⁴ *Kasem Ali*, (1919) 47 Cal. 154; *Mahadeo*, (1926) 27 Cr. L. J. 807, [1926] AIR (N) 426.

¹⁵ *Dukharan*, (1904) 7 O. C. 163, 1 Cr. L. J. 490.

¹⁶ *Hidayata*, (1914) P. R. No. 3 of 1915, 16

Cr. L. J. 800, [1914] AIR (L) 545.

¹⁷ *Mankura Pasi*, (1899) 27 Cal. 139.

¹⁸ *Bhona*, (1911) 38 Cal. 480; *Baksho*, (1930) 24 S. L. R. 252, 31 Cr. L. J. 1046, [1930] AIR (S) 211.

¹⁹ *Tukaram Malhari*, (1912) 14 Bom. L. R. 373, 13 Cr. L. J. 539.

²⁰ *Motiram Hari*, (1924) 26 Bom. L. R. 1223, 26 Cr. L. J. 1391.

²¹ *Shriram Venkatasami*, (1871) 6 M. H. C. 120, 1 Weir 452.

Penal Code, and within my cognizance [or the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (d) and 12 (2). As to Burma, see the Burma Laws Act (1898), s. 4 (3) (b) and sch. II.

“If an accused takes part in any dacoity accompanied with murder, the proper section of the Penal Code to apply to him is s. 396 in addition to s. 400, and he is liable to be sentenced to death, or transportation for life, or ten years' rigorous imprisonment and fine. If he has not rendered himself liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organised band, have only recently joined it, and have perhaps not taken part in more than one or two dacoities at the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who have belonged to the worst gangs, who go about armed defying the authorities and inflicting grievous hurt upon the people, and those smaller and less dangerous gangs who dacoit only because driven to do so by want and starvation, and because they are afraid to surrender, and who inflict no injury upon the people beyond that of depriving them of a few fowls and baskets of paddy, the food they are in search of”.²²

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Assembling for purpose of committing dacoity.

COMMENT.

This section applies to mere assembling without proof of other preparation. Where there is preparation s. 399 applies.²³

Five or more persons (who constitute an unlawful assembly) meeting for a common purpose to commit dacoity are subject to the severe punishment provided in this section, even though the persons assembled may not have proceeded one step towards the accomplishment of their objects.

CASES.

Where the accused knew that the assembly, of which they formed a part, was an assembly for the purpose of committing dacoity, and that all the persons of the assembly lived on the proceeds of dacoity and had no other means of living, they were held guilty of this offence.²⁴ Several persons were found at eleven o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. It was held that they were guilty under this section.²⁵ Fifteen men were seen approaching a village and split up into three bands just outside the village. Subsequently, different members of these three bands were caught and found to be in possession of arms and ammunition, and none of them could explain his presence at the spot. It was held that they were members of a party and had collected for the purpose of committing dacoity and were consequently liable to be convicted under this section.¹ Where the accused belonging to different villages were found at a lonely well at a long distance

²² Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B. 441, 442.

²³ *Ramesh Chandra Banerjee*, (1913) 41 Cal. 350.

²⁴ *Kendra Kamar*, (1867) 7 W. R. (Cr.) 61, [97].

²⁵ *Bholu*, (1900) 23 All. 124. This decision is somewhat startling as from the facts given in

the report it does not appear that it was the object of the accused to commit dacoity and not any other offence. It has been referred to with approval in *Bhola*, (1924) 22 A. L. J. R. 1028, 26 Cr. L. J. 380.

¹ *Bhola*, (1924) 22 A. L. J. R. 1028, 26 Cr. L. J. 380.

from their homes fully armed and equipped for committing a dacoity, a conviction under this section was held maintainable.¹

PRACTICE.

Evidence.—Prove (1) that five or more persons were assembled.

(2) That they were assembled for the purpose of committing dacoity.

(3) That the accused was one of such persons.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were one of five (*or more*) persons assembled for the purpose of committing dacoity, and that you thereby committed an offence punishable under s. 402 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [*by the said Court*] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (1898) s. 4 (3) (*b*).

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Of Criminal Misappropriation of Property.

403. Whoever dishonestly misappropriates or converts to his own use¹ any moveable property,² shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

ILLUSTRATION.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose

¹ *Waryam Singh*, (1926) 27 Cr. L. J. 605; 144.
Ahmad, (1927) 29 Cr. L. J. 14, [1928] AIR (L)

of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

ILLUSTRATIONS.

(a) A finds a rupee on the high-road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

COMMENT.

Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent.³ The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender.⁴ See illustrations (a), (b) and (c) which show that the original innocent taking amounts to criminal misappropriation by subsequent acts.

This section lays down a principle quite at variance with the English law according to which the intention of the accused at the time of obtaining the possession of property is only taken into account. If the intention was not dishonest when the possession was obtained, subsequent change of intention does not convert the possession into an illegal one. Explanation 2 emphasizes the difference between the English law and the Code.

"Section 403 requires that the property should be shown to have been misappropriated or converted to his own use by the accused. The mere possession of the property is not sufficient for proving the charge without something to indicate the

³ Per Norris and Ghose, JJ., in *Bhagiram Dome v. Abar Dome*, (1888) 15 Cal. 388, 400.

⁴ *Ramakrishna*, (1888) 12 Mad. 49, 50.

appropriation or conversion though long possession without any attempt to find the owner may amount to evidence of intention to do so... There is no proof of any other overt act indicating conversion or appropriation to his own use, nor did any interval of time worth considering elapse between the taking and the arrest to raise any presumption, from the mere act of detention, of an intention to misappropriate or convert. Explanation (2) to s. 403... makes the necessity of some positive proof of this sort quite clear. Illustration (a) shows that the picking up of a rupee, whose owner is not known, is not an offence. Similarly, Illustration (e) shows that the finding of a purse with money belonging to an unknown owner is not an offence, but the appropriation of it to the finder's own use is necessary to complete it".⁵

According to the English law innocent taking followed by conversion, owing to subsequent change of intention, is a civil wrong but not an offence.

Theft and criminal misappropriation.—In theft the object of the offender always is to take property which is in the possession of a person out of that person's possession; and the offence is complete as soon as the offender has moved the property in order to a dishonest taking of it. In criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property; and is either lawfully in possession of it, because either he has found it or is a just owner of it, or his possession, if not strictly lawful, is not punishable as an offence because he has acquired it under some mistaken notion of right in himself or of consent given by another.

Ingredients.—The section requires—

1. Dishonest misappropriation or conversion of property for a person's own use.

2. Such property must be movable.

1. '**Dishonestly misappropriates or converts to his own use**'.—"In order to be dishonest the property must be misappropriated or converted 'with the intention of causing wrongful gain to one person, or wrongful loss to another', that is, with the intention to cause gain by unlawful means of property to which the person gaining it is not legally entitled, or the loss by unlawful means of property to which the person losing it is legally entitled. The gain or loss of property, and the gain or loss of the possession of property are not necessarily identical things, and the distinction is especially clear when the loss of possession is only temporary, and is intended by the person who causes such loss to be temporary only. When there is no intention to cause wrongful gain or wrongful loss of property, and merely an intention to deprive the owner temporarily of the use of property, dishonesty is not made out".⁶ The offence is complete as soon as there is a misappropriation or conversion with a dishonest intention. It is not necessary that loss to the owner should have actually accrued by that time.⁷ The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued, but only on the act which has been done.⁸ A wrong opinion that the accused was justified in keeping the thing does not constitute this offence,⁹ nor does a mere retention of a redeemed pledge by the pledgee as security for the repayment of a loan of a different person constitute this offence.¹⁰ Where a criminal intention is an essential ingredient of the crime charged against a person, any mental state in addition to drunkenness can also be put forward with equal relevancy for the purpose of negating the existence of that intention.¹¹

'**Dishonestly misappropriates.**'—The verb 'to appropriate' in this connection means setting apart for, or assigning to, a particular person or use; and to 'misappropriate' means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly.¹² The word 'misappropriation' is in the

⁵ Per Chatterji, J., in *Phuman*, (1907) P. R. No. 11 of 1908, at pp. 33, 34, 8 Cr. L. J. 250, 253.

⁶ Per Plowden, J., in *Jhandu*, (1886) P. R. No. 27 of 1886, at p. 59.

⁷ *Kashiram Mehta*, (1934) 56 All. 1047, F.B.

⁸ *Simhachalam*, (1917) 44 Cal. 912, 915;
Ahmed Ebrahim, v. Hajee A. A. Ganny, (1923)

1 Ran. 56.

⁹ *Khanderao*, (1894) Cr. R. No. 30 of 1894, Unrep. Cr. C. 700.

¹⁰ *Gulab Chand Sowcar v. Arumugam*, [1935] M. W. N. 1063.

¹¹ *Joseph*, [1939] Mad. 353, 355.

¹² *Sohan Lal*, (1915) 13 A. L. J. R. 1131, 16 Cr. L. J. 795, [1915] AIR (A) 380.

illustrations and in the Explanations to the section replaced by the expression "appropriates to his own use", which seems equivalent to "setting apart for his own use to the exclusion of others". It does not, of course, follow from this that setting apart by one person for the use of some person other than himself and the true owner, is not a misappropriation. A Hindu girl having picked up a gold necklet and made it over to a sweeper girl, the accused, the brother of the finder, represented to the latter that the necklet belonged to a person of his acquaintance and thus got possession of it from her. On inquiry by a police constable a few hours later, he repeated the representations, but afterwards gave up the necklet. These representations were found to be untrue to the knowledge of the accused. It was held that he had committed this offence.¹³ This section is in no way restricted to appropriating property to one's own use. If a trustee repudiates the trust and asserts that he holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claims to it.¹⁴

Retention of money for a sufficiently long period by a person who is bound under law to return it to another legally entitled to it raises an inference of a temporary misappropriation within the meaning of this section. When the prosecution proves such retention it is not incumbent to prove that the accused did not refund it to the person from whom he received it and the accused is liable to be convicted of an offence under the section if he fails to prove that he returned it to the person legally entitled to it, or from whom he received it.¹⁵ The mere realization of money and failure to credit the same is not in itself criminal misappropriation but the retention of money realised for a particular purpose without any justification shown ordinarily leads to the inference that it has been misappropriated and the reasonable inference to draw when a person has realised money for somebody else and has not paid it is that he has appropriated it to his own needs. Such inference of course may be rebutted by the accused.¹⁶ Where an employee withdraws the amount deposited by him as a security during his appointment without his employer's permission and before adjustment of the amounts between him and the employer, the withdrawal amounts to criminal misappropriation.¹⁷

A false denial of a loan is not in itself a misappropriation at all, and may amount to no more than an attempt to evade civil liability for the money or the chattel lent. Attempt to evade civil liability does not necessarily imply that the property lent has been misappropriated. The false denial of a loan is compatible with the absence of criminal misappropriation, and no more constitutes that offence than possession of stolen property constitutes theft or dishonest receipt. The false denial may be evidence of an offence under this section as possession of stolen property may be evidence of offences under s. 379 or s. 411.¹⁸

'Converts to his own use'.—There must be actual conversion of the thing appropriated to the use of some person other than the person entitled thereto. Where the accused found a thing, and merely retained it in his possession, it was held that he could not be convicted of criminal misappropriation.¹⁹ Similarly, where the accused found a purse on the pavement of a temple in a crowded gathering and put it in his pocket but was immediately after arrested, it was held that he was not guilty of criminal misappropriation for it could not be assumed that by the mere act of picking up the purse or putting it in his pocket he intended to appropriate its contents to his own use.²⁰ Where a police constable of seventeen years' standing caught a strayed sheep intended for sacrifice and on his transfer, from the *thana* to which he was attached, to another *thana* he took it with him there, it was held that it was sufficient evidence of dishonesty.²¹ Mere retention of money would not warrant a conviction under this section unless there is evidence that accused used the money: Where a clerk received certain sums on various dates but entered them in the accounts on each occasion some days after and it was found that the clerk was not in difficulties and that he did not use the amounts, the

¹³ *Ram Dayal*, (1886) P. R. No. 24 of 1886.

¹⁴ *Indar Singh*, (1925) 48 All. 288.

¹⁵ *Prool. Govt., C. P. & Berar v. Shanker Gopal*, [1939] Nag. 180.

¹⁶ *Nani Gopal v. Nripendra Nath*, (1947) 51 C. W. N. 301.

¹⁷ *Surendra Nath Basu*, [1938] 2 Cal. 257.

¹⁸ *Girji*, (1904) 6 Bom. L. R. 1093, 1 Cr. L. J. 1109.

¹⁹ *Abdool*, (1868) 10 W. R. (Cr.) 23A.

²⁰ *Phuman*, (1907) P. R. No. 11 of 1908, 8 Cr. L. J. 250.

²¹ *Sarju Malla*, (1918) 17 A. L. J. R. 145, 20 Cr. L. J. 218, [1919] AIR (A) 302.

mere retention by the clerk of the money for some days would not warrant a conviction under this section.²²

'Any moveable property'.—The misappropriation must be of 'moveable property'. As to the meaning of this expression see s. 22, *supra*.

There cannot be any criminal misappropriation with regard to immovable property.

A bull set at large in accordance with a Hindu religious usage is not 'property' of any one, and not the subject of ownership by any person, as the original owner has surrendered all his rights as its proprietor, and has given the beast its freedom to go withersoever it chose.²³ Such a bull cannot be the subject of criminal misappropriation. The fact that such a bull receives some attention from the cow-herd of the persons who set it at liberty and is daily fed by him by direction of his employers, and is not used for breeding purposes without their permission being asked, is not consistent with a total surrender by those who set it at liberty of all their rights as proprietors.²⁴

The offence of criminal misappropriation is committed, either permanently or for a time, of property which is already without wrong in the possession of the offender. The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention, which in theft is sufficiently manifested by a moving of the property, must in the other offence be carried into action by an actual misappropriation or conversion.²⁵

Temple property.—The property of an idol or a temple must be used for the purposes of that idol or temple : any other use will be a malversation of that property, and, if dishonest, will amount to criminal misappropriation.¹

Retention of money paid by mistake.—Where money is paid to a person by mistake, and such person, either at the time of the receipt or at any time subsequently, discovers the mistake, and determines to appropriate the money, that person is guilty of criminal misappropriation.² In England, the law is doubtful on this point.³ But in a case the Ministry of Food, in error, drew and posted a cheque to the accused, who then wrote and asked them to insert his initials on the cheque. This was done and the cheque was returned to him. The accused paid the cheque into a bank and drew upon it. It was held that the process of taking the cheque and deciding to appropriate it to his own use must be regarded as one transaction, the accused, therefore, who had an *animus furandi* at the moment of his decision to appropriate, also had an *animus furandi* at the moment of taking and was guilty of larceny.⁴

Joint property.—Where the accused is interested in the property jointly with others, he is not necessarily guilty of a criminal act if he takes possession of it, and disposes of it.⁵ But joint property might be criminally misappropriated.⁶ No coparcener in a joint Hindu family having before division a right in or to any specified share in any particular items of the family property, a prosecution for dishonest misappropriation cannot lie against the managing member of the family until the accounts have been taken and the shares allotted.⁷ "Such managing member may be liable to a charge of misappropriation, if, after a division of property has taken place, and the share of each member of the family has been ascertained, it is found that the manager has wrongfully applied to his own use the share that belongs to one of the other coparceners ; but so long as no account of produce or money has been taken, or the shares ascertained, no member of an undivided Hindu family has the right to claim any particular share or property as his separate property, and no prosecution against the manager for misappropriation would lie. The mere fact that there has been a general agreement to divide does not entitle one of the coparceners to claim any defined portion of the

²² *Raghava Menon*, [1940] 2 M. L. J. 748, [1940] M. W. N. 1110, (1940) 52 L. W. 633, 42 Cr. L. J. 296 (1), [1941] AIR (M) 250.

²³ *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348.

²⁴ *Romesh Chunder Sannyal v. Hiru Mondal*, (1890) 17 Cal. 852.

²⁵ M. & M. 359.

¹ *Gadgaya v. Guru Siddeshwar*, (1897) Unrep. Cr. C. 919.

² *Shamsoondur*, (1870) 2 N. W. P. 475.

³ *Middleton*, (1873) L. R. 2 C. C. R. 38 ; *Ashwell*, (1885) 16 Q. B. D. 190; *Flowers*, (1886) 16 Q. B. D. 643; *Hehir*, [1895] 2 I. R. 709.

⁴ *Hudson*, [1943] 1 A. E. R. 642.

⁵ *Parbutty Churn Chuckerbutty*, (1870) 14 W. R. (Cr.) 13.

⁶ *Pania*, (1881) 1 A. W. N. 89.

⁷ (1880) 1 Weir 453.

estate, nor does it even enable him to say that he is entitled to any particular *quantum* in an isolated item of the property; until division, the law entrusts the property to the manager."⁸

Partner.—A partner is liable to be tried for criminal misappropriation of partnership property.⁹

Explanation 1.—This Explanation "refers only to cases in which there is a 'dishonest misappropriation', and explains that the section includes temporary as well as permanent misappropriation of that description. It does not extend the section so as to include not only cases of wrongful gain or loss of property, but also cases of wrongful gain or loss of the possession of property, as distinct from gain or loss of the property itself".¹⁰

A servant, who misappropriates his master's property with the intention of restoring it after a time, ought to be punished. He has no more right to steal his master's property for a time than for ever. It is no answer for a trustee who misappropriates his trust property to say that he intended to put it back again. The fact is that when once a man makes away with property in this way, it generally happens that he never has the means of making restitution. So with regard to the thief, the probability is that when he steals another's property he will never change his mind about restoring the same to the owner.¹¹

Explanation 2.—There can be no criminal misappropriation of things which have actually been abandoned.¹² The property must have its owner to render a person guilty of misappropriating it. Illustration (a) to this section is to be taken as qualified by ill. (f).¹³

Where property is cast away or abandoned, any one finding and taking it acquires a right to it which will be good even as against the former owner, if the latter should be minded to resume it, but when a thing is accidentally lost, the property is not divested, but remains in the owner who loses it.¹⁴

Property found drifting in river.—The accused found two logs of wood drifting in a river during a high flood and took possession of them. The logs were left by the accused in front of his house unused and exposed for several months. It was held that a conviction under this section could not be upheld.¹⁵

Lost property.—A person who takes possession of property which the rightful owner has lost is guilty of criminal misappropriation if he appropriates or converts such property to his own use.¹⁶ A very high standard of honesty is demanded of the finders of lost property. Before appropriating it, they must attempt to find the owner, if they have means of so doing. If there is no clue to the owner, the finder must use all reasonable means to find the owner and must wait a reasonable time to allow the owner to claim the property before he appropriates it. Where a person lost some currency notes and they were found by a child in the street and ultimately came in the possession of the accused to whom they were traced and ultimately recovered within a short time of the incident, it was held that no offence was committed under s. 411.¹⁷ Where the accused found a gold *mohur* on an open plain, and sold it the next day to a shroff for the full value and appropriated the sale-proceeds, it was held that, in the absence of any information as to the circumstances under which the coin was lost, and as it was not impossible that the property in the coin had been abandoned by the original owner, the accused could not be convicted of criminal misappropriation.¹⁸ A person, finding a property of which, from the nature of it, there must be an owner, must take reasonable care of it and endeavour to find out the owner, but he is not bound to adopt extraordinary

⁸ *Anon.*, (1880) 1 Weir 453, 454.

⁹ *Reddy v. Reddy*, [1941] Ran. 547; *Baron Von Dincklage*, [1941] 2 M. L. J. 748, [1942] M. W. N. 41, (1941) 54 L. W. 521, 48 Cr. L. J. 395, [1942] AIR (M) 182.

¹⁰ Per Plowden, J., in *Jhandu*, (1886) P. R. No. 27 of 1886, at p. 60.

¹¹ P. L. C. 1861, p. 1270.

¹² *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348; *Romesh Chunder Sannyal v. Hiru Mondal*, (1890) 17 Cal. 852; *Sita*, (1893) 18 Bom. 212.

¹³ *Mahadev Govind*, (1930) 32 Bom. L. R. 356, 31 Cr. L. J. 926, [1930] AIR (B) 176.

¹⁴ *Glyde*, (1868) L. R. 1 C. C. R. 139.

¹⁵ *Murugan*, (1883) 1 Weir 455.

¹⁶ *Nga Shwe Zan*, (1916) 18 Cr. L. J. 300, [1917] AIR (LB) 15.

¹⁷ *Ramakhal*, (1937) 39 Cr. L. J. 312, 46 L. W. 812, [1937] 2 M. L. J. 734, [1937] M. W. N. 1321.

¹⁸ *Sita*, (1893) 18 Bom. 212. See *Phuman*, (1907) P. R. No. 11 of 1908, 8 Cr. L. J. 250.

means for the discovery, nor is he bound to be out of pocket in discovering the owner by means of an advertisement.¹⁵ The accused found a spanner of no appreciable value in a public road and attempted to sell it. It was held that he was not guilty of criminal misappropriation as the case was governed by ill. (a) and not by ill. (f) to the section.¹⁶ Where a person took possession of a bullock which had strayed, but there was no evidence that it was stolen property, and he dishonestly retained it, it was held that he was guilty under this section and not under s. 411.¹⁷

The law with regard to the finder of the lost property does not apply to the case of property of a passenger accidentally left in a railway carriage, and found there by a servant of the company.¹⁸

Treasure trove.—A person who found money from a piece of land purchased by him and appropriated it to his own use was held not to have committed this offence.¹⁹

In England the law seems to be this: "...if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriate them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he take them with the like intent though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."²⁰

The possessor of land is generally entitled, as against the finder, to chattels found in the land.²¹

CASES.

Dishonest intention necessary.—The accused was found riding on a mare which had strayed away from the possession of its owner. The day after he was found riding he confessed that he had found the mare hobbled, had unfastened the rope and used it as a bridle, had mounted the mare intending to ride her to his house and to loose her when he reached his house. Subsequently he stated before the Magistrate that his intention was to take the strayed mare to a police-station. He was convicted under this section. It was held that the conviction was illegal, for it could not be assumed that the intention of the accused was dishonest. The subsequent statement being attributable to fear did not affect the question of the accused's guilt.²² The accused, who had lost his buffalo some time back, found a buffalo very much resembling his own entering into his house and tied her in on an open verandah which overlooked a public road and refused to permit the complainant, who claimed the buffalo as his, to remove the same. It was held that the essential element of a dishonest intention to make up the offence was wanting.²³ Where the accused removed posts and hitters for firewood from a house which they believed was deserted, it was held that they did not commit criminal misappropriation for there was no dishonesty in the act.²⁴ Where the accused took certain hides from the prosecutrix, but refused to pay for them on the ground that she owed a sum to him, it was held that he had not committed this offence.²⁵ Where a Sub-Inspector of Police kept a bullock for twenty days and after advertising for the owner sold it, it was held that no offence had been made out under this section.¹ An order was passed by a District Magistrate staying delivery of certain property to the complainant. This order was by mistake not communicated to the lower Court. In pursuance of the lower Court's order, complainant was served with notice by the police that he should take delivery or the property would be forfeited to Government. The complainant took delivery though knowing of the stay order and afterwards disposed of it in such a way as to make it impossible of being returned to the other party if the District Magistrate would order it to be returned. It was held that the action of the complainant did not amount to an offence under this section.² Where on settling the marriage of his daughter with the complainant, the accused took from the latter certain

¹⁵ *Sarajul Haque*, (1920) 23 Cr. L. J. 401.

¹⁶ *Mahadev Govind*, (1930) 32 Bom. L. R. 356, 31 Cr. L. J. 926, [1930] AIR (B) 176.

¹⁷ *Phul Chand Dube*, (1929) 52 All. 200.

¹⁸ *Pierce*, (1852) 6 Cox 117.

¹⁹ *Chodapa*, (1868) Unrep. Cr. C. 8.

²⁰ *Per Park, B.*, in *Thurborn*, (1849) 18 L. J. M. C. (N. S.) 140, 144.

²¹ *South Staffordshire Water Company v. Sharman*, [1896] 2 Q. B. 44.

²² *Muhammada*, (1905) 7 P. L. R. 100, 3 Cr. L. J. 299.

²³ *Dwarka Doss v. Narasimhalu Naidu*, (1922) 44 M. L. J. 128, [1923] AIR (M) 364.

²⁴ *Nawtara Singh*, (1904) U. B. R. (1904-06) (P. C.) 7, 1 Cr. L. J. 558.

²⁵ *Boystum Moochee*, (1872) 17 W. R. (Cr.) 11.

¹ *Amir Hasan Khan*, (1925) 24 A. L. J. R. 128, 27 Cr. L. J. 5, [1926] AIR (A) 251.

² *Nagendra Nath Roy*, (1934) 35 Cr. L. J. 886

ornaments and clothes of female wear, meant either as a present to the future bride or as a part of the amount to be given to him in consideration of giving his daughter in marriage, but later on he married his daughter to some other person and on being questioned by the complainant, denied both the agreement for marriage and the receipt of the articles, it was held that an offence under this section had been committed.³

Claim of right.—A servant, who retained in his hands money which he was authorized to collect and which he did collect from the debtor of his master, because money was due to him as wages, was held guilty of criminal misappropriation.⁴

Servant misappropriating money received on behalf of his master.—Where the accused, a Government servant, whose duty it was to receive certain moneys and to pay them into the treasury on receipt, admitted that he had retained two sums of money in his possession for several months, but on fearing detection he paid them into the treasury, making a false entry at the time in his books with a view to avert suspicion;⁵ and where the accused, a village *kurnam*, received money from the head of the village for the purpose of remitting it to the public treasury, but omitted to do so until after an inquiry had been held into arrears due by the villager,⁶ it was held that this offence was committed. It is impossible for the prosecution to follow the money in the hands of an accused person and prove that he spent a certain specific item in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts.⁷

Secreting letters.—The accused, a servant in the Postal Department, while assisting in the sorting of letters, secreted two letters, with the intention of handing them over to the delivery peon and sharing with him certain money payable upon them. It was held that the accused was guilty of attempt to commit dishonest misappropriation of property and of theft.⁸

A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W read the letter, and put it on a table in the room and left it there. H took the letter, and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, 'of strengthening Mrs. W's case and of improving his own position'. The Court, however, refused to receive the letter. It was held that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter.⁹

D who wanted to send by registered insurance post a letter with five currency notes each of Rs. 100 asked the accused to write the address on the envelope but the accused tried to substitute another envelope in the place of the original one and wrote the address on it. D's suspicions having been aroused he demanded of the accused the original envelope. An altercation ensued and the original envelope containing the currency notes and D's coat were torn. The accused was charged under this section. It was held that the accused was guilty of attempt to commit criminal misappropriation.¹⁰

Harvesting crops under attachment.—Where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, it was held that he had committed this offence.¹¹

Exchanging railway tickets.—A and B were about to travel by the same train from Benares City. A had a ticket for Ajudhia. B had two tickets for Benares Cantonment. A voluntarily handed over her ticket to B in order that he might tell her if it was right. B, under the pretence of returning A's ticket, substituted therefor one of his own, and kept A's ticket. It was held that the offence committed by B was that of criminal misappropriation rather than that of cheating.¹²

English cases.—A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appro-

³ *Mohori Lal Chowdhury*, (1938) 42 C. W. N. 783.

⁴ *Bissessur Roy*, (1869) 11 W. R. (Cr.) 51.

⁵ *Ramakrishna*, (1888) 12 Mad. 49; *Kareem Bux*, (1871) 3 N. W. P. 30.

⁶ *Madduri Krishnamma*, (1884) 1 Weir 455.

⁷ *Shiam Sundar*, (1930) 6 Luck. 435.

⁸ *Venkatasami*, (1890) 14 Mad. 229.

⁹ *Harris*, (1917) 40 All. 119.

¹⁰ *Rabu Saleh*, (1932) 34 Cr. L. J. 802, [1932] AIR (S) 139.

¹¹ *Obayya*, (1898) 22 Mad. 151.

¹² *Raza Husain*, (1905) 25 A. W. N. 9, 2 Cr. L. J. 94.

priated to his own use. At the time of the sale no person knew that the bureau contained anything whatever. It was held that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny.¹³ If a bureau be delivered to a carpenter to repair, and he discovered money in a secret drawer of it, which he, unnecessarily as to its repair, breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appear that he did it with intention to restore it to its right owner.¹⁴ A servant indicted for stealing bank-notes, the property of her master, in his dwelling-house, set up, as her defence, that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertised. It was held that she ought to have inquired of her master whether they were his notes or not, and that not having done so, but having taken them away from the house, she was guilty of stealing them.¹⁵ The accused stole some iron from a canal, in which it was found when the canal was in process of being cleaned. In an indictment against him for stealing the iron, it was held that the proprietors of the canal had a sufficient property in the iron to justify alleging of the property to be in them.¹⁶

PRACTICE.

Evidence.—Prove (1) that the property in question is moveable property.

(2) That the accused misappropriated it or converted it to his own use.¹⁷

(3) That he did so dishonestly.¹⁸

See the Indian Evidence Act, s. 14, ill. (b).

On a charge of criminal misappropriation, it is sufficient for the prosecution to establish that some of the money mentioned in the charge has been misappropriated by the accused, even though it may be uncertain what is the exact amount so misappropriated.¹⁹

When a case comes under the second Explanation it should be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases, it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do at the time of taking it, and if he did not restore it to the owner the jury might conclude that he took it when he took complete possession of it.²⁰

The mere fact that the prosecutor gave the accused time to make out his accounts and pay the balance due does not vitiate a conviction for dishonest misappropriation, or show that the matter is one for civil Courts only.²¹

Procedure.—Not cognizable—Warrant—Bailable—Compundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate.

In a case of complaint under this section, it is open to a Magistrate in case of doubt to hold an inquiry under s. 202 of the Criminal Procedure Code before summoning the accused in order to find out whether a *prima facie* case was made out or whether the accused should be summoned or not.²²

Venue.—The offence of criminal misappropriation may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which

¹³ *Merry v. Green*, (1841) 7 M. & W. 623.

¹⁴ *Green's Case*, (1802) 2 Leach 952.

¹⁵ *Kerr*, (1837) 8 C. & P. 176.

¹⁶ *Rowe*, (1859) 28 L. J. (M. C.) 130.

¹⁷ *Ghulam Haidar*, (1938) 40 P. L. R. 870, 39 Cr. L. J. 851.

¹⁸ *Parsotam Das*, (1881) 1 A. W. N. 80; *Murugan*, (1883) 1 Weir 455; *Ramayya*, (1904) 10 Burma L. R. 170, 1 Cr. L. J. 908; *Ram Byas Rai*, (1918) 19 Cr. L. J. 943, [1918] AIR (P)

489 (2).

¹⁹ *Byramji Chawalla*, (1927) 52 Bom. 280, 30 Bom. L. R. 325; *Vinayak Bhatkhande*, (1928) 30 Bom. L. R. 1530, sub-nom. *Bhatkhande*, (1928) 53 Bom. 119.

²⁰ *Thurborn*, (1849) 18 L. J. M. C. (N.S.) 140, 144.

²¹ *Sreekant Biswas*, (1866) 5 W. R. (Cr.) 56.

²² *Gowkaran Lal v. Sarjoo Saw*, (1920) 1 P. L. T. 200, 21 Cr. L. J. 519.

is the subject of the offence was received or retained by the accused person, or the offence was committed.²³ Even in the absence of any evidence on the point, it will be fair to presume that the accused retained the property, which is the subject of the offence, at the place where he resides. And the Court of that place has, therefore, jurisdiction to try the offence.²⁴

Separate offences.—The misappropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate inquiry. The duty of a committing officer in such a case is to select certain distinct items, to frame his charges upon them, and to adduce evidence specially upon those items.²⁵ Where moneys are dishonestly misappropriated and false accounts or vouchers prepared for the purpose of screening the misappropriation, the offence of falsification becomes part and parcel of the offence of misappropriation, and the whole transaction must be considered practically as one offence consisting of criminal misappropriation.¹

Joinder of charges.—When two persons are implicated in a case of criminal misappropriation with respect to a certain sum of money, the charges against them must be of misappropriation in one case and of abetment in the other because it is impossible to hold that two persons can be guilty of misappropriation of the same sum of money. It is also open to the Court to frame charges against each of them in the alternative, i.e. of misappropriation or of abetment.²

Charge.—When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of s. 234: Provided that the time included between the first and last of such dates shall not exceed one year.³

The charge should run as follows:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly misappropriated [*or converted to your own use*] certain property, to wit——, belonging to AB, and thereby committed an offence punishable under s. 403 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

404. Whoever dishonestly misappropriates¹ or converts to his

Dishonest misappropriation of property possessed by deceased person at the time of his death. own use property,² knowing that such property was in the possession³ of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

ILLUSTRATION.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

²³ Criminal Procedure Code, s. 181, (2).

²⁴ *Hussain Bakhsh v. Khuda Bakhsh*, (1936) 18 Lah. 299.

²⁵ *C. A. Chetter*, (1871) 15 W. R. (Cr.) 5.

¹ *Anant Narayan*, (1904) 6 Bom. L. R. 94, 1

Cr. L. J. 105.

² *Girwar Narain*, (1912) 16 C. W. N. 600, 13 Cr. L. J. 506.

³ Criminal Procedure Code, s. 22 (2).

COMMENT.

This section relates to a description of property peculiarly needing protection. The offence consists in the pillaging of movable property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person or officer authorized to take charge of it.⁴

Scope.—The section is intended only to punish servants and strangers who could possibly have no right to, or interest in, the effects of a dead man and who misappropriates such effects, but not to punish near relations who take possession of and deal with the deceased's effects under a claim of independent ownership or a claim to succeed as heir to the deceased.⁵

1. '**Dishonestly misappropriates**'.—A person may commit the offence of dishonest misappropriation of property possessed by a deceased person at the time of his death by dishonestly misappropriating the money entrusted to him although he does not bring such money to his own use.⁶ As to the meaning of 'dishonestly', see. s. 24, *supra*.

2. '**Property**'.—The High Courts of Bombay and Calcutta hold that the word 'property' does not refer to immovable property, but only to movable property. Hence, where a person was convicted of misappropriating the house of a deceased person the conviction was annulled.⁷ The Allahabad High Court has dissented from this view. It says that this section contains no such express limitation. This section and some of the other sections following it refer to property without any qualifying description; and in each the context must determine whether the property referred to is intended to be movable property or property movable or immovable. Where the accused, in order to obtain a wrongful gain to the prejudice of a decree-holder whose decree was still pending, removes some rafters from a house which was in the possession of a deceased person at the time of her death and had not since been in the possession of any person legally entitled to it, it was held that the accused were guilty of an offence under this section. The property removed by the accused was immovable property so long as it was attached to the house but became movable property when it was severed from the house.⁸

3. '**Possession**'.—See s. 27, *supra*.

PRACTICE.

Evidence.—Under this section all the elements required to constitute the offence of criminal misappropriation in respect of a person who is alive will be necessary.⁹ Prove (1) that the property in question is movable property.

(2) That it was in the possession of a deceased person at the time of his death.

(3) That it was not thereafter in the possession of any person legally entitled to its possession.

(4) That the accused misappropriated it or converted it to his own use.

(5) That he did so dishonestly.¹⁰

(6) That he knew the circumstances mentioned in (2) and (3).

For the second clause prove further that the accused was, at the time of the owner's death, employed by him as a clerk or servant.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable¹¹—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly misappropriated [*or converted to your own use*] certain property, to wit——, knowing that such pro-

⁴ M. & M. 364.

⁵ *Karri Mangadu*, [1914] M. W. N. 791 15 Cr. L. J. 602, [1915] AIR (M) 506.

⁶ *Enayet Hoosein*, (1869) 11 W. R. (Cr.) 1; *Nobin Chunder Sircar*, (1869) 12 W. R. (Cr.) 39.

⁷ *Girdhar Dharamdas*, (1869) 6 B. H. C. (Cr. C.) 33; *Jugdown Sinha*, (1895) 23 Cal. 372.

⁸ *Daud Khan*, (1925) 24 A. L. J. R. 153, 27 Cr. L. J. 17, [1925] AIR (A) 673.

⁹ *Nobin Chunder Sircar*, (1869) 12 W. R. (Cr.) 39.

¹⁰ *Vide* s. 24, *supra*.

¹¹ (1874) 7 M. H. C. Appx. 34

perty was in the possession of AB, a deceased person, at the time of the said AB's decease, and had not since been in the possession of any person legally entitled to such possession; and that you thereby committed an offence punishable under s. 404 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Of Criminal Breach of Trust.

405. Whoever, being in any manner entrusted with property, or with any dominion over property,¹ dishonestly misappropriates or converts to his own use that property,² or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do,³ commits "criminal breach of trust".

ILLUSTRATIONS.

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

To constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or mana-

gement of the property in respect of which the breach of trust is charged.¹² There must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract; and thirdly the misappropriation or conversion or disposal must be with a dishonest intention.¹³ Every breach of trust gives rise to a suit for damages, but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust. Every offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek his redress for damages in the civil Court, but every breach of trust, in the absence of *mens rea*, cannot legally justify a criminal prosecution.¹⁴

'Larceny' and 'embezzlement' in English law are the offences which represent what is known in India as theft, criminal misappropriation and criminal breach of trust. There is no exact equivalent in English law of "criminal breach of trust".¹⁵

Scope.—The terms of the section are very wide. It applies to one who is in any manner entrusted with property or dominion over property. The section does not require that the trust should be in furtherance of any lawful object. The section then provides, *inter alia*, that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him, he commits criminal breach of trust. This part of the definition is complete in itself. It has no reference to the provisions as to disposal in violation of a direction of law, or of a legal contract. There are separate ways in which criminal breach of trust may be committed.¹⁶ This section embraces the cases of all those offenders not specifically provided for in ss. 407, 408 and 409. Offences committed by trustees with regard to trust property fall within the purview of this section.

Criminal misappropriation and criminal breach of trust.—In criminal misappropriation the property comes into the possession of the offender by some casualty or otherwise, and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property and he dishonestly misappropriates the same, or wilfully suffers any other person to do so, instead of discharging the trust attached to it.

Ingredients—The section requires—

1. Entrusting any person with property or with any dominion over property.
2. The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation—
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or
 - (ii) of any legal contract made touching the discharge of such trust.

1. 'Entrusted with property, or...dominion over property'.—It is an essential condition...that the property which is the subject-matter of the offence must have been entrusted to a person. "Entrusted" is not necessarily a term of law. It may have different implications in different contexts. In its most general significance all it imports is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all".¹⁷ The accused falsely represented to the complainant that they had sent some bonds for rectification to Bombay and as they had not arrived and the last day for completion of a contract with a Bank had arrived, requested the complainant to oblige them by giving the complainant's bonds temporarily for a few days, assuring him that his bonds would be returned

¹² *Isser Chunder Ghose v. Peari Mohun Palit*, (1871) 16 W. R. (Cr.) 39; *Ko Set Shwin*, (1903) 1 U. B. R. (P. C.) 9, 1 Cr. L. J. 385.

¹³ *V. Krishnan*, [1939] M. W. N. 1213, (1939) 41 Cr. L. J. 824, [1940] AIR (M) 329.

¹⁴ *Kanhaiya Lall*, (1937) 38 Cr. L. J. 491, [1937] O. W. N. 505, [1937] AIR (O) 331.

¹⁵ *Velagala Venkata Reddy v. Kovvuri Chinna* L. C.—63

Venkata Reddy, [1941] Ran. 547.

¹⁶ *Nga Te*, (1904) 2 L. B. R. 216, 1 Cr. L. J. 730, F.B.

¹⁷ Per Viscount Haldane in *Lake v. Simmons*, (1927) 96 L. J. K. B. 621, 625; *McIver*, (1935) 69 M. L. J. 681, 690, [1935] M. W. N. 914, 42 L. W. 923, 37 Cr. L. J. 142, [1936] AIR (M) 1.

to him as soon as the bonds sent for rectification were received and the complainant endorsed and delivered to the accused the bonds for this purpose. It was held that the bonds were not handed over absolutely to the accused but were entrusted to them. Even though the accused when he induced the complainant to part with certain properties had the intention of deceiving him, a subsequent misappropriation by him of the property to his own use would amount to criminal breach of trust. The fact that there was complete offence of cheating when the property was received would not prevent the accused being guilty.¹⁸ The word 'entrusted' when used with respect to money means that the money has been transferred to the accused under circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with his instructions.¹⁹ Where goods are delivered to a person in pursuance of a contract for their purchase, there is no entrustment which would give rise to a trust and the mere fact that the person denies receipt of goods delivered does not render him guilty either of criminal misappropriation or criminal breach of trust.²⁰ Where a person was entrusted with property attached by an order of a civil Court and he deliberately refused to produce the property when called upon to do so, it was held that his conduct amounted to a repudiation of his trust and he was guilty of criminal breach of trust.²¹ When the secretary of a Bank who is authorised by the terms of a power-of-attorney to purchase Government Promissory Notes on behalf of the Bank receives the notes he becomes "entrusted" with them by the Bank within the meaning of this section. He is bound to pay them to the Bank, and has no authority to keep them in his hands in satisfaction of any claim he may have against the Bank. Such retention amounts to misappropriation.²²

A person cannot be said to be entrusted with property within the meaning of this section when he obtains possession by means of a trick. A trust implies confidence placed by one man in another. It implies necessarily that the confidence was freely given and that there is a true consent. There is no true consent if confidence is obtained as a result of a trick. If there was a trick or deceit, a true consent cannot arise; there can be no entrustment, and no offence under s. 406, because an essential element of that offence is an entrustment. The accused represented to the complainant that he was a tinner while he was in fact not a tinner. The complainant thereupon gave the accused certain utensils to be repaired which were neither repaired nor returned by the accused. It was held that while it might be said, using the words of general import, that the complainant entrusted the accused with property, he was, in fact, tricked out of it. Therefore the offence fell not under this section, but under s. 420.²³

Trust of some kind necessary.—A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.²⁴ Hence, where there is no original confidence, there is no trust, and a misappropriation, if punishable at all, will be under s. 403.

The terms of this section are wide enough to include trustees of every kind; that is, those who are such, not only by reason of some employment for which they receive remuneration, but by reason of some trust constituted by express deed, or even by mere implication of law, though the office may be gratuitous. They also include the case of a person who commits this offence by misappropriation of property to the advantage of a third person.²⁵ Where the complainant entrusted the accused with his property in order to prevent it from being taken in execution of a decree that might be passed against him, it was held that that was not a legal defence to a charge

¹⁸ *McIver*, (1935) 69 M. L. J. 681, 690, [1935] M. W. N. 914, 42 L. W. 933, 37 Cr. L. J. 142, [1936] AIR (M) 1.

¹⁹ *Ghanshamdas*, (1927) 29 Cr. L. J. 431, 23 S. L. R. 13, [1928] AIR (S) 106.

²⁰ *Velayutham Chetty*, (1922). 24 Cr. L. J. 332; *Labhu*, (1930) 32 Cr. L. J. 300, [1930] AIR (L) 408; *Nga Po Seik*, (1912) 5 B. L. T. 143, 6 L. B. R. 62, 13 Cr. L. J. 888.

²¹ *Chanan Singh*, (1934) 36 Cr. L. J. 119.

²² *Ram Nath Dave*, [1942] O. W. N. 485, (1942) 43 Cr. L. J. 832, [1942] AIR (O) 473.

²³ *Arab Mian*, [1942] Kar. 284.

²⁴ Indian Trusts Act, II of 1882, s. 3.

²⁵ *Nobin Chunder Sircar*, (1869) 12 W. R. (Cr.) 39; *Shah Naim Ata*, (1930) 7 O. W. N. 668, 31 Cr. L. J. 1012, [1930] AIR (O) 401.

under this section when the accused had misappropriated the property for his own use.¹

The trust may not be legal or in furtherance of a lawful object. But if there is no trust there will be no offence under this section. Thus, a person who takes a sum of money by way of a loan is not entrusted with any property.² But a servant who obtains money by false pretences from his master for using it in a particular way may be guilty of criminal breach of trust. Where the accused, a servant of a company, misappropriated a large sum of money made up of amounts which he received from the manager at various times on the false pretence that they were required for paying coolies, it was held that he was guilty of criminal breach of trust. When he received the money he did so as the servant of the company for the express purpose of using it for his master's benefit in a particular way. He was, therefore, entrusted with the money and his appropriating it to himself amounted to criminal breach of trust. The fact that the criminal intent was present at the time of the receipt of the money was immaterial.³

Mere breach of contract is not made synonymous with criminal breach of trust. In all cases given in the illustrations to s. 405 in which the person is said to have committed the offence, the property in respect of which it is said to have been committed is property of another person, or property of which the offender was not the beneficial owner, although in one case, that of the executor, he had the legal title. The property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or the beneficial interest in or ownership of it must be in some other person and the offender must hold such property on trust for such other person or in some way for his benefit.⁴ Moneys advanced to a broker for the specified purpose of purchase and supply of paddy with the agreement that the broker is to suffer the loss or get the profit by a fall or rise in market price cannot be said to be entrusted to him within the meaning of this section, although by the agreement the company bound itself to take delivery of the paddy purchased and an express trust was declared in regard to the amounts advanced. The accused entered into an agreement with the complainant company under which he received Rs. 4,500 by way of advance and undertook to employ the money in the purchase and transport of paddy to it. There were stipulations in the agreement to the effect that he was to hold the money in trust for the company and that the property in the money and the paddy purchased therewith was to remain with the company. These stipulations were, however, inconsistent with other clauses of the agreement which *inter alia* laid on the accused the responsibility for any loss of either paddy or money, whatever the cause. It was held that there was no real trust and that the accused was not guilty of criminal breach of trust in failing to devote the money to the purchase and transport of paddy.⁵

Debt.—The complainant owed money to the accused on a mortgage bond and on a certain day went to their house and paid the amount settled as due in full satisfaction of the bond. An endorsement of payment was made on the back of the bond by one of the witnesses for the prosecution and the accused went inside their house with the bond and money saying that they would keep the money and return the bond, but they did not come back that day and afterwards denied the receipt of the money. It was held that on the facts there was no trust which could bring the case within the terms of this section.⁶ Where the complainant executed a handnote in favour of the accused and also pawned ornaments with him, the accused then evaded settlement of account and return of the handnote and the ornaments, and so *panchas* settled the total dues at Rs. 155 which the complainant paid, but the accused on the pretext of bringing the document from inside the house bolted away and was charged for criminal misappropriation of the sum of Rs. 155, it was held that there was no breach of trust because there was

¹ *Chinna Karuppa Muppan*, (1889) 1 Weir 463.

² *Wong Yone Main*, (1911) 6 L. B. R. 46, 13 Cr. L. J. 269.

³ *Ramappa*, (1911) 22 M. L. J. 112, 13 Cr. L. J. 15.

⁴ *Po Seik*, (1912) 6 B. L. R. 62, 13 Cr. L. J. 888, F.B.; *Hock Chong & Co. v. Tha Ka Do*,

(1913) 7 L. B. R. 16, 14 Cr. L. J. 145, F.B.; *Ramaswami Reddi*, [1930] M. W. N. 790, 32 Cr. L. J. 743, [1931] AIR (M) 235.

⁵ *Po Ywet*, (1914) 7 L. B. R. 278, 7 B. L. T. 209, 15 Cr. L. J. 452, F.B.

⁶ *Golam Hussain*, (1917) 22 C. W. N. 1005, 20 Cr. L. J. 151, [1919] AIR (C) 155.

no entrustment, the money was not given in trust but in discharge of a debt, and the money became the accused's property as soon as he received it.⁸

'Property'.—'Property' referred to in this section must be movable property. Criminal breach of trust cannot be committed in respect of immovable property. The accused was a Jemadar of an indigo factory and in such capacity was entrusted with dominion over certain plots of *zerait* land. His duty was to see that the plots were cultivated with indigo, but he knowingly allowed them to be cultivated with other crops. It was held that the accused was not guilty of criminal breach of trust.⁹ It is submitted that the offence of criminal breach of trust is committed not only by dishonest conversion, but also by dishonest use or disposition, and there is nothing in the wording of this section to exempt from the definition of criminal breach of trust dishonest use of immovable property by the person entrusted with dominion over it. The Madras High Court has remarked that the above case is based on the general assumption that if a man cannot move a thing away, he cannot dishonestly convert it to his own use. In the majority of cases that assumption may be correct: but the wording of s. 405 is very comprehensive and it is dangerous to lay down any absolute rule.¹⁰ Accused borrowed an agricultural engine from his relation, who was looking after it for the real owner. He had also a lease of the engine from his relation. He sold the engine to his aunt. He was convicted of criminally misappropriating the engine, the breach of trust being alleged to consist in the sale of the engine "in violation of the trust". The engine was not moved from the place where it was put, and there was no evidence of an intention to move it either. It was held that the accused was not guilty of any criminal offence.¹¹ In another case the Court has discussed the question, without deciding, whether immovable property can be the subject of an offence under s. 406.¹² A forest range officer marked certain growing teak trees and allowed them to be felled by a free-license-holder whose license allowed him to fell only *aule-nathat* teak. The officer was convicted of criminal breach of trust and in the alternative of mischief. It was held that the criminal breach of trust referred to movable property only and that standing teak trees being immovable property the officer could not be convicted of criminal breach of trust in respect of them.¹³

The word 'property' includes the sale-proceeds of goods entrusted to the accused.¹⁴ A cancelled cheque falls within the term 'property'. The question of the value of the property in respect of which the breach of trust is committed is, except so far as s. 95 of the Code is concerned, quite immaterial.¹⁵

An association not expressly sanctioned by law, yet not criminal, is not incapable of holding any property at all.¹⁶

'Dominion over property'.—The property regarding which the offence is alleged to have been committed must have been 'entrusted' to the accused or he must have 'dominion over' it. Where it is the duty of a Municipal Water Works Inspector to supervise and check the distribution of water from the municipal water-works, he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of trust.¹⁷

If a mortgagor in possession, who is entrusted with the dominion over the mortgaged property by the mortgagee in whom the property is in a mortgage in the English form, wilfully defaults and causes the property to be sold for arrears of Government revenue for the purpose of defrauding the mortgagee, and purchases it *benami*, he is liable to be punished for this offence.¹⁸ The accused hypothecated to the complainant by a written contract all his claims as a contractor against Government in respect of work done and materials supplied to the Executive Engineer, and under-

⁸ *Hitnarain v. Bednarain*, (1944) 24 Pat. 128.

⁹ *Jugdown Sinha*, (1895) 23 Cal. 372; *Bhagu Vishnu*, (1897) Cr. R. No. 36 of 1897, Unrep. Cr. C. 928; *Anon.*, (1925) 49 M. L. J. 30 (Notes of Recent Cases); *Chandan Lal*, (1926) 27 Cr. L. J. 760, [1926] AIR (L) 478.

¹⁰ *Rukmani Ammal v. Muthurama Reddi*, (1925) 24 L. W. 603, 50 M. L. J. 94, 27 Cr. L. J. 331.

¹¹ *Ibid.*

¹² *Natesa Mudaliar v. Srinivasulu Naidu*,

[1932] M. W. N. 1353.

¹³ *U Ka Doe*, (1929) 8 Ran. 13.

¹⁴ *Balthasar*, (1914) 41 Cal. 844; *Dwarkanadas Haridas*, (1928) 30 Bom. L. R. 1270, 30 Cr. L. J. 329, [1928] AIR (B) 521.

¹⁵ *Maula Bakhsh*, (1904) 27 All. 28.

¹⁶ *Tankard*, [1894] 1 Q. B. 548.

¹⁷ *Bimala Charan Roy*, (1913) 35 All. 361.

¹⁸ *Ram Manick Shaha v. Brindaban Chunder Potdar*, (1866) 5 W. R. 230.

took regularly and without fail to convey and make over to the complainant all cheques drawn by the Executive Engineer in his favour, and, subsequently, in violation of the said contract, cashed two such cheques, and appropriated the proceeds. It was held that the accused had committed criminal breach of trust.¹⁹

When the manager of a branch office of a bank receives Government Promissory Notes from a constituent under a contract of pledge as security for overdrafts granted to the latter and gets them entered into the books of the bank, the Promissory Notes pass into the possession of the bank, over which, apart from the pledge, it has banker's lien. The manager becomes entrusted with dominion over the Promissory Notes to hold them as security against the overdrafts. If, before the overdrafts are satisfied, either *pro tanto* or completely, the manager returns the Promissory Notes, though shown in the books of the bank as still deposited there, and the constituent repledges them with other banks, the manager commits the offence of criminal breach of trust and the constituent abetment thereof. It is no defence for the manager, who is also a servant of the bank subject to its directions and control, to say that he is to be treated as an agent of the bank under a power-of-attorney granted to him, which authorises him to accept and take securities owing to the bank, give or grant any release, discharge or acquittances for the same and perform all such matters in regard thereto as should effectually transfer the property and interest therein of the bank. Whatever may be the effect of such power-of-attorney upon the rights of third parties in civil proceedings, it is the duty of the manager to serve the bank honestly and faithfully. If he acts dishonestly and in breach of his duty to his employers and he commits an offence against the criminal law, the power-of-attorney will not protect him from the consequence thereof. Both the manager in returning the Promissory Notes and the constituent in taking them back, knowing full well that he had pledged them as security and that the manager was acting in breach of his duty to the bank in so returning them, act dishonestly within the meaning of s. 24.²⁰

Partner.—The words of the section are wide enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it or converted it to his own use.²¹ A partner is entitled to be called upon for an account of the expenditure of the money, which he has received, and it is open to him to spend the money received by him and to account for it in dealing with the partnership. Where it was not satisfactorily made out that this was not done, and could not be made out in the absence of a proper demand for accounts, it was held that there was no dishonest conversion, which would justify his conviction under this section.²² In the case of a charge of criminal breach of trust against a partner, the criminal Court should not entertain the case if the prosecution is unable to prove clearly and beyond doubt that the accused has acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was bound by a fiduciary relationship.²³ The Court will not interfere if the case against the partner is an outcome of a dispute as regards the liabilities of the partners.²⁴ The Court should be very careful in dealing with charges against partners of criminal breach of trust. It is impossible to say in many cases what the share of the accused may be, whether the accused is indebted to the firm or whether the firm is indebted to him. If the firm is indebted to him there may be no dishonest intent in his withdrawing money from the firm.

¹⁹ *Shuduthroy Bisseshurda v. Agama Mistry*, (1908) U. B. R. (P. C.) 13, 8 Cr. L. J. 24.

²⁰ *Sailendra Nath Mitter*, [1943] 1 Cal. 493.

²¹ *Okhoy Coomar Shaw*, (1873) 13 Beng. L. R. 307, sub. nom. *Nrigendro Lall Chatterjee v. Okhoy Coomar Shaw*, (1874) 21 W. R. (Cr.) 59, F.B., overruling *Lall Chand Roy*, (1868) 9 W.R. (Cr.) 87; *Laloo Ghella*, (1904) 6 Bom. L. R. 553, 1 Cr. L. J. 757; *Jagannath Raghunathdas*, (1931) 33 Bom. L. R. 1518, 33 Cr. L. J. 317; *Karim Bakhsh v. Habibulla*, (1903) P. R. No. 15 of 1903, 1 Cr. L. J. 506; *Bhudarmull Marwari v. Ramchander Marwari*, (1920) 1 P. L. T. 127, 21 Cr. L. J. 338, [1920] AIR (P) 112; *Balls*, (1871) L. R. 1 C. C. R. 328; *Tankard*, [1894] 1 Q. B. 548; *Bhupendranath Singha v. Girdharilal Nader* (1932) 60 Cal. 1318; *Sham Lal v.*

Chaman Lal, (1938) 41 P. L. R. 37, 40 Cr. L. J. 942, [1939] AIR (L) 406; *Alla Rakha v. Liakat Hossain*, (1940) 44 C. W. N. 650, 41 Cr. L. J. 796, [1940] AIR (C) 371; *Reddy v. Reddy*, [1941] Ran. 547; *Baron Von Dincklage*, [1941] 2 M. L. J. 748, [1942] M. W. N. 41, (1941) 54 L. W. 521, 43 Cr. L. J. 395, [1942] AIR (M) 182; *Mandavalli Satyanarayanamurthi v. Kotha Manikyala Rao*, [1939] M. W. N. 1252, (1938) 41 Cr. L. J. 398, [1940] AIR (M) 265.

²² *Debi Prasad Bhagat v. Nagar Mull*, (1901) 35 Cal. 1108.

²³ *Koorathakwar Chetty*, [1920] M. W. N. 346, 11 L. W. 144, 21 Cr. L. J. 309, [1920] AIR (M) 150.

²⁴ *Ragho Prasad Gupta*, (1930) 12 P. L. T. 255 22 Cr. L. J. 690

If there is any doubt upon the matter, the accused must always have the benefit of the doubt.²⁵ A partner who receives money on behalf of the partnership does not receive it in a fiduciary capacity. Consequently, when one partner is alleged to have withheld the share of the profits of the partnership business said to be due to another partner, he cannot be prosecuted under this section.¹

Auctioneer.—An auctioneer is not liable for criminal breach of trust merely because he does not punctually carry out every term in the agreement, e.g. as to the date of the sale and the time of payment of the proceeds.²

Executor de son tort.—An executor *de son tort* is held liable to account for assets which come into his hand, not upon the basis of entrustment, but upon the basis that, not being entrusted, he had no business to intermeddle. The application of the doctrine in no way depends upon the bad faith in the person intermeddling. It is not sound to hold a person guilty of the offence of criminal breach of trust upon the basis that he became an executor *de son tort*.³

Wife.—A wife has a joint possession of her husband's property and cannot, therefore, be indicted for disposing of it in any way.⁴ According to English law she can be convicted of larceny as a bailee.⁵

Loan.—If a sum of money is advanced by way of loan no criminal breach of trust is committed even if the borrower uses it for a purpose other than that for which the advance was made. The accused was given a sum of money for the purpose of buying paddy for the complainant. At the time of the advance he signed an agreement under which he undertook to use the money solely to buying paddy, and to deliver the paddy to the complainant. The value of the paddy was to be credited at the market rate of the day of delivery. The accused had also signed a demand promissory note for the amount of the advance. The accused failed to carry out the arrangement and was convicted of criminal breach of trust. It was held that the conviction was bad as the transaction amounted to a loan and not a trust.⁶

Pledgee.—A person who pledges what is pledged to him in violation of any direction of law or contract⁷ or denies the pledge⁸ is guilty of this offence. Where there is no condition attached to the contract of pledge, the pledgee has a perfect legal right to deal with the pledged property in any manner he chooses so long as he is within the rights that can be exercised by a bailee with regard to the property which is the subject-matter of bail. Consequently, no dishonest intention can be inferred from the fact of a sub-pledge by a pledgee.⁹ The accused, in the regular course of his money-lending business, effected sub-pledges of the same jewels, for the same amounts and on the same dates as the pledges made to him, with his financiers or *khata-dars* to raise capital at a lower rate of interest. There was no express contract taking away the right to make sub-pledges and there was no evidence to show that the sub-pledges were made with a dishonest intention. It was held that the accused was not guilty of the offence of criminal breach of trust. Under s. 179 of the Indian Contract Act the pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest.¹⁰ Where the accused, to whom a thing was not entrusted, was present and helped the other accused in pledging it, knowing that the other had no right to pledge it, it was held that though he could not be convicted of criminal breach of trust he would be guilty of abetment of that offence.¹¹ The accused was entrusted with a pair of earrings for the purpose of raising Rs. 7 only upon them for the complainant's

²⁵ *Jagannath Raghunathdas*, (1931) 33 Bom. L. R. 1518, 33 Cr. L. J. 317.

¹ *Man Mohan Das v. Mohendra Bhowal*, (1948) 52 C. W. N. 441.

² *Baliharas*, (1914) 41 Cal. 844.

³ *Susenbihari Ray*, (1930) 58 Cal. 1051, s.b.

⁴ (1864) Weir (3rd Edn.) 266. This decision does not seem to be a sound one. If a wife removing the separate property of her husband is guilty of theft, there is no reason why she should not be guilty of criminal breach of trust in respect of such property.

⁵ *Jane Robson*, (1861) 31 L. J. (M. C.) 22.

⁶ *Wong Yone Main*, (1911) 6 L. B. R. 46, 13 Cr. L. J. 269, approved of in the full bench

cases of *Po Seik*, (1912) 6 L. B. R. 62, 13 Cr. L. J. 888, F.B., and *Hock Chong & Co., v. Tha Ka Do*, (1913) 7 L. B. R. 16, 14 Cr. L. J. 145, F.B.

⁷ (1871) 6 M. H. C. (Appx.) 28, 1 Weir 461; *Vadivaloo Chetty v. Abdul Razak*, (1907) 13 Burma L. R. 286, 6 Cr. L. J. 334.

⁸ *Abinas Chandra Kumar v. Dhani Buksh Muhammad*, (1935) 62 C. L. J. 487, 38 Cr. L. J. 118, [1936] AIR (C) 673.

⁹ *Sarju Prasad*, (1922) 26 O. C. 4, 24 Cr. L. J. 10, [1922] AIR (O) 280.

¹⁰ *Nemichand Parakh*, [1938] Mad. 639;

¹¹ *Yeditha Subbayya*, [1912] M. W. N. 725, 23 M. L. J. 722, 13 Cr. L. J. 453.

use. But he pledged them for a larger sum and gave Rs. 7 to the complainant and applied the additional money to his own use without telling him what he had done. It was held that he was guilty of criminal breach of trust.¹²

Where the accused who had pledged promissory notes with the complainant as security for a loan dishonestly induced the latter to hand over the same to him by pretending that he required the same to collect money from his debtors with the aid of which he would pay cash to the complainant and the accused disposed of the notes in violation of his contract with the complainant, it was held that there was both entrustment and dishonest misappropriation and the accused was guilty of criminal breach of trust.¹³

Deposit.—Security deposit by an employee is a sum which the employer is entitled to retain as long as it is necessary to secure him against losses which may be occasioned by the employee's default. This would usually be until accounts between the employer and the employee have been adjusted. During such period no one, not even the employee who has made the deposit, may deprive the employer of his right to retain the amount deposited. The surreptitious withdrawal by the employee of his security deposit before accounts have been adjusted amounts to criminal breach of trust on the part of the employee.¹⁴ The accused was an employee of a *zemindar* and at the time he entered service he furnished a certain amount in cash as security. At the time of leaving his service the accused handed over the account papers to his masters. One item of expenditure shown in the account papers was the withdrawal of the money that he had put in as security. It was held that no dishonest intention could be made out on the part of the accused. It might be that he took a wrong view of his civil rights in taking away the amount, but he believed he had the right on giving up his service and his conviction under s. 408 could not stand.¹⁵ The return of a deposit to the brother of the depositor under circumstances indicating the best of intention and an absence of moral turpitude, may render the depositee civilly liable to the depositor but does not amount to criminal breach of trust which involves moral turpitude.¹⁶ The complainant executed a mortgage to the accused and left the money with the accused with the stipulation that as the complainant settled and arranged with his creditors by remissions the necessary amount should be advanced by the accused to him. The accused made certain payments but after a time refused to pay further amounts. The accused was charged with an offence of criminal breach of trust. It was held that no criminal offence was committed as it was not a case of entrustment of money to a clerk or a servant or a bare custodian on the understanding that it should be produced when required but was a case of current deposit.¹⁷ Where the complainant had failed to recover from the accused a Municipal debenture which he had deposited with him by way of security on being given an employment and it appeared that the accused had deposited the debenture with a Bank against a loan and made no attempt to redeem it but there was no evidence that he had no intention of doing so, it was held that by such use of the debenture as had been made, there was no breach of any legal contract, express or implied, and the accused was not guilty of criminal breach of trust.¹⁸ A mere failure to return promptly the amount deposited by an employee with an employer as security was held to be not sufficient for conviction of the employer for criminal breach of trust.¹⁹

Hire.—The words of this section do not embrace the case of a man who has taken an article on hire and fails to produce it. There must be some evidence that he acted dishonestly. A person who fails to produce a meter installed by an electric company is responsible for its price but is not guilty of criminal breach of trust.²⁰

Hire-purchase agreement.—If a person gets an article under a hire-purchase agreement and subsequently sells it without making payments in full to the person

¹² *Gurumahanty Appalasamy*, (1894) 1 Weir 464.

¹³ *Venkatagurunatha Sastri*, (1923) 45 M. L. J. 133, [1923] M. W. N. 813, 17 L. W. 580, 24 Cr. L. J. 452, [1923] AIR (M) 597.

¹⁴ *Surendra Nath Basu*, [1938] 2 Cal. 257.

¹⁵ *Abdul Majid*, (1936) 38 Cr. L. J. 56, [1936] AIR (C) 520.

¹⁶ *Hussainalli Mahomedali*, (1929) 30 Cr. L.

J. 735, [1929] AIR (S) 119.

¹⁷ *Mahammad Ismail Beig v. Ahamad Sheriff*, [1934] M. W. N. 738.

¹⁸ *Gurudas v. Monindra*, (1940) 44 C. W. N. 872.

¹⁹ *L. Cramwell*, (1944) 48 C. W. N. 734.

²⁰ *Manni Lal*, [1932] A. L. J. R. 213, 33 Cr. L. J. 866.

from whom he has hired it, he commits a criminal breach of trust.²¹ The accused hired a motor car of the complainant company under the hire-purchase system, which provided that until the car was fully paid for by the accused the car was to remain the absolute property of the company; and the accused agreed during the hiring not to "assign, underlet or part with the possession" of the car in any way. Whilst this agreement was in force the accused pledged the car to three different persons on three different occasions. The accused was convicted of the offence of criminal breach of trust for making those assignments. It was held that the pledging of the car by the accused was a violation of the legal contract made by him in regard to the hire of the car and that violation was dishonest on the part of the accused.²² The accused obtained a motor car from the complainant on a hire-purchase agreement, stipulating that so long as the whole amount of the price was not paid, the car would remain the absolute property of the complainant and that the accused would not in any way dispose of it. The complainant brought a suit for the recovery of the price still remaining due under the agreement and got a decree for a certain sum with costs, but no lien on the car was declared by the Court. Soon after this decree the accused sold away the car. It was held that the accused in disposing of the car, in contravention of the original hire-purchase agreement, did not commit an offence under this section, as the original contract was merged in the decree of the civil Court.²³ One C agreed to purchase a motor lorry from the owners, paying the price by instalments. Meanwhile he signed an agreement with the owners by which, describing himself as "the hirer", he undertook to pay certain instalments; to insure the vehicle hired; not to deal with it; to allow the owners to recover possession in case of default in payment of instalments; and he admitted that the lorry would remain the property of the owners until all the instalments due were paid. It was held that C, having, in spite of his agreement, sold the lorry before the instalments were paid, was guilty of criminal breach of trust.²⁴ But where the complainant sold a gramophone to the accused on instalment system but on his not paying the instalments the complainant asked for the machine and, though it was not immediately produced, it had not been sold and was produced in Court, it was held that the matter was of civil dispute, and the mere non-payment of the monthly instalments could not be considered as a criminal offence.²⁵

Disputed claim.—The accused was employed by the complainant and others to take their paddy for sale and he sold it to a Marwari. The complainant stated that the accused had withheld from him a portion of the money due from the sale of his paddy. There was a dispute between the parties as to the number of bags that were given to the complainant by the accused, and the defence was that some of the bags, for which the price was claimed by the complainant, were bags given to the accused by another man who had filed a suit against the accused to recover their price. It was held that the accused could not be convicted of criminal breach of trust on refusing to give to the complainant money, which was claimed by another person as well as by the complainant.¹ Where the accused still retains dominion over the property and has some claim to it, even if it turns out not to be sustainable in law, there is no offence unless the claim is merely a pretence and not bona fide.²

Debt is not trust.—Upon a charge for criminal breach of trust the accused pleaded that the amount claimed by the complainants was due to them as a debt, but having sustained losses in business they were unable to pay it. It was held that in such cases the crucial test is, was the sum due to complainants owed by the accused as a debt, or was it held by them as trust money for complainants over which they had no right of disposition of any kind?³

2. 'Dishonestly misappropriates or converts to his own use that property'.—Dishonest intention is the gist of the offence.⁴ Whether wrongful gain or loss

²¹ *Maung Mya Gyi v. Nga Po Shwe*, (1914) 7 L. B. R. 298, 15 Cr. L. J. 425, [1914] AIR (LB) 157.

²² *Moses*, (1915) 17 Bom. L. R. 670, 16 Cr. L. J. 665.

²³ *Cohen v. Sasi Bhushan Das Gupta*, (1917) 18 Cr. L. J. 728, [1918] AIR (C) 668.

²⁴ *C. J. Cadd*, (1928) 45 All. 588. Reference to s. 420 in the headnote is wrong.

²⁵ *Kalipada Mondal v. Kali Kinkar Chatterjee*,

(1936) 38 Cr. L. J. 113, [1936] AIR (C) 674.

¹ *Raj Kishore Patter v. Joy Krishna Sen*, (1900) 28 Cal. 362.

² *Harry Jones*, (1924) 28 C. W. N. 831, 25 Cr. L. J. 1053, [1924] AIR (C) 908.

³ *Raushan Rai*, (1901) P. R. No. 32 of 1901.

⁴ *Rahim Baksh*, (1879) P. R. No. 30 of 1879; *Ponnambalam Pillai*, (1883) 1 Weir 462; *Murphy*, (1887) 9 All. 666; *H. A. L. Girsham v. Mutusamy*, (1909) U. B. R. (P. C.) 21, 11 Cr. L. J. 44.

actually results is immaterial; it is a consequence, but not essential part, of the offence, and a person is not accused of the offence by reason of it.⁵ Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate must be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law.⁶ As to the meaning of "dishonestly" see s. 24, *supra*. The offence of criminal breach of trust is completed by the misappropriation or the conversion of the property dishonestly. It is only the intention which is essential; whether wrongful gain or loss actually results is immaterial; it is a consequence, but not essential part, of the offence, and a person is not accused of the offence by reason of it.⁷ Mere retention of property entrusted to a person without any misappropriation is not criminal breach of trust. Unless there is some actual user by the accused which is in violation of law or contract, there is no criminal breach of trust; and even if there is such user there must be a dishonest intention. If a man is proved to have had a reasonable claim against another for more than the sum of money belonging to the other in his hands, his retention of it, and even his user of it for his own purposes would not in law amount to criminal breach of trust because the intention could not have been dishonest, that is to say, to cause wrongful loss or wrongful gain.⁸ The accused, who was the Head Clerk in a Sub-Magistrate's Court, was convicted of criminal breach of trust in respect of amounts of fines received by him as Head Clerk from parties. It was admitted that he received the amounts in question and spent them for his private purposes. The evidence, however, showed that during the period when the misappropriation took place, he was not in a normal state of mind and that he was subject to fits of insanity which rendered him unable to understand that what he was doing was wrongful. It was held that, even if the case was not really covered by s. 84, the evidence excluded the existence of a dishonest intention which was an essential ingredient of the offence of criminal breach of trust, that the misappropriation could not therefore be regarded as criminal, and that the conviction of the accused was illegal.⁹

Loss to the principal or anybody else is not a necessary ingredient of this offence.¹⁰

If, instead of denying the appropriation of property, the accused, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, this offence is not committed.¹¹ Bare refusal by the accused to allow the removal of a box left in his house by the complainant, unless some debt due to him by the complainant was paid, was held not to amount to a criminal breach of trust.¹²

Where an agent receives money on behalf of his principal, the money so received is the property of, and is owned by, the principal, and if such agent refuses, at the request of the person paying the money, to refund it, he is not criminally liable, and, consequently, cannot be prosecuted for criminal breach of trust, as the gist of that offence is the dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him.¹³

'Misappropriates'.—"There may be appropriation by a mental act without any actual expenditure of the money thus appropriated. The fact that the money has not been expended is a circumstance to be taken into account as evidence in favour of the view that there has been no mental appropriation, but the circumstance is not conclusive that there has been no such appropriation. Again, the mental appropriation must be established by some overt and visible act, but actual expenditure of the money is not the only proof of it".¹⁴

Dishonest conversion.—Where a Magistrate made over a pony, which had been condemned by the municipal authorities as unfit for work, to a person professing to be the secretary of a society for the maintenance of incurable animals and as such secretary

⁵ *Mathura Pd.*, [1946] P. W. N. 192.

⁶ *Rangi Lall*, (1930) 6 Luck. 68; *Kanhaiya Lal*, [1937] O. W. N. 505, 38 Cr. L. J. 491, [1937] AIR (O) 331.

⁷ *Rambilas*, (1914) 38 Mad. 639.

⁸ *V. Krishnan*, [1939] M. W. N. 1213, (1939) 41 Cr. L. J. 824, [1940] AIR (M) 329.

⁹ *Joseph*, [1939] Mad. 353.

¹⁰ *Jivandas Savchand*, (1930) 32 Bom. L. R.

1195, 55 Bom. 59, F.B.

¹¹ *Norman*, (1842) Car. & M. 501.

¹² *Adinarayana Iyer*, (1907) 17 M. L. J. 413, 6 Cr. L. J. 330.

¹³ *Ram Khelawan*, (1919) 20 Cr. L. J. 654, [1919] AIR (P) 570.

¹⁴ Per Plowden, J., in *Kesho Ram*, (1889) P. R. No. 36 of 1889, at p. 137.

agreed to take charge of the pony, but afterwards sold it to an *eka* (one-horse carriage) driver,¹⁵ this offence was held to have been committed.

A lady wishing to get a railway ticket, finding a crowd at the pay-place at the station, asked the accused, who was nearer to the pay-place, to get a ticket for her, and handed him a sovereign to pay for it. The price of the ticket was 10s. He took it intending to steal it, and instead of getting the ticket immediately ran away with the money. It was held that he was guilty of larceny at common law, as the lady being present retained the dominion and possession, in point of law, after she had handed it to him for the intended purpose.¹⁶ Under the Penal Code, it will be criminal breach of trust.

Where the accused asked for a gold *mohur* (sovereign) from the complainant in order that he might play with the child who was weeping, using the *mohur* as a plaything, and subsequently misappropriated it, it was held that he was guilty of criminal breach of trust.¹⁷ Where a municipal board undertakes house scavenging by means of "customary sweepers", the rubbish and night-soil collected by the sweepers is the property of the board. Hence, where a sanitary inspector, having induced the sweepers to deposit the matter collected by them in a place other than that prescribed by the board, thereafter sold it for his own benefit, it was held that he was guilty of criminal breach of trust.¹⁸ Certain grain and live-stock were attached from complainant's possession in execution of a decree against him, and were made over to the decree-holder (accused) for safe-custody. When the attached property was sold, it was found that there was a shortage in quantity of grain and animals while in accused's possession. It was held that the accused was guilty of criminal breach of trust and not of an offence under s. 206 as the criminal intention required to be proved in the latter offence was materially different from the intention required in the offence of criminal breach of trust.¹⁹

Stake-holder.—A stake-holder, who misappropriates to his own use the stakes deposited with him for a wager, is guilty of criminal breach of trust.²⁰

3. 'Dishonestly uses or disposes of that property in violation of any direction of law...or of any legal contract...touching the discharge of such trust, or wilfully suffers any other person so to do'.—A user of property comes within this definition when such user causes substantial or appreciable loss to the owner of the property or gain to the accused. The use by a printer of certain blocks entrusted to him to print the complainant's catalogue for the purpose of printing a rival firm's catalogue amounts to criminal breach of trust.²¹ It is not necessary, in order to establish dishonesty, that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for his own benefit for a time, may be sufficient.²² The Madras High Court has held that for either wrongful loss or gain the property must be lost to the owner or the owner must be wrongfully kept out of it. The deterioration of an article, such as a turban, by use, is, according to its opinion, not such a loss of property to its owner, and the wrongful beneficial use of property by the accused is not such a gain to him.²³

Where a sum of money is placed in the hands of a person under a lawful agreement which, however, becomes subsequently incapable of execution, and is retained by him afterwards against a debt due to him, he cannot be held guilty of criminal breach of trust.²⁴

'Wilfully suffers any other person so to do'.—If a person entrusted with property, or with any dominion over property, wilfully suffers any other person to use or dispose of the trust property, he will be liable under the second part of the section. Where

¹⁵ *Gauri Shankar*, (1894) 14 A. W. N. 197.

¹⁶ *George Thomas*, (1862) 32 L. J. (M. C.) 53.

¹⁷ *Raghubir Kurmi*, (1919) 1 U. P. L. R. 69, 20 Cr. L. J. 418, [1919] AIR (A) 309.

¹⁸ *Hori Lal*, (1922) 45 All. 281.

¹⁹ *Sahebrao Baburao*, (1936) 38 Bom. L. R. 1192, 38 Cr. L. J. 272, [1937] AIR (B) 46.

²⁰ *Nga Te*, (1904) 2 L. B. R. 216, 1 Cr. L. J. 730, F.B., overruling *Nga Po Twe*, (1881) S. J.

L. B. 130.

²¹ *Keshab Chandra Boral v. Nityanund Biswas*, (1901) 6 C. W. N. 203.

²² *Chaturbhuj Narain Choudhury*, (1935) 15 Pat. 108.

²³ (1866) 3 M. H. C. (Appx.) 6.

²⁴ *Puran*, (1925) 27 Cr. L. J. 383, [1926] AIR (A) 298.

a public servant, who was entrusted with the safe custody of records, allowed the keys of the record-room to go into the possession of another person in order to give corruptly access to the records to make copies, it was held that the fact that the accused himself did not misappropriate or use or dispose of any record in violation of his trust was immaterial and the second part of s. 405 applied and the accused was guilty under s. 409.²⁵ See Comment on s. 477A, *infra*, as to the meaning of the word 'wilfully'.

Wilful omission to account.—If a person receives money which he is bound to account for and does not do so, he commits this offence, although no precise time can be fixed at which it was his duty to pay over the money.¹ Where a servant fails to render accounts and to deliver up the money realized by him in spite of repeated demands, he uses the property entrusted to him in violation of the legal contract made by him with his master and is guilty of an offence under s. 408.² "...where money is entrusted for a particular purpose, the owner cannot know that it has been misappropriated until the person to whom it has been entrusted fails to account for it. On the other hand, when the latter fails to account for the money entrusted to him, the owner naturally comes to the conclusion that he has dishonestly misappropriated it. Whether a civil suit for account does or does not lie, and whether the complainant or informant has or has not been led to institute criminal proceedings, merely because he has not got an account, are immaterial. The question is whether the facts constitute the offence defined in section 405".³ It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused because under the law even temporary retention is an offence provided that it is dishonest. The essential thing to be proved in such cases is whether the accused was actuated by dishonest intention or not. The failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. The mental act or intent to deprive the master of his property is the gist of the offence of criminal breach of trust.⁴

If a servant, immediately on receiving a sum for his master, enters a smaller sum in his master's books and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry. It will make no difference though he received other sums for his master the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry.⁵

It is not necessary to prove that any particular sum or sums were received from any particular person. Where the accused had debited himself with an amount, forming the balance of a large number of receipts and payments, this was held to be sufficient.⁶

It was the duty of a servant, authorized to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums, nor paid them over. He never denied the receipt of them, nor rendered any written account in which they were omitted. It was held that, if the servant wilfully omitted to account for these sums, and pay them over on the respective days on which he received them, they were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them.⁷ If a public servant in his capacity as such receives money on a certain date and does not include it in his cash balance entered in the register which he is required to maintain, there is very strong *prima facie* evidence of the money having been misappropriated on that date, and he is guilty of embezzlement if he does not hand over to his successor the money in his hands due to Government.⁸ The position of a shroff of a Battery with reference to the custody of the Government moneys entrusted to him being that of a cashier, his

²⁵ *Abdus Salam*, (1935) 37 Cr. L. J. 219, [1936] AIR (P) 108.

¹ *Welch's Case*, (1846) 1 Den. 199.

² *Brij Kishore v. Chandrika Prasad*, (1936) 12 Luck. 77; *Wazair Singh*, (1941) 17 Luck. 353.

³ *Per Shaw, J. C.*, in *H. A. L. Girdham v. Mutusamy*, (1909) U. B. R. (P.C.) 21, 22, 11 Cr. L. J. 44, 45.

⁴ *Chaturbhuj Narain Choudhury*, (1935) 15

Pat. 108.

⁵ *Hall's Case*, (1821) Russ. & Ry. 463.

⁶ *Lambert*, (1847) 2 Cox 309.

⁷ *Jackson*, (1844) 1 C. & K. 384; *Charles Lister*, (1856) 26 L. J. (M. C.) 26; *Chandra Prasad*, (1926) 5 Pat. 578.

⁸ *Daya Shankar*, (1926) 1 Luck. 345; *Dewasikhamani Asari*, (1925) 23 L. W. 718, 26 Cr. L. J. 863, [1926] AIR (M) 727.

failure to produce the entire amount of the balance of cash entrusted to him was held to be criminal breach of trust.⁹

In cases of criminal breach of trust failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. But accused must not be convicted on it alone. It is only an indication, a piece of evidence pointing to dishonest intention, and must be considered along with other facts of the case.¹⁰ Accused was employed as agent by the complainant to collect certain taxes. He was to receive as remuneration ten per cent. of the collections, and was to hand over the collections, less his remuneration, to his master or to pay the money into the treasury, no period being fixed for the latter purpose. It was alleged that while in charge of the collections he failed to account for a certain sum of money collected by him. He was accordingly convicted of criminal breach of trust. It was held that in such cases the nature of the trust should be established; that as the accused was entitled to deduct his remuneration from the collections, and as no period was fixed for payment into the treasury, a charge of criminal breach of trust could only be maintained after an adjustment of accounts, the mere fact that he retained the sums collected not being conclusive proof of criminal breach of trust, and that the conviction was, therefore, not maintainable.¹¹

False accounting.—The accused had received a cheque which he was to get cashed, and lay out the proceeds in the market. He did cash it, but did not lay out the proceeds as he ought to have done, and in the prosecutor's books gave a wrong account of the manner in which the money had been expended. It was held that this offence had been committed.¹²

'In violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract...touching the discharge of such trust.'—The misappropriation, conversion, etc., must be in violation of a legal direction prescribing the mode in which the person entrusted with the property is to carry out the trust or the contract. Where the accused were entrusted with some silver for the purpose of making ornaments and they introduced copper into the ornaments, it was held that they were guilty of criminal breach of trust.¹³

When a person takes goods on approval under an agreement that property therein was to pass only if he exercised his option to take them and paid cash in full for certain articles and in part for others, the trust continues till the option is exercised and cash payments made, and he commits criminal breach of trust if he sells them without such payments.¹⁴

The servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it, he was to receive a certain quantity himself, and he was to account for the remainder to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he mixed water with the liquor, and having thus increased its amount, sold it at the same rate per gallon as was chargeable for unadulterated liquor, and appropriated the profit thus made to his own use. It was held that having thus gained by unlawful means money to which he was not legally entitled, he acted dishonestly within the meaning of the Code, and was guilty of criminal breach of trust.¹⁵ In both the cases the accused were entrusted with property for a particular purpose and there was a contract with them which they violated. If the contract itself is illegal no conviction can be sustained even if there is misappropriation in violation of the terms of the contract. Where the accused misappropriated money under an agreement which was by way of wager it was held that he could not be convicted under the second part of this section under which he was charged. In this case the accused had started a betting business, the principal object of which was to provide facilities to constituents to back horses at various race meetings in India. He was to remit sums furnished by customers to some person

⁹ *Hira Lal*, (1907) P. R. No. 19 of 1908, Cr. L. J. 492.

¹⁰ *Harakrishna Mahatab*; (1929) 11 P. L. T. 319, 31 Cr. L. J. 249, [1930] AIR (P) 209; *Gona Achayya*, [1936] M. W. N. 825.

¹¹ *Nurul Hassan*, (1920) 21 Cr. L. J. 509, [1920] AIR (P) 168 (2).

¹² *Goodenough*, (1853) 6 Cox 206; see also *Guelder*, (1860) 8 Cox 372.

¹³ *Babaji bin Bhau*, (1867) 4 B. H. C. (Cr. C.) 16.

¹⁴ *Khitish Chandra Deb Roy*, (1924) 51 Cal. 796.

¹⁵ *Jamsetji*, (1888) Cr. R. No. 53 of 1888, Unrep. Cr. C. 395.

present at the race meeting, who would put them on selected horses either through the totalizer or otherwise. Certain sums of money were placed in his hands as bets on horses running in Poona races, but he did not forward the money to Poona and misappropriated the sum.¹⁶ But where an assistant station-master, whose duty it was to issue tickets to the passengers and to charge fares as fixed by the railway, made an overcharge over some of the tickets and did not credit the excess so realised to the railway, it was held that he was not guilty of criminal breach of trust, as he was not a trustee within the meaning of this section. The Court observed: "A trustee is a person in whom is invested the legal or formal interest in property, the equitable or beneficial interest vesting in and belonging to some other person. In the present case it is beyond doubt that the legal and the beneficial interest both vested in and belonged to one and the same person, viz. the petitioner, the Railway having no beneficial interest in the money dishonestly recovered and in fact in direct contravention of their own instruction".¹⁷

No breach of trust if there is no dishonest use or disposal.—Where a cloth was entrusted to the accused, a washerman, on the understanding that it was not to be washed by men of certain class, and the accused allowed the article to be worn by the prohibited class, the article being thereby rendered valueless to the owner;¹⁸ where the accused refused to give up land alleged to have been mortgaged;¹⁹ where the accused did not immediately apply the money for the purpose for which it was intended;²⁰ where the mother of a child recently vaccinated accepted two annas from a vaccinator under promise to take the child to another village where the vaccinator wanted to take lymph out of the baby and she subsequently refused to take the child there;²¹ where a Sub-Inspector of Police purchased a pony which had been impounded;²² and where the accused failed to deliver the full quantity of hides entrusted to him as the tindal of a cargo boat to be carried on a steamer,²³ this offence was not committed. Where the accused were entrusted by a Court officer with certain movable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice, it was held that they could not be held guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust.²⁴ Where in payment for certain cloth valued at Rs. 43-12-0 purchased from the accused the complainant sent a hundred rupee note, but the accused did not send back any change alleging that money was due to him and refusing to give the change until the account was settled, it was held that no offence under this section was committed, inasmuch as the conduct of the accused was not dishonest.²⁵

Bona fide claim.—Where a bona fide claim of title is raised, founded or unfounded, the accused is entitled to acquittal, but whether the claim is bona fide raised or not is a question of fact and has to be determined in the circumstances of each case.¹

PRACTICE.

Evidence.—Prove (1) that the accused was entrusted with property or with dominion over it.²

(2) That he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

(3) That he did so in violation of (a) any direction of law prescribing the mode in which such trust was to be discharged, or (b) any legal contract, express or implied, which he had made touching the discharge of such trust;³ or that he wilfully suffered some other persons to do as above.

¹⁶ *Uppasini*, (1926) 52 M. L. J. 179, 28 Cr. L. J. 381, [1927] AIR(M) 425.

¹⁷ *Kudrat Nath*, (1922) 24 Cr. L. J. 879, [1923] AIR (L) 295.

¹⁸ (1880) Weir (3rd Edn.) 269.

¹⁹ *Jaffir Naik*, (1864) 2 B. H. C. 127.

²⁰ *Aredeshir Merwanjee*, (1889) Cr. R. No. 50 of 1889, Unrep. Cr. C. 484.

²¹ *Satawa*, (1891) Unrep. Cr. C. 557.

²² *Rajkristo Biswas*, (1871) 16 W. R. (Cr.) 52, 8 Beng. L. R. (Appx.) 1.

²³ *Ramaya*, (1904) 1 Cr. L. J. 908.

²⁴ *Harnam Singh*, (1918) 16 A. L. J. R. 600, 19 Cr. L. J. 975, [1918] AIR (A) 446.

²⁵ *Bajinath Marwari*, (1933) 34 Cr. L. J. 915, [1933] AIR (P) 554.

¹ *Panchi Mandar*, (1920) 1 P. L. T. 318, 21 Cr. L. J. 609, [1920] AIR (P) 663.

² *Gouri Narayan Barrua v. Tilbikram Chetri*, (1921) 25 C. W. N. 838, 23 Cr. L. J. 220, [1921] AIR (C) 531.

³ *Pritchard*, (1928) 30 Cr. L. J. 18, [1928] AIR (L) 382.

In a case under this section the question of trust must be fully inquired into. For this purpose it is essential that the whole prosecution evidence should be recorded. It is impossible to guess at an intermediate stage what will be the result of the inquiry. The Magistrate is not so much concerned as to whether an offence has been committed against the complainant as to whether an offence has been committed which is punishable by the law of the land. Consequently when only a few of the prosecution witnesses have been examined, it is too premature to decline to examine any more witnesses for the prosecution and discharge the accused on the ground that the case is of civil nature.⁴

To make out a case of criminal breach of trust it is not sufficient to show that money has been retained. It must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it and that he did so dishonestly. The mere fact that the accused did not at once apply the money to the purpose for which it was intended does not amount to criminal breach of trust. There must be some dishonest use of money to constitute the offence.⁵ Mere retention of money does not necessarily raise a presumption of dishonest misappropriation to one's own use, but dishonest misappropriation may sometimes be inferred from the circumstances without direct evidence.⁶ The prosecution cannot rest content with proving mere false entries to bring home to the accused that money had been misappropriated without further evidence to prove that the accused attempted to suppress all traces of his embezzlement by any manipulation of the accounts, or evidence of the financial circumstances of the accused which would render probable a case of misappropriation.⁷

(4) That he acted as in (2) dishonestly.⁸

Where the accused admits having received the money alleged to have been misappropriated by him, but defends himself by saying that he made it over to the proper person, the onus does not lie on him to prove payment, but on the prosecution to prove non-payment; for it is only when the latter is proved that a presumption will arise of misappropriation or breach of trust.⁹

It is neither necessary nor possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, since by law even temporary retention provided it is dishonest is an offence. But where there is no direct evidence of misappropriation and one is left to surmise as to what use was made by the accused of the money, one ought to require clearer evidence of dishonest intention than in a case where there is direct evidence to prove that the money was appropriated by the accused for a particular use which is inconsistent with his position as a trustee of the money.¹⁰

Evidence of acts of embezzlement other than those charged in indictment.—An indictment charged the accused with having embezzled three sums of £2, the moneys of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in the keeping of the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the Court in determining what value was to be attached to the suggestion. It was held that such evidence was admissible.¹¹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

In a case of criminal breach of trust arising out of the misappropriation of a number of sums, the proper course is for the prosecutor to select three items on which

⁴ *Chan Eiliam v. L. H. Wellington*, (1938) 41 Cr. L. J. 25, [1939] A. L. J. R. 806, [1939] AIR (R) 377.

⁵ *Nga Hmu*, (1901) 1 U. B. R. (1897-1901) 345; *Parmod Ban Behari Saran*, (1927) 29 Cr. L. J. 90.

⁶ *Nga Tha Zan*, (1905) U. B. R. (P.C.) 19, 2 Cr. L. J. 478.

⁷ *Rama Rao v. The Sub-Inspector of Police, Kalahasti Station*, [1937] M. W. N. 566.

⁸ *Nagappa Malkappa*, (1907) 9 Bom. L. R. J. 120; *Jagannath Raghunathdas*, (1931) 33 Bom. L. R. 1518, 33 Cr. L. J. 317.

⁹ *Hari Dagdu*, (1896) Cr. R. No. 47 of 1896, Unrep. Cr. C. 872; *Ramchandra Ganesh*, (1896) Cr. R. No. 27 of 1896, Unrep. Cr. C. 860.

¹⁰ *Harakrishna Mahatab*, (1929) 11 P. L. T. 319, 31 Cr. L. J. 249, [1930] AIR (P) 209.

¹¹ *Richardson*, (1861) 8 Cox 448; *Wm. Proud* (1861) 9 Cox 22.

to proceed in the first instance and to give some general evidence as to the amount believed to have been misappropriated.¹² In view of s. 222(2) of the Criminal Procedure Code this is not necessary, but if it is done the accused cannot complain of multifariousness. Where a person receives money for the express purpose of using it for his master's benefit in a particular way, he is entrusted with money, and his appropriation of it to himself amounts to criminal breach of trust; and consequently a conviction for criminal breach of trust committed by misappropriation of a large sum of money made up of various items (more than three in number) on false pretences is not illegal.¹³

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must, therefore, be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction.¹⁴

If a person commits breach of trust of or misappropriates different sums of money, he commits so many offences. But it is not desirable that he should be tried as many times, when he could have been tried for all of them at one trial.¹⁵

Agreement to refund does not bar prosecution.—An agreement between the prosecutor and the accused that the money embezzled shall be refunded cannot be pleaded in bar of the prosecution.¹⁶

Pending of civil suit between parties.—Where offences with which the accused had been charged were under ss. 406 and 420 of the Code, but civil suits were also pending between the complainant and the accused in respect of the ornament which was the subject-matter of the criminal complaint, it was held that criminal proceedings could not be stayed till the civil cases were decided.¹⁷

Venue.—The offence of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.¹⁸ Section 405 is in two parts. The first part will apply where it is known that the accused has dishonestly misappropriated or converted to his own use the entrusted property at a particular place, and jurisdiction to try the accused will be at that place. But where it cannot be alleged that the misappropriation was actually and definitely committed at any particular place, there the case comes under the second part of section 405, namely dishonestly disposing of property in violation of any direction of law or of any legal contract; and if the legal contract required that the accused should remit or deliver or otherwise dispose of the property at a particular place, then his failure to do so constitutes the offence, and the jurisdiction to try the accused exists at such place. Hence, if there is evidence apart from the fact of non-delivery or non-accounting to show where the misappropriation was committed, the trial may be held at that place; but if there is no evidence to show where the misappropriation was committed, other than the fact of non-delivery or non-accounting according to the contract, then the trial may be held at the place where the accused failed to deliver or to account, because that is where the offence was committed. So, where the accused was engaged in Cawnpore as an agent of a firm of Cawnpore to sell goods in Bengal and either bring or remit the money to Cawnpore; and the accused made some sales and realised the prices at some places in Bengal but failed to bring or remit the money to Cawnpore; and there was no allegation or evidence that the accused had actually misappropriated or converted to his own use the money by any definite act committed at any particular place, it was held that the Cawnpore Court had jurisdiction to try him for an offence under s. 408/409.¹⁹ *Mohru Lal's* case has been dissented from by the Rangoon High Court in a case where the accused, an employee

¹² *Villikkat Govind Menon*, (1888) Weir (3rd Edn.) 270.

¹³ *Ramappa*, (1911) 22 M. L. J. 112, 13 Cr. L. J. 15.

¹⁴ *Khirode Kumar Mukerji*, (1924) 29 C. W. N. 54, 40 C. L. J. 555, 26 Cr. L. J. 532, [1925] AIR (C) 260.

¹⁵ *Sidh Nath Awasthi*, (1929) 57 Cal. 17, 24.

¹⁶ *Mayandi Pillai*, (1886) 1 Weir 462; *The Zamindar of Yethiyapuram v. Ramasami Nandan*,

(1888) 1 Weir 465.

¹⁷ *Panna Lal*, [1943] All. 27.

¹⁸ Criminal Procedure Code, s. 181; *D'Mello v. Pereira*, (1937) 39 Bom. L. R. 620, [1937] Bom. 743.

¹⁹ *Mohru Lal*, (1935) 58 All. 644; *Kunj Behari Lal v. Brahman Datta*, [1942] A. L. J. R. 559, (1942) 44 Cr. L. J. 102, [1942] AIR (A) 439.

of the complainant at Akyab, was sent to Cochin to receive consignments of rice shipped by the complainant's firm from Rangoon and Akyab and to sell the rice. The accused was to submit accounts and pay the net cash balance resulting from the sales to the complainant's firm at Akyab. Instead of doing so the accused went away to his native country from Cochin without returning to Akyab to account for and pay in the moneys which came into his hands in the business at Cochin. The complainant filed a complaint for criminal breach of trust against the accused before a Magistrate at Akyab. It was held that the Magistrate at Akyab had no jurisdiction to try the offence, as it was not committed in Akyab. Although a person may have to account for money, it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. The money was not received or retained by the accused at Akyab. Further the failure by the accused to remit or bring the money occurs at the place where the accused is, and not in the place where the money is to be sent or brought.²⁰ In a case of criminal breach of trust by a servant whose duty it is to render account at one place, and there is no evidence to show where the alleged misappropriation was committed other than the fact of non-accounting, the venue may be laid in the place where the accused failed to account. If, however, there is evidence, apart from the fact of non-accounting, to show where the misappropriation was committed, the venue must be laid either in that place or the place where the property was received or retained. In the latter case there is no alternative venue in the place where the account was to be rendered.²¹ There is a clear distinction between mere liability to account at a particular place and the further duty to deliver property at that place. An agreement to render accounts at a particular place cannot be deemed to hand over or deliver any money or property at that place.²² Where criminal breach of trust was completed in Rangoon, the obligation on the part of the accused to render accounts in Bombay and to send the accounts to Bombay did not give the Bombay Court jurisdiction to try the offence.²³ The offence of criminal breach of trust cannot be tried at a place where neither the entrustment nor any act of conversion of the money entrusted took place but where the accused was to account for and deposit the money received and failed to do so, specially when there was nothing to show that the accused had been at that place at any material time.²⁴

Section 179 of the Criminal Procedure Code contemplates cases where the act done, and the consequence ensuing therefrom, together constitute the offence. The "consequence" contemplated by the section must be a necessary ingredient of the offence. If the offence is complete in itself by reason of the act having been done, and the consequence is a mere result of it which was not essential for the completion of the offence, then s. 179 would not be applicable. Loss to the owner is not the kind of "consequence" contemplated by s. 179, and that section will not confer jurisdiction for trial at the place where loss to the owner may ensue.²⁵

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being entrusted with certain property, to wit——, committed criminal breach of trust; and that you thereby committed an offence punishable under s. 406 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

A charge under this section is defective if it omits to set out the time and manner of the entrustment alleged with sufficient particularity.¹ It must indicate the clause of s. 405 under which the offence complained of falls.²

When the accused is charged with criminal breach of trust, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been com-

²⁰ *Khimjee v. Tokersey*, [1938] Ran. 1; *Abdul Salam*, (1919) 21 Cr. L. J. 149.

²¹ *Paul De Flonder*, (1931) 59 Cal. 92; *Brij Kishore v. Pandit Chandrika Prasad*, (1936) 12 Luck. 77.

²² *Fateh Singh*, [1940] All. 48.

²³ *Jivandas Savchand*, (1930) 32 Bom. L. R.

1195, 55 Bom. 59, F.B.

²⁴ *Daityari Tripatti v. Subodchandra Chaudhuri*, [1942] 2 Cal. 507.

²⁵ *Kashi Ram Mehta*, (1934) 56 All. 1047, F.B.

¹ *Bhupendranath Singha v. Giridharilal Nagar*, (1933) 60 Cal. 1316.

² *Abinashchandra Sarkar*, (1935) 63 Cal. 18.

mitted, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence: Provided that the time included between the first and last of such dates shall not exceed one year.³ Prior to the enacting of this clause there was a difference of opinion between the various High Courts as to the legality of charging a person for a general deficiency without specifying particular items or exact dates. This clause is in accordance with the present English law. Where an accused person is charged with having misappropriated or committed criminal breach of trust in respect of an aggregate sum of money, the whole sum being alleged to have been wrongfully dealt with by the accused within a period not exceeding one year, the mere fact that the items composing such aggregate sum are specified and may be more than three in number will not render the charge obnoxious to the prohibition implied by s. 234 of the Code of Criminal Procedure.⁴ In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. It was held that a charge so framed did not offend against s. 234 of the Code of Criminal Procedure.⁵ An accused person was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them. He was not charged with three offences, but with one offence under s. 409 and was convicted and sentenced to one term of imprisonment. It was held that the charge as framed was not contrary to law, it being in accordance with s. 222, sub-s. (2), and s. 234 of the Code of Criminal Procedure.⁶

Where the charge against the accused was to the effect that he on or before June 21, 1907, committed breach of trust in respect of some deeds which he took from the complainant and was thereby guilty of an offence punishable under this section, but at the trial he was convicted of embezzling not the deeds but amounts obtained by dealing with those deeds, it was held that the conviction was bad.⁷

Punishment.—A case of embezzlement of money is not a case contemplated by s. 62; and hence, in a sentence under this section, the Court is not competent to order that the rents and profits of the property of the accused should be forfeited to Government during the period of his imprisonment.⁸

407. Whoever, being entrusted with property as a carrier,¹ wharfinger² or warehouse-keeper,³ commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach
of trust by carrier,
etc.

COMMENT.

Those who receive property under a contract, express or implied, to carry it or keep it in safe custody are punishable under this section for a criminal breach of duty with respect to such property. The persons specified in this section are alike in being entrusted with the custody of property for which they are remunerated, their employment being not continuous, but intermittent and in relation to specific goods.

1. 'Carrier'.—A 'carrier' is a person who undertakes to transport the goods of other persons from one place to another for hire.⁹ Any one who undertakes to carry the goods of all persons indifferently for hire, is a common carrier.¹⁰ Railway companies are carriers.¹¹

³ Criminal Procedure Code, s. 222 (2). The cases of *Ramchandra Govind Harshe*, (1895) 19 Bom. 749, *Luchminarain*, (1886) 14 Cal. 128, *Pursotam Dass Morarjee*, (1896) 24 Cal. 193, *C. A. Chetter*, (1871) 15 W. R. (Cr.) 5, *Ekram Ali*, (1891) 2 C. W. N. 341, are no longer of any authority. See *Kellie*, (1895) 17 All. 153; *Buddhu v. Babu Lal*, (1895) 18 All. 254.

⁴ *Gulzari Lal*, (1902) 24 All. 254.

⁵ *Ishtaq Ahmad*, (1904) 27 All. 69.

⁶ *Sat Narain Tewari*, (1905) 32 Cal. 1085.

⁷ *Bipra Das Giri v. Niradmoni Bewa*, (1908) 12 C. W. N. 577, 7 Cr. L. J. 372; *Balthasar*, (1914) 41 Cal. 844.

⁸ *Amrit Lal*, (1906) 29 All. 25.

⁹ Wharton; 14th Edn., p. 164.

¹⁰ *Gisbourn v. Hurst*, (1710) 1 Salk. 249.

¹¹ Indian Railways Act, IX of 1890. Their civil liability is restricted by ss. 72-82.

2. 'Wharfinger'.—The term 'wharfinger' means a person who owns or keeps a wharf, which is 'a broad plain place, near some creek or haven, to lay goods and wares on that are brought to or from the water'.¹²

3. 'Warehouse-keeper'.—One who keeps a warehouse, which is a house to deposit or keep wares in. Ware is an article of merchandise, fabric, especially in the plural, goods, commodities, merchandise.

PRACTICE.

Evidence.—Prove (1) that the accused is a carrier, wharfinger, or warehouse-keeper.

(2) That he was as such entrusted with the property in question.

(3) That he committed criminal breach of trust in respect of it.¹³

See the Indian Evidence Act, s. 15 (b).

To establish the essential elements of this offence it is necessary to show at least that some of the property entrusted to the accused cannot be accounted for by him.¹⁴

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Place of trial.—Where the accused was entrusted with the carriage of a quantity of coffee from an estate in Mysore to a merchant firm in Mangalore, and a portion of the goods was abstracted and there was no evidence as to when or where such abstraction took place, it was held that the Magistrate at Mangalore had jurisdiction to try the accused on a charge of criminal breach of trust, as there was a failure to deliver the goods at Mangalore in accordance with the terms of the entrustment.¹⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being entrusted with property, to wit——, as a carrier [*or wharfinger, or warehouse-keeper*] committed criminal breach of trust in respect of such property; and that you thereby committed an offence punishable under s. 407 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

408. Whoever, being a clerk¹ or servant² or employed as a clerk or servant,³ and being in any manner entrusted in such capacity with property,⁴ or with any dominion over property,⁵ commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by clerk or servant.

COMMENT.

Section 381 punishes theft by a clerk or a servant. This section inflicts enhanced punishment on such a person for criminal breach of trust.

Scope.—The offence is committed even where the act of the accused is to cause wrongful loss to his master for a time only.¹⁶

1. 'Clerk'.—In modern usage this word means a writer in an office, public or private, either for keeping accounts or entering minutes. See s. 381, *supra*.

2. 'Servant'.—Master and servant, a relation whereby a person calls in the assistance of others, where his own skill and labour are not sufficient to carry out his own business or purpose.¹⁷ See s. 381, *supra*. A person hired by a market gardener

¹² Wharton, 14th Edn., p. 1064.

¹³ *Vide s.* 406, *sup.*

¹⁴ *Parabhu*, (1907) 9 Bom. L. R. 229, 5 Cr. L. J. 235.

¹⁵ *Public Prosecutor v. Podimonu Beary*,

(1928) 52 Mad. 61.

¹⁶ *Tulsidas Chhaganlal*, (1906) 8 Bom. L. R. 951, 5 Cr. L. J. 5.

¹⁷ Wharton, 14th Edn., p. 641.

to do a day's work, and sent by him to sell vegetables at market and brings back the proceeds is a servant to his employer in respect of such employment.¹⁸ A person engaged by a trading firm on commission to make purchases under instructions from the firm is a servant of the firm.¹⁹ A broker is a middleman who brings together a buyer and a seller. To work as a broker under or for a firm is not necessarily to become their servant.²⁰

3. 'Employed as a clerk or servant'.—If a person acts as a clerk or servant although there is no contract binding on him to work, yet so long as he does the duties he will come under the category of clerk or servant.²¹

If a servant receives money on his employers' account and embezzles it, he is guilty of a felony, though his employers had no right to it and were wrong-doers in receiving it.²²

4. 'Entrusted in such capacity with property'.—The property must have been entrusted to the accused in his capacity of a clerk or a servant.²³ If it is not entrusted in such capacity the clerk or servant will be liable under s. 406 and not under this section. Where a servant fails to render accounts and to deliver up the moneys realised by him in spite of repeated demands, he uses the property entrusted to him in violation of the legal contract made by him with his master and is guilty of an offence under this section.²⁴

If a servant secret moneys which his master has marked and sent by a friend to make a purchase at his shop, with a view to try the honesty of the servant, it is a felonious breach of trust.²⁵

Accused was engaged by the complainant as a tonga driver on a monthly salary of Rs. 15 to drive the tonga on hire within the limits of the Ludhiana Municipality. He was to bring the tonga back each evening and pay over his earnings to the complainant. He did not return one evening and on the following day was pursued and arrested at a place several miles from Ludhiana driving the tonga rapidly. The accused was convicted of an offence under this section by the Magistrate but acquitted on appeal to the Sessions Judge who found that there had been no criminal breach of trust as the accused had not disposed of the tonga. It was held that there was no doubt that the accused intended to deprive his master of the tonga and that this intent or mental act of his was the gist of the offence of criminal breach of trust and he was therefore guilty of an offence under this section.¹

A cheque is property within the meaning of this section.²

5. 'Or with any dominion over property'.—If a clerk or servant who has dominion over the property of his master in some way or other misappropriates or converts to his own use such property he commits criminal breach of trust. For instance, where it is the duty of a Municipal Water-works Inspector to supervise and check the distribution of water from the municipal water-works, he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of trust.³ Where a Municipal Water-works Inspector, being the lessor of a house within municipal limits which he had sub-let, had such house connected with a municipal water main and accepted a yearly payment as water-tax from his tenants, but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water-tax from his tenants, it was held that he was properly convicted under this section.⁴

Commission obtained by servant.—The principle applying to cases where a servant employed to pay a bill for his master, obtains a commission or a reduction

¹⁸ *Winnall*, (1851) 5 Cox 326. See *Pyo Gyi*, (1919) 10 L. B. R. 31, 20 Cr. L. J. 513, [1919] AIR (LB) 60.

¹⁹ *Pyo Gyi*, *ibid.*

²⁰ *Maung Chan Sein*, [1941] Ran. 193, 197.

²¹ *Foulkes*, (1875) L. R. 2 C. C. R. 150. See *Karim-ud-din*, (1918) 40 All. 565.

²² *Beacall*, (1824) 1 C. & P. 454.

²³ (1865) 3 W. R. (Cr. L.) 12.

²⁴ *Brij Kishore v. Pandit Chandrika Prasad*, (1936) 12 Luck. 77; *Wazir Singh*, (1941) 17 Luck. 353.

²⁵ *Headge's Case*, (1909) 2 Leach 1033.

¹ *Dina*, (1925) 6 Lah. 257.

² *S. F. Rich*, [1930] A. L. J. R. 849, 31 Cr. L. J. 865, [1930] AIR (A) 449.

³ *Bimala Charan Roy*, (1913) 35 All. 361.

⁴ *Ibid.*

of a price for his own benefit, has been thus laid down:—"If the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price by the servant, it is obvious that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has *settled* the account with the tradesman for a specific sum, and he sends the servant with the money, and the servant, after making the payment, asks the tradesman for a present, then, if the servant takes the present and keeps it, he is not guilty of stealing, because he has no intention to steal: the money is given to him by a person whom he believes to have a right to give it. It may be that, according to the strict equitable doctrines of the Court of Chancery, the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory upon him to render an account."⁵

Wilful omission to account.—As to wilful omission to account for the money received on behalf of the master, see Comment on p. 1008.

CASES.

Conversion by servant under special trust.—Where a Court Inspector improperly delegated to a constable the custody, etc., of Government moneys taking from him private security to save himself from loss in case of defalcation, and the constable dishonestly converted the money to his own use, although he afterwards restored it, it was held that his offence fell under this section and not under s. 409, the money having been entrusted to him in his private and not public capacity.⁶ A servant, who received money for a specific purpose, and did not use it for that purpose, and, on being called on to account for the money, falsely said that he used it for that purpose, was held to have committed this offence.⁷

If a servant immediately on receiving a sum for his master enters a smaller sum in his master's books, and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry. It will make no difference though he received other sums for his master the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry.⁸ The accused was given money by complainant company to purchase specified paddy at specified prices. He was to be paid all expenses incurred in purchasing the paddy and bringing it to the mill, and was to receive a commission of rupee one per hundred baskets. This commission was his only form of legitimate remuneration, and he could not suffer any loss by the transaction. It was held that the accused was a servant of the company in this transaction, that the money was entrusted to him for a specific purpose, and that the accused was guilty of criminal breach of trust under this section.⁹

Property must have been entrusted to person's clerk or servant.—A station-master on the East Indian Railway, under an arrangement with the company, received a fixed allowance in respect of the marking, loading and unloading work at his station and used to engage his own men for that purpose. One of such men, engaged as a marksman, was first allowed to keep certain registers, which it was the duty of the station-master to maintain, and next allowed to receive cash payments and make entries in the cash register. Whilst so employed, he received a sum of Rs. 5-10-0 as an overcharge or demurrage in respect of certain goods which passed through his hands, and appropriated the same. To this sum, however, the railway company made no claim. He was also alleged to have received and appropriated to his own

⁵ Per Petheram, C. J., in *Imdad Khan*, (1885) 8 All. 120, 138. See *U Maung Gale*, (1926) 4 Ran. 128, where the commission was obtained by the Vice-President of a Municipality.

⁶ *Banee Madhub Ghose*, (1867) 8 W. R. (Cr.) 1. This case has been modified by *Ram Dhan Dey*, (1870) 13 W. R. (Cr.) 77, in which conviction

under s. 409 was maintained.

⁷ *Watson & Co. v. Golab Khan*, (1868) 10 W. R. (Cr.) 28, 1 Beng. L. R. (S. N. C.) 21. See also *Lalit Mohan Sarkar*, (1894) 22 Cal. 313.

⁸ *Hall's Case*, (1821) Russ. & Ry. 463.

⁹ *Pyo Gyi*, (1919) 10 L. B. R. 31, 20 Cr. L. J. 518, [1919] AIR (LB) 60.

use two other sums of money under somewhat similar circumstances. In respect of these three sums he was tried and convicted on three counts under this section. It was held that the offence, if any, committed with regard to the sum of Rs. 5-10-0 did not fall within this section at all, and, this being so, the joinder of the three charges in one trial was illegal.¹⁰ Where a railway servant was supplied with a water-proof coat on condition that if it was damaged or lost it would be renewed at the cost of the railway servant, the contract was one of bailment. Delivery of the water-proof coat was an entrustment, and when he attempted to pawn the garment, he was liable to conviction under this section read with s. 511¹¹. Where the accused who was a paid supervisor of a society connected with the co-operative movement, debited Rs. 2 as the pay of a sweeper woman, took the thumb impression of his nephew against the debit entry, certified the thumb impression to be that of the sweeper woman, and appropriated the amount to himself, it was held that he committed the offence of criminal breach of trust under this section, as he misappropriated the amount.¹²

Use of property entrusted for benefit of another person.—Where a person entrusted another with some blocks of wood-engraving to print his catalogue, and that other person used the blocks or allowed other persons to use the blocks to print a rival firm's catalogue, it was held that such dealing with the blocks was a violation of an implied contract and caused wrongful gain to the accused, for he obtained a catalogue at a less expense, and wrongful loss to the owner, inasmuch as his property deteriorated in value, and therefore constituted criminal breach of trust.¹³

Appropriation by servant of property ordered to be destroyed.—The accused, a servant, was ordered by his employers to take certain bags of papers and forms belonging to them to their yard and there to burn and destroy them. Instead of doing this, the accused carried the papers away to a certain place. It was held that the act of the accused did not amount to this offence.¹⁴ As no reasons are given in the judgment, this decision is not a sound one in the light of observations made in the following case. Where a currency note was cancelled by tearing off certain parts, but the further process of cutting it into pieces and then destroying it by burning remained, it was held that such a note though cancelled was not *res nullius* and could be the subject-matter of theft. The Court observed: "A very clear distinction must be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that property and hands it over to some person to effect those purposes is in our opinion a clear indication that he still maintains his rights as the owner of that property and that those rights subsist until the abandonment or destruction is completed...As long as the destruction or abandonment is not fulfilled and as long as it is still in the hands of the owner to countermand such destruction or abandonment the property is still the property of the owner and the taking it out of his possession is theft, and improper use of it is breach of trust."¹⁵

PRACTICE.

Evidence.—Prove (1) that the accused was the clerk or servant of the person reposing trust.

(2) That he was in such capacity entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it.¹⁶

Actual conversion need not be proved. A mental act of fraudulent appropriation may be inferred from conduct.¹⁷

To support a conviction for abetment of criminal breach of trust by a servant it must be proved that the transaction was a dishonest transaction, that the accused knew that, in respect of such transaction, the servant was acting dishonestly and was committing a breach of trust, and that he abetted the servant in effecting it.¹⁸

¹⁰ *Karim-ud-din*, (1918) 40 All. 565.

¹¹ *Nga Aung Thein*, (1933) 35 Cr. L. J. 718, [1934] AIR (R) 41.

¹² *Keshavrao*, (1934) 36 Bom. L. R. 1120, 36 Cr. L. J. 522.

¹³ *Keshab Chandra Boral v. Nityanund Biswas*, (1901) 6 C. W. N. 203.

¹⁴ *Preo Nath Chowdhry*, (1902) 29 Cal. 489.

See *Wilkinson*, (1898) 2 C. W. N. 216, where the accused was a public servant.

¹⁵ *Moti*, (1923) 17 S. L. R. 260, 262, 26 Cr.

L. J. 189, [1925] All. (S) 21.

¹⁶ *Vide* s. 406, *sup.*

¹⁷ *Kesho Ram*, (1889) P. R. No. 36 of 1889.

¹⁸ *Bal Gobind Shaha*, (1900) 4 C. W. N. 309.

Excessive delay in remitting revenue collections to the Treasury is held to be evidence of a dishonest misappropriation on the part of a village officer.¹⁹

Where a property is entrusted to a servant and such servant fails to return or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statements of the servant.²⁰

Where the accused was charged with criminal breach of trust, the case of the prosecution being that he had realised certain sums of money on behalf of his master but did not actually credit the same in the master's books and the defence of the accused was that he had done so, but the accused was convicted as he did not adduce any evidence to prove the payment, it was held that the case was dealt with on an erroneous point of view and that it was the duty of the prosecution to prove that the accused had not in fact made the payments.²¹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Jurisdiction.—The Court, within whose jurisdiction the consequence of an accused's act occurs, can inquire into the charge.²² Where the complainant residing at Rangoon entrusted certain negotiable securities to the accused at Rangoon with instructions to proceed up-country and collect the amounts due upon them at various places and to account for the receipts at Rangoon, it was held that the offence of criminal breach of trust in respect of the proceeds of such collection could be tried by the Rangoon Courts.²³ Where it is the duty of the accused to keep accounts of all the moneys received by him at different places and to deposit the moneys so realised at his master's place of business and get accounts entered there, and the accused fails to deposit the money and render accounts at the said place, the Court at that place is fully competent to try the case.²⁴

Joint trial of principal and abettor.—Under s. 239, Criminal Procedure Code, all persons abetting the principal offender in defalcating the different items can be tried at the same trial with the latter.²⁵

Charge.—Where an accused person was charged under this section with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge specified not only the gross sum taken and the dates between which it was taken, but also set out the items, twenty-two in number, composing such gross sum, giving the dates and the amount alleged to have been misappropriated on each date, it was held that the charge came within s. 222 (2) of the Criminal Procedure Code, and that by specifying the items composing the gross sum the charge went beyond what was necessary and was to that extent favourable to the accused.¹ The Patna High Court has held that it is lawful to charge a person under this section with criminal breach of trust in respect of a lump sum of money made up of three different items and to link with that a series of charges of falsification of accounts under s. 477A each of which charges under s. 477A is united with one of the items of embezzlement under the charge under this section, provided the charges of embezzlement under this section are linked together into one sum and that linking together also affects the charges of falsification.² It has subsequently held that the series of charges under s. 477A even though committed in the course of one year are not permitted to be lumped up together as s. 222(2), Criminal Procedure Code, 1898 refers only to the offence of criminal breach of trust or dishonest misappropriation of

¹⁹ (1880) 1 Weir 464.

²⁰ *Sona Meah*, (1924) 2 Ran. 476.

²¹ *Balai Chandra Khara v. Bishnu Bejoy Srimani*, (1934) 38 C. W. N. 474, 35 Cr. L. J. 715, [1934] AIR (C) 425.

²² *O'Brien*, (1886) 19 All. 111; *Ali Mohamed Kassim*, (1931) 9 Ran. 338.

²³ *Yacoub Ahmed v. V. M. Abdul Ganny*, (1928) 6 Ran. 380; *Public Prosecutor v. Podimou Beary*, (1928) 52 Mad. 61; *Brij Kishore v. Pandit Chandrika Prasad*, (1936) 12 Luck. 77;

D'Mello v. Pereira, (1937) 39 Bom. L. R. 620, [1937] Bom. 743.

²⁴ *Brij Kishore v. Pandit Chandrika Prasad*, (1936) 12 Luck. 77.

²⁵ *Rabindra Nath Majumdar v. Patiya Urban Co-operative Bank*, [1944] 1 Cal. 109.

¹ *Samiruddin Sarkar v. Nibaran Chandra Ghose*, (1904) 31 Cal. 928. See *Gulzari Lal*, (1902) 24 All. 254; *Raman Lal*, (1926) 49 All 312.

² *Michael John*, (1930) 10 Pat. 463.

money and not to falsification of accounts. Where the prosecution selected more than three charges under s. 477A although by the device adopted by the Public Prosecutor twenty-eight charges were condensed into four by using sub-headings under each charge, it was held that the charges as framed were illegal.³ The Calcutta High Court has held that a joinder of three charges under s. 409 with three under s. 477A relating to different transactions is not warranted by any of the exceptions provided in the Code, and is illegal. Such a misjoinder is absolutely fatal to the trial.⁴

The charge should run thus :—

I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being a servant in the employment of AB, and in such capacity entrusted with [*or with dominion over*] certain property, to wit——, committed criminal breach of trust with respect to the said property, and thereby committed an offence punishable under s. 408 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

409. Whoever, being in any manner entrusted with property,¹ or with any dominion over property in his capacity of a public servant² or in the way of his business as a banker,³ merchant,⁴ factor,⁵ broker,⁶ attorney⁷ or agent,⁸ commits criminal breach of trust in respect of that property,⁹ shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section classes together public servants, bankers, merchants, factors, brokers, attorneys and agents. As a rule the duties of such persons are of a highly confidential character, involving great powers of control over the property entrusted to them; and a breach of trust by such persons may often induce serious public and private calamity. "In order to bring a case within s. 409 it is... necessary to show that property was entrusted to a public servant and that he accepted the property entrusted, being in his public capacity required or authorized to accept it. Otherwise in accepting the property he acts as a mere volunteer, and is not entrusted with it in his capacity of a public servant. It is not... sufficient to show merely that a person delivered property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or of the person accepting it, or of both, that the latter was authorized to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant".⁵ This section cannot be construed as involving that any head of an office, who is negligent in seeing that the rules about remitting money to the Government treasury are observed, is *ipso facto* guilty of the offence of criminal breach of trust; but something more than that is required to bring home the dishonest intention, which is one of the essentials of the offence. There should be some indication which justifies a finding that the accused definitely had the intention of wrongfully keeping Government out of the moneys; and ordinarily that would be shown by some overt act, which went beyond mere retention of money that should have been remitted to the treasury.²⁰ This was followed in a later case, where, on similar facts, the Court remarked : "There can be no doubt that the accused ought to have kept all

³ *Ramautar Lall*, (1941) 21 Pat. 113.

⁴ *Raman Behari Das*, (1913) 41 Cal. 722.

⁵ Per Plowden, J., in *Bhag Singh*, (1876) P. R. No. 24 of 1876, at p. 46; *Banee Madhub Ghose*, (1867) 8 W. R. (Cr.) 1.

⁶ *Lala Raoji*, (1928) 30 Bom. L. R. 625, 628, 630, 29 Cr. L. J. 922, [1928] AIR B, 205. See *Sukhdeo Narain*, (1929) 30 Cr. L. J. 812, [1929] AIR (P) 506.

the Government moneys in the box and in departing from this obviously desirable practice he was guilty of some dereliction of duty. It appears to us, however, to be getting too far to infer from the fact that the money was not kept in the box that the accused had a dishonest intention of converting it to his own use."⁷

Scope.—This section does not include an intention to misappropriate at a future date.⁸

1. 'Entrusted with property'.—The relationship between a banker and a customer in respect of money received from the latter on a current account is that of debtor and creditor, the banker being free to use the money, which becomes his own, in any way he pleases, subject to a liability to repay on demand. The money is not entrusted with him within the meaning of s. 405 and this section. Consequently, no prosecution under this section lies against a banker for his failure to pay the money on demand on the ground of want of cash.⁹

Moneys paid to a post-master for money-orders are public moneys; as soon as they are paid they cease to be the property of the remitters, and a misappropriation of such moneys will fall under this section.¹⁰

2. 'In his capacity of a public servant'.—It is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity.¹¹ The section does not limit the mode in which a trust arises, whether by specific order or by reason of its being part of the proper duty of a public functionary.¹² If a public servant in his capacity as such receives money on a certain date and does not include it in his cash balance entered in the register which he is required to maintain, there is very strong *prima facie* evidence of the money having been misappropriated on that date, and he is guilty of embezzlement if he does not hand over to his successor the money in his hands due to Government. Where, under the rules, a public servant was required to lodge in the treasury any Government money in excess of that shown due to Government by the registers in his hands and the public servant removed the excess from the office cash-box, it was held that he was guilty of misappropriation and it made no difference that he removed it to a godown belonging to Government, he being not entitled to retain it pending scrutiny of the accounts.¹³

Without the slightest evidence of any money having been received by a public servant he can be convicted of criminal breach of trust by a public servant under this section and of conspiracy under s. 120B when property under his control disappears and his connection with the conspiracy is brought home to him.¹⁴

As to the meaning of 'public servant' see s. 21, *supra*. A naib nazir is a public servant within the meaning of this section.¹⁵

3. 'Banker' is one who receives money to be drawn out again as the owner has occasion for it, the customer being lender, and the banker borrower, with the super-added obligation of honouring the customer's cheques up to the amount of the money received and still in the banker's hands.¹⁶ The word 'banker' includes a cashier or shroff.¹⁷ The relation between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank.¹⁸

4. 'Merchant'.—A merchant is one who traffics to remote countries; also, any one dealing in the purchase and sale of goods.¹⁹ But every one that buys and sells is not at this day under the denomination of a merchant, only those who traffic, in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation or exchange, and which make it their living

⁷ Per Broomfield, J., in *Vishnu Balwant Gharbude*, (1936) Crim. Revn. No. 463 of 1929, decided by Mirza and Broomfield, JJ., on January 22, 1936 (Unrep. Bom.).

⁸ *Ahmad Din*, (1934) 36 Cr. L. J. 165.

⁹ *S. Takashi*, (1941) 45 C. W. N. 1071, 43 Cr. L. J. 451, [1941] ALN (C) 718.

¹⁰ *Juala Prasad*, (1884) 7 All. 174, F.B.

¹¹ *Ram Soonder Foddar*, (1878) 2 C. L. & 515.

¹² *Ram Dhun Day*, (1870) 13 W. R. (Cr.) 77.

¹³ *Daya Shankar*, (1926) 1 Luck. 345.

¹⁴ *F. S. Hay*, (1925) 2 O. W. N. 469, 26 Cr. L. J. 1217, [1925] AIR (O) 469.

¹⁵ *Mahmood Hoossein*, (1870) 2 N. W. P. 298.

¹⁶ Wharton, 14 Edn., p. 109.

¹⁷ *Hira Lal*, (1907) P. R. No. 19 of 1908, 8 Cr. L. J. 492.

¹⁸ *Foley v. Hill*, (1848) 2 H. L. C. 28.

¹⁹ Wharton, 14th Edn., p. 649.

to buy and sell, by a continued assiduity, or frequent negotiation, in the mystery of merchandising are esteemed merchants. Bankers, and such as deal by exchange, are properly called merchants.²⁰

5. 'Factor' is a substitute in mercantile affairs; an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for a compensation commonly called factorage or commission.²¹

6. 'Broker' is an agent employed to make bargains and contracts between other persons in matters of trade, commerce and navigation, by explaining the intentions of both parties, and negotiating in such a manner as to put those who employ him in a condition to treat together personally. More commonly he is an agent employed by one party only to make a binding contract with another.²²

A factor is "entrusted with the possession as well as the disposal of property" a broker is "employed to contract about it, without being put in possession".²³

7. 'Attorney' is one who is appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated.²⁴

8. 'Agent'.—An agent is a person employed to do any act for another or to represent another, in dealings with a third person.²⁵ The person charged with an offence must have been entrusted with the property in his capacity of an agent, but the section does not require that he should be still an agent at the time of committing the breach of trust.¹ A person who is the manager of a firm cannot be held criminally liable for breach of trust where there is no personal entrustment of goods to him but to the firm in respect of which the offence was alleged to have been committed.² Where the accused was authorised to lend his master's money and he lent it to himself without his master's permission, it was held that he was guilty of criminal breach of trust.³ Where a *lambardar* converted to his own use the money paid to him by landowners in discharge of their liability to Government, it was held that he was guilty under this section.⁴ Where a commission agent was employed to sell cotton and he acted according to the custom of the market which made him liable for the price of the cotton on demand being made, it was held that he could not be prosecuted under this section for the return of the cotton.⁵

9. 'Commits criminal breach of trust in respect of that property'.—Dishonesty is a pre-requisite for a prosecution under this section.⁶

CASES.

Guilty.—Public servant.—Where a constable dishonestly misappropriated to his own use the pay of his station police entrusted to him;⁷ where a police-officer misappropriated the property seized by him, under s. 550 of the Criminal Procedure Code, during an investigation;⁸ and where the head clerk of an office entrusted the management of stamps, with the knowledge and sanction of his superiors, to one of his assistants, and the latter stole stamps,⁹ it was held that this offence had been committed. Where the accused, a cattle pound-keeper, having levied Rs. 5 for five buffaloes in his charge, gave a receipt for Rs. 4 only to the owner of the cattle, and entered only Rs. 4 in his accounts, but subsequently altered the accounts and entered the proper amount, namely, Rs. 5, it was held that the conviction should be under this section and s. 511.¹⁰

²⁰ Jacob's Law Dictionary, (1736) as enlarged by Tomlins, Vol. II, Edn. of 1809.

²¹ Wharton, 14th Edn., p. 400.

²² Wharton 14th Edn., p. 148.

²³ Smith's Mercantile Law, 13th Edn., p. 195, quoted in *Dixon Henley*, (1876) 4 Ch. D. 133, 137, and in *Stevens v. Buler*, (1883) 25 Ch. D. 31, 34.

²⁴ Wharton, 14th Edn., p. 95.

²⁵ The Indian Contract Act (IX of 1872), s. 182.

¹ *Chaturbhuj Narain Choudhury*, (1955) 15 Pat. 108.

² *S. C. Guha*, (1930) 32 Cr. L. J. 149.

³ *Ramanathan Chettiar v. Duraiswamy Ayyangar*, [1933] M. W. N. 256.

⁴ *Sultan Mahmud*, [1939] Lah. 119; *Ram Prasad Saikia*, (1936) 40 C. W. N. 1154.

⁵ *Gangaram*, [1943] N. L. J. 128, (1942) 44 Cr. L. J. 423, [1943] AIR (N) 168.

⁶ *Krishna Dayal*, (1945) 47 Cr. L. J. 1041, [1946] A. I. R. (A) 227.

⁷ *Subdar Meeah*, (1865) 3 W. R. (Cr.) 44.

⁸ *Local Government v. Abas Ali*, (1935) 31 N. L. R. 312, 36 Cr. L. J. 867.

⁹ *Ram Dhun Dey*, (1870) 13 W. R. (Cr.) 77.

¹⁰ *Bhula*, (1893) Cr. R. No. 2 of 1893, Unrep. Cr. C. 632.

A traveller, with considerable property, partly in cash and partly in gold coins, put up at an inn, and believing himself to be dying, sent for a police officer for protection of his property. The accused went to the inn, and received charge of the property. It was held that the accused was entrusted with the property in his capacity of a public servant as he was empowered by s. 95, Criminal Procedure Code, to receive the property to prevent the commission of an offence, i.e. theft by other persons, taking advantage of the illness or death of the traveller.¹¹ A clerk in a record room made over a document forming part of a record in his custody to a person who was entitled to the document, but would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner. It was held that the clerk was, under the above circumstances, rightly convicted under this section.¹² The accused, a petty officer in the Salt Department, was empowered to sell salt at reduced prices to fish-curers. He was directed to enter the sales to such persons by departmental orders in the Government books. He really bought some salt for himself at the reduced rates entering the sales in the Government books as if made to fish-curers and thereby appropriated to himself the difference between the reduced price and the proper price. It was held that the accused was guilty under this section and not under s. 177, as he was not 'legally bound' to obey the departmental rule.¹³ A post-master whose duty it was to pay over to the holders of certain cash certificates the money due thereon at a certain rate, in fact paid the holders at a lower rate and appropriated the difference to himself. It was held that by so doing he had committed an offence under this section.¹⁴ Where a public servant was entrusted with money to purchase some materials for building a house and he by some private arrangement obtained the same free of cost, it was held that a trust having been reposed in the accused as a public servant it was his duty to account truly for all the moneys received and that as he had obtained the materials free of cost, it was his duty to have refunded the unspent balance to Government and as he did not do so he was guilty of criminal breach of trust.¹⁵ C, a sub-postmaster, and D, a parcels clerk, were charged with criminal breach of trust in respect of three sums of money received for value-payable articles. The sums of money were paid to the post office and were received by D in the usual course and entered by him in the register of value-payable articles received. C had made some entries in the register of value-payable articles received and had also initialled the balance of articles undisposed of. Under the rules the accused were bound to send money received for value-payable articles to the sender on the date of receipt or at the latest on the next day. It was not proved that C was ever entrusted with the money received by D or that he had any knowledge of the receipt of money in the post office. It was held that D was guilty of criminal breach of trust; and that the mere fact that C had made some of the entries in the register and had initialled the daily balance of articles undisposed of, or the fact of his failure to check the register with the articles actually in hand, did not take the place of proof that he knew the moneys to have been paid or that they were at any time entrusted to his care, and that, therefore, he was not guilty.¹⁶

Where a public servant was required to lodge in the treasury any Government money in excess of that shown due to Government by the registers in his hands and the public servant removed the excess from the office cash box, it was held that he was guilty of misappropriation and it made no difference that he removed it to a godown belonging to Government, he being not entitled to retain it pending scrutiny of the accounts.¹⁷

The accused, a sub-postmaster, received a value-payable letter to be delivered to a person on payment of the value-payable amount. He handed over the letter to that person without getting payment on or before October 20, 1925, and he altered his accounts so as to make it appear that he only handed over the letter on October 24, 1925. It was held that the accused was guilty of criminal breach of trust and falsification of accounts.¹⁸

¹¹ *Bhag Singh*, (1876) P. R. No. 24 of 1876.

¹² *Ganga Prasad*, (1904) 27 All. 260.

¹³ *The Government Pleader v. Balayya*, (1894)

1 Weir 467.

¹⁴ *Sita Ram*, (1919) 42 All. 204.

¹⁵ *Sayid Mohiuddin*, (1925) 4 Pat. 488.

¹⁶ *Chandra Prasad*, (1926) 5 Pat. 578.

¹⁷ *Daya Shankar*, (1926) 1 Luck. 345.

¹⁸ *Kandasami Aiyar*, (1926) 52 M. L. J. 703, 25 L. W. 656, 28 Cr. L. J. 552, [1927] AIR (M) 626.

Director.—Where the directors of a bank paid the dividends out of the deposits, when there were no profits, thereby causing gain to persons to which they were not entitled; and wrongful loss to depositors, they were held guilty under this section.¹⁹ The mere passing of an incorrect balance-sheet was held not to amount to an offence under this section.²⁰ The accused, the managing director of a bank, wishing the bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the share-holders and the public and so to make possible a project for increasing largely the bank's capital, on December 17, 1912, got his son to present a pro-note for Rs. 3,000 as a *pro tanto* addition to the profits for 1912, by reducing on paper to that extent his remuneration account from Rs. 4,050, which he had actually drawn, to Rs. 1,050, and thus deceiving the shareholders as to the real profits, induced them to declare a dividend of six per cent. instead of some three per cent. which would otherwise have been the most possible. Later, in January, 1913, i.e. after the close of the financial year, the whole thing was readjusted and matters returned to the *status quo ante* December 17, 1912. It was held that the accused was guilty of an offence under this section inasmuch as by his act he caused wrongful immediate gain to himself and the other shareholders to the extent of the enhanced dividend and so acted dishonestly.²¹ A German Director in India of a German company on the eve of the declaration of war between Britain and Germany realised some cash by sale of his stock and handed over the money to his wife. In a prosecution for criminal breach of trust, it was found that the acts of the accused were done merely to screen the money from the Government of India or Custodian of Enemy Property and that he had no intention to cause wrongful loss or wrongful gain to any other person or persons. It was held that there being no evidence that he intended to profit himself at the expense of his firm of which he was a partner or that he intended to defraud creditors of the firm, he was not guilty of an offence under this section.²²

Trustee.—Where a trustee or a manager of a temple misappropriated temple jewels, he was held guilty of the offence of criminal breach of trust under ss. 405, 408, and this section, and not of offences under ss. 380, 381 and 457. The trustee or manager of the temple appointed by a committee under Act XX of 1863 is not in the position of a clerk or servant removable at the pleasure of the committee, and his possession of the temple and its properties is not possession of the committee. The property of the temple is not vested in the committee, nor do they represent it. The deity is the owner of the property and the trustee is the agent of the deity subject to the committee's control. Therefore, if such trustee or manager misappropriates temple jewels, he is not guilty of theft but of the offence of criminal breach of trust by an agent punishable under this section.²³

Not guilty.—Public servant.—A certain consignment of rice lay unclaimed at the docks and was advertised for sale by auction by the Port Commissioners. But the rice was found to be in a rotten condition and was ordered to be destroyed by the Health Department of the Corporation of Calcutta. It was entrusted for the purpose of destruction to the accused, who were Inspectors in that Department; but they sold the same to a third party and retained the proceeds of such sale. It was held that they had committed no offence under the Code, though they might have been guilty of infringing a departmental rule.²⁴ It was so held on the ground that the rice was not 'property' and there was no one in whom the right of property was vested. Where the accused in his capacity of Revenue Patel received from the Government treasury small sums of money on account of certain temple allowances, and did not at once pay over the same to the persons entitled to receive them as he was bound to do, but it appeared that such persons were willing to trust him, and had actually passed receipts which the accused forwarded to the revenue authorities, it was held that the accused fulfilled the trust reposed in him by Government and that his mere retention of money for a time, in the absence of any evidence of dishonesty, did not amount to

¹⁹ *Moss*, (1893) 16 All. 88.

²⁰ *Giles Seddon v. Loane*, (1910) 11 Cr. L. J. 624.

²¹ *Daulat Rai*, (1915) P. R. No. 28 of 1915, 16 Cr. L. J. 473, [1915] AIR (L) 471. See *Mangal Sen*, (1929) 30 Cr. L. J. 954, [1930]

AIR (L) 57.

²² *Baron Von Dincklage*, [1941] 2 M. L. J. 748, [1942] M. W. N. 41, (1941) 54 L. W. 521, 43 Cr. L. J. 395, [1942] AIR (M) 182.

²³ *Muthusami Pillai*, (1895) 1 Weir 432.

²⁴ *Wilkinson*, (1898) 2 C. W. N. 216.

criminal breach of trust.²⁵ Where a village shroff, whose duty it was to assist in collecting public revenue, received grains from ryots and gave receipts as if for money received by virtue of a private arrangement, it was held that he was not guilty of this offence as he was not authorized to receive the public revenue in kind and the party who delivered the grain did not thereby discharge himself from liability for the revenue.¹ The accused, a *kurnam* of a Government village, received moneys from certain ryots of the village as revenue due on unassessed lands, part of which was cultivated by the ryots without leave, and as cost of boundary stones required for the said lands and misappropriated the moneys so received to his own use. It was held that the accused was not guilty of the offence of criminal breach of trust by a public servant under this section or of cheating under s. 417.² The accused, the nazir of the Court of the Cantonment Magistrate, was convicted of having criminally misappropriated Rs. 52-6-3 out of the Government money in his charge. It appeared that he intended to restore this money to Government. It was also found that the accounts in the books were kept all right and there appeared to have been a practice of long standing in the office among officials employed to receive advances of moneys out of the cash with the accused according to their requirements, generally out of mutual regard, and then to repay them when the salaries were drawn from the treasury and that the accused had made advances when deficiency was found in the cash. The accused made good the deficiency when he was ordered by the Cantonment Magistrate to refund it. It was held that the accused was not guilty of this offence, as there was no dishonest misappropriation or conversion or use within the meaning of s. 405.³ The mere fact that a Village Munsiff did not pay into the treasury the very next day an amount received by him as an instalment of an agricultural loan was held insufficient, by itself, to convict him for criminal breach of trust.⁴ Where money drawn by the principal of a school for payment of a bill due to a particular firm had been under his order appropriated towards the payment of another bill due to the same firm, it was held that this was an irregularity but it did not amount to an offence under this section if no money was actually embezzled by anybody.⁵

Trustee.—Where an assistant station-master whose duty it was to issue tickets to the passengers and to charge fares as fixed by the railway made an overcharge over some of the tickets and did not credit the excess so realized to the railway, it was held that he was not guilty of criminal breach of trust as he was not a trustee within the meaning of s. 405.⁶ The accused, who was a Vice-President of a Municipality, had received a certain commission from a firm on the purchase of certain goods made by the Municipality. The commission was paid to him personally. It was held that there being no trust, the accused was not guilty of an offence under this section.⁷ Where the president of a co-operative society, who was authorised to draw a certain sum of money from a bank, drew the sum, but instead of crediting the amount to the society retained it for his own use with the permission of his fellow members of the managing committee, as he was in need of funds for some purpose, it was held that the offence, if any, committed by the president was of a purely technical nature and he was entitled to the benefit of the doubt as he probably did not think that he was doing any dishonest act.⁸

Intention to misappropriate at future date.—Where the accused, who was the treasurer of a co-operative credit society, satisfied a decree against him by making a deposit entry in favour of his creditor-decree-holders, it was held that the fraudulent action of the accused did not earmark the money in his hands as the source for payment in respect of that liability: the fraudulent entry was intended to make it possible at a later date to misappropriate the moneys of the society; but nothing was then misappropriated and consequently the accused was not guilty under this section.⁹

²⁵ *Ganpat Tapidas*, (1885) 10 Bom. 256; *Lachman Singh*, (1930) 32 Cr. L. J. 811; *Muthuswami Udayan*, [1911] -M. W. N. 667, (1941), 54 L. W. 235, 43 Cr. L. J. 445, [1941] AIR (M) 761.

¹ (1869) 4 M. H. C. (Appx.) 32, 1 Weir 465.

² *Rengaswami Ayyangar*, (1888) 1 Weir 466.

³ *Imam Din*, (1902) 3 P. L. R. 157.

⁴ *Munusami Nainar*, (1930) 58 M. L. J. 649, 31 L. W. 887, [1930], M. W. N. 530, 31 Cr. L.

J. 1198, [1930] AIR (M) 507.

⁵ *Chandrika Prasad*, (1930) 7 O. W. N. 564, 31 Cr. L. J. 1081, [1930] AIR (O) 324.

⁶ *Kudrat Nath*, (1922) 24 Cr. L. J. 879, [1923] AIR (L) 295.

⁷ *U Maung Gale*, (1926) 4 Ran. 128.

⁸ *Azad Khan*, (1930) 32 Cr. L. J. 274, [1930] AIR (L) 1045.

⁹ *Ahmad Din*, (1934) 36 Cr. L. J. 165.

PRACTICE.

Evidence.—Prove (1) that the accused was either a public servant or a banker, or a merchant, or a factor, or a broker, or an attorney, or an agent.

(2) That he was in such capacity entrusted with the property in question or with dominion over it.¹⁰

(3) That he committed criminal breach of trust in respect of it.¹¹

Distinct proof of criminal misappropriation is necessary.¹² But it does not lie on the prosecution to prove the actual mode of misappropriation. Where it is proved by the prosecution that the money was not returned by accused which he was bound to do, it lies on the accused to prove his defence.¹³

All the necessary elements constituting the offence must be strictly proved, and when the charge is that something was substituted in place of another, there must be clear evidence that the thing alleged to have been extracted was actually there when it came under the dominion of the accused.¹⁴

In a charge under this section, it is not necessary for the prosecution to prove in what manner the money alleged to have been misappropriated has actually been spent by the accused. If it is shown that money entrusted to the accused or received by him for a particular purpose, was not used for such purpose, neither was the same returned by him in accordance with his duty, it lay on the accused to prove his defence if he has set up any. Mere retention of money would not necessarily raise a presumption of dishonest intention: but it is a step in the direction. The fact that money entrusted to be used for a particular purpose, was not used for such purpose, that there was retention for a sufficiently long time, would justify the inference that the accused did not intend to pay.¹⁵ The prosecution need not prove the actual mode of misappropriation, but must prove dishonest misappropriation. It may do so either directly (e.g. by showing that the money was paid into the account of the accused) or indirectly by circumstantial evidence. In the latter case the fact that the accused has failed to show what has happened to the money coupled with other circumstances may justify an inference that he misappropriated it. But that does not mean that the burden of proof has shifted from the prosecution to the defence.¹⁶ A person accused of criminal misappropriation has not to account for the moneys, and when he has stated how the money was spent it is for the prosecution to disprove the alleged expenditure. It is wrong to hold that unless a person accused of criminal breach of trust himself proves the truth of every item of expenditure alleged by him, he cannot rely on such payments as a defence. On the other hand, if the statement of account is otherwise reasonable or probable the accused is entitled to the benefit of the statement of expenditure submitted by him unless and until that statement is proved to be false. The practice of running down the evidence of witnesses is much to be deprecated. It is unfair to the witnesses and it might often result in serious miscarriage of justice. A witness should not be rejected as a false witness merely because he has not produced his account unless it is clear that he keeps an account and has not produced it when required and when it was possible for him to produce it. Without any opportunity being given for production of the account and without even a question being asked whether an account is kept or not, it would be hardly right to characterise a witness as a liar because he has not produced his account.¹⁷ When an accused person takes up a substantive defence and that defence receives considerable support from the prosecution evidence itself, it is incumbent upon the prosecution to establish, by definite and clear evidence, that the case for the defence is untrue.¹⁸ Where the dispute between the complainant and the accused is one in the nature of accounting, the proper remedy of the complainant is to file a civil suit for recovery of the amounts due from the accused and not to launch a prosecution under this section.¹⁹

¹⁰ *Rangamannar Chetty*, [1935] M. W. N. 649.

¹¹ *Id.*, s. 406, sup.

¹² *Brinbadhur Putnaik*, (1866) 5 W. R. (Cr.) 21

¹³ *Kadir Bakhsh*, (1910) 8 A. L. J. R. 88, 11. Cr. L. J. 699.

¹⁴ *I. G. Singleton*, (1924) 29 C. W. N. 260, 26 Cr. L. J. 662, [1925] AIR (C) 501.

¹⁵ *Akshoy Chandra Bose*, (1934) 38 C. W. N. 467, 59 C. L. J. 306, 35 Cr. L. J. 1279, [1934]

AIR (C) 532.

¹⁶ *Robert Stuart Wauchope*, (1923) 61 Cal. 168, 185.

¹⁷ *Syed Karim Sahib*, [1936] M. W. N. 1019, 1022.

¹⁸ *Hem Chandra Halder*, (1934) 38 C. W. N. 582, 35 Cr. L. J. 912, [1934] A. R. (C) 407.

¹⁹ *Munnoo Lal*, [1935] O. W. N. 126, 36 Cr. L. J. 477.

It is not open to an accused charged with criminal breach of trust to put up a defence that the prosecution have failed to prove the embezzlement of a particular sum with which he is charged though they might have succeeded in proving embezzlement of other sums. Such a defence cannot hold good for the simple reason that if accepted it would merely involve a conviction whatever hypothesis was adopted and no prejudice can be urged by the accused for lack of charge because it was his own defence.²⁰

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

The Magistrate should hold a preliminary inquiry before issuing a warrant of arrest. He should not issue it merely on a sworn statement of the complainant, without asking him how he proposed to prove his allegations.²¹

Place of trial.—The complainant who resided at Lyallpur appointed the accused his agent for sale of certain commodities at Najibabad and sent him goods in pursuance of that contract. The accused sold the goods and misappropriated the sale proceeds. It was held that the Court at Najibabad was only competent to entertain the complaint and not that at Lyallpur.²² Where goods were pledged in British India and the pledgee sub-pledged them for a higher amount in a place outside British India, the offence of criminal breach of trust constituted by the sub-pledge cannot be tried in British Indian Courts in the absence of compliance with the requirement of s. 188, Criminal Procedure Code, regarding certificate of the Political Agent or sanction of the Provincial Government.²³

Public servant.—Sanction necessary.—Under s. 197, Criminal Procedure Code, when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Governor General in Council where the public servant is employed in the affairs of the Government of India or of the Governor of a Province where the public servant is employed in the affairs of a Province. Where a Sub-Postmaster was prosecuted under this section in respect of embezzlement of funds entrusted to him by various depositors for credit into their Savings Bank accounts, it was held that no sanction under s. 270 of the Government of India Act, 1935, was necessary for his prosecution because in committing such an offence he could not be said to be acting in the discharge of his official duty, but intended to act in direct opposition of his duty.²⁴ Similarly, where the accused had misappropriated certain medicines entrusted to him in his official capacity as a Sub-Assistant Surgeon, it was held by the Federal Court of India that the consent of the Governor under s. 270 of the Government of India Act, 1935, was not necessary.²⁵ An officiating Kulkarni (village official) collected money on account of land revenue and instead of sending it to the Government treasury used it for his own purposes. He was prosecuted for an offence under this section, without obtaining sanction of the Local Government under s. 197 of the Criminal Procedure Code. It was held that the offence was not committed by the accused while acting or purporting to act in the discharge of his official duty and therefore no sanction of the Local Government under s. 197 of the Criminal Procedure Code was necessary.¹

Charge.—See s. 408.

In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. It was held that a charge so framed did not offend against s. 234, Criminal Procedure Code.² An accused person was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them. He was not charged

²⁰ *Gurbaksh Singh*, (1936) 38 P. L. R. 1157, 37 Cr. L. J. 581, [1936] AIR (L) 907.

²¹ *Htye Yar*, (1937) 39 Cr. L. J. 91, [1937] AIR (R) 474.

²² *Durga Parshad v. Banwari Lal*, (1928) 29 Cr. L. J. 453; *Gobindram Jashammal*, (1928) 29 Cr. L. J. 1032, [1928] AIR (S) 166.

²³ *Verghese*, (1947) 60 L. W. 233.

²⁴ *Manzur Ali*, [1939] Lah. 227; *Sannaya*, [1941] Mad. 258.

²⁵ *Hori Ram Singh*, [1939] F. C. R. 159.

¹ *Gurushiddaya Shantiviraya*, (1938) 40 Bom. L. R. 1286, [1939] Bom. 199.

² *Ishtiaq Ahmad*, (1904) 27 All. 69.

with three offences, but with one offence under this section, and was convicted of one offence and sentenced to one term of imprisonment. It was held that the charge as framed was not contrary to law, it being in accordance with ss. 222, sub-s. (2), and 234 of the Code of Criminal Procedure.³ Where the accused was charged with three offences under s. 477A and three offences under this section, and tried and convicted, it was held that the trial was void by reason of misjoinder of charges.⁴ Where the amount composed of four different sums payable in respect of four different holdings, was realized at the same time and for which one receipt was originally granted by the accused for the whole amount, it was held that it could not be said that there were four different items in respect of which he was charged and one single charge regarding the whole amount did not contravene the provisions of s. 234 of the Code of Criminal Procedure. The accused was charged under s. 222 (2) of the Code of Criminal Procedure for misappropriating a certain amount between April 1923 and March 31, 1924. In ascertaining the amount misappropriated, the Court had to go into details and found the different dates on which the different amounts came into his hands. The Court found that on some dates certain sums were realized by him and that between some other dates certain other sums were realized by him. The method adopted by the Court was to facilitate the calculation of the total amount for the misappropriation of which he was charged. The accused did not realize and misappropriate different sums during different periods. It was held that the charge as framed was right, and did not contravene the provisions of s. 234 of the Code of Criminal Procedure.⁵

Punishment.—Criminal breach of trust by a person in charge of public moneys calls for a severe sentence.⁶

Of the Receiving of Stolen Property.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property ^{Stolen property.} which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as “stolen property”, whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India.¹ But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof,² it then ceases to be stolen property.

411. Whoever dishonestly receives or retains any stolen property,¹ knowing or having reason to believe the same to be stolen property,² shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Section 410 explains what comes under the words ‘stolen property’. Things which have been stolen, extorted, or robbed, or which have been obtained by criminal misappropriation or criminal breach of trust come under the extended signification given to these words. As to the definition of ‘possession’ see s. 27; of ‘theft’, s. 378; of ‘extortion’, s. 388; of ‘robbery’, s. 390; of ‘criminal misappropriation’, s. 403; of ‘criminal breach of trust’, s. 405. Under s. 410 it is immaterial whether the transfer is made or misappropriation or breach of trust has been committed within or without British India.

³ *Sat Narain Tewari*, (1905) 32 Cal. 1085. See *Kashinath Bagaji Sali*, (1910) 12 Bom. L. R. 226, 11 Cr. L. J. 337.

⁴ *Raman Behari Das*, (1913) 41 Cal. 722; *Manant*, (1915) 27 Bom. L. R. 1343, 49 Bom. 892; *Nagendra Nath Sen Gupta*, (1922) 36 C. W.

N. 542, 55 C. L. J. 111, 33 Cr. L. J. 265; *Bhu Prakash*, (1940) A. L. J. R. 796.

⁵ *Harendra Kumar Ghosh*, (1926) 45 C. L. J. 207, 28 Cr. L. J. 489, [1927] AIR (C) 409.

⁶ *Parma Nand*, (1927) 29 Cr. L. J. 1.

Section 411 clearly shows that besides dishonest possession of stolen property there must also be the knowledge of or at least reasonable belief in the property being stolen property; but when some property is proved to be stolen property and the person who is found in possession of it cannot account for its possession especially when he is found in possession of it soon after the theft of the property, it is only reasonable to conclude not only that he was in possession knowing or having reason to believe it to be stolen property but also that his possession of it was dishonest.⁷

English law.—The description of 'stolen property' in s. 410 is not so wide as that of the similar provision of the Larceny Act,⁸ which enacts that "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, etc." This provision includes property obtained by cheating, whereas the definition of stolen property as given in s. 410 does not include it.

1. 'Whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India'.—These words were inserted by Act VIII of 1882, s. 9. They have enlarged the scope of the term 'stolen property', and the act by which property has been stolen no longer need be an act punishable under the Code. The amendment was made in consequence of *Moorga Chetty's* case,⁹ which decided that bills of exchange stolen in Mauritius were not 'stolen property' so as to make the receiver a Bombay liable under s. 411.

The receipt or retention must take place within British India, unless the person receiving or retaining out of British India is a British subject.¹⁰ A subject of a Native State, who is guilty of retaining stolen property within that State, is not liable to be punished under the Code.¹¹

Where there is a dishonest retention in British India of property stolen elsewhere, it is no defence by the accused, being a foreign subject, that the property was stolen by himself, he not being liable to be tried, convicted, or punished by the British Court for the theft.¹²

Where a Nepalese subject, having stolen cattle in Nepal, brought them into British territory, it was held that he could not be convicted of theft but that he might be convicted of an offence under s. 410.¹³ Similarly, where the accused, a subject of a Native State, committed a theft at Rajkot (Indian State) and brought the property to Thana (British territory), it was held that he could not be tried for theft, but he might be tried under s. 411 for retaining stolen property.¹⁴ Two persons, B, who was not a British subject, and R, who was, were committed to the Court of Session at Jhansi, it being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory. It was held that though neither could be tried by the Sessions Judge of Jhansi for the robbery, B because he was not a British subject, and R because the certificate required by s. 188 of the Code of Criminal Procedure was wanting, yet both might be tried for the offence of retaining stolen property under s. 411.¹⁵

But if theft has been committed in British India and the accused is found in possession of stolen property outside British India, he cannot be tried for an offence under s. 411 by a British Court having jurisdiction over the place where the theft took place because the offence of receiving or retaining stolen property was committed at a place beyond 'British territory'.¹⁶

2. 'If such property subsequently comes into the possession of a person legally entitled to the possession thereof'.—If the owner of stolen property some-

⁷ *Shakur*, [1935] O. W. N. 911, 914, 38 Cr. L. J. 1206, 1208.

⁸ 24 & 25 Vic., c. 96, s. 91.

⁹ (1881) 5 Bom. 338, F.B.; *Adivigadu*, (1876) 1 Mad. 171, is also now obsolete.

¹⁰ See s. 188, Criminal Procedure Code.

¹¹ *Gunna*, (1926) 48 All. 687.

¹² *Jafar Ali*, (1898) P. R. No. 30 of 1894.

¹³ *Sunker Gope*, (1883) 6 Cal. 307. Held similarly where the accused, a foreign subject, stole a horse in the Bhawalpur State and

brought it in British India: *Mul Chand*, [1943] Lah. 62.

¹⁴ *Abdul Latib valad Abdul Rahiman*, (1885) 10 Bom. 186; *Chhataria Pyaralal*, (1930) Crim. Ref. No. 14 of 1930, decided by Mirza and Broomfield, JJ., on February 3, 1930 (Unrep. Bom.).

¹⁵ *Baldewa*, (1906) 28 All. 372.

¹⁶ *Moheshwari Prasad Singh*, (1914) 18 C. W. N. 1178, 15 Cr. L. J. 537, [1914] AIR (C) 725.

how resumes possession of the stolen property before its receipt by the person accused of receiving it, it ceases to be stolen property, and the accused cannot be convicted of receiving it knowing it to have been stolen.²¹ If stolen goods are restored to the possession of the owner, and he returns them to the thief for the purpose of enabling him to sell them to a third person, they are no longer stolen goods, and that third person cannot be convicted of feloniously receiving stolen goods, although he received them, believing them to be stolen. Where, therefore, stolen goods were found by the owner in the pockets of a thief, and the owner sent for a policeman who took the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others, and the thief then went to the shop of the accused and sold goods, and gave the money to the owner, it was held that the accused was not guilty of feloniously receiving stolen goods, inasmuch as they were delivered to him under the authority of the owner by a person to whom the owner had bailed them for that purpose.²²

If a person buys in good faith property which has been stolen he does not acquire any ownership therein.²³

Stolen property coming into possession of owner before its receipt by person accused of receiving it.—Four thieves stole goods from the custody of a railway company, and sent them in a parcel by the same company's line addressed to the accused. During the transit the theft was discovered; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter whose duty it was to deliver it, with instructions to keep it till further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the accused, who was afterwards convicted of receiving the goods knowing them to be stolen. It was held that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong.²⁴ A parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees. While in the prosecutors' depot, a servant of the prosecutors removed the parcel to a different part of the premises, and placed upon it a label addressed to the accused. The superintendent of the prosecutors' business, on receipt of information as to this, and after inspection of the parcel, directed it to be replaced in the place to which the thief had removed it, and to be sent in a van, accompanied by two detectives, to the address shown on the label. The parcel was received by the accused under circumstances which clearly showed knowledge on their part that it had been stolen. It was held that as the owners had resumed possession of the stolen property before its receipt by the accused, it had then ceased to be stolen property, and the accused could not be convicted of receiving it knowing it to have been stolen.²⁵ A lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar from him in the master's presence. In consequence of the lad's statement, the cigar was returned to him with five others, which the lad took to the accused and gave them to him. It was held that the accused could not be convicted of receiving the cigars knowing them to be stolen for they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with six cigars, and instructing him what to do with them.¹

Section 411.—This section requires two essentials:—

1. Dishonest receipt or retention of stolen property.
2. Knowledge at the time of receipt that the property was obtained in one of the ways specified in the section.

1. **'Dishonestly receives or retains any stolen property'.—**The offences of receiving and retaining are different.

"The use of the alternative expression 'dishonestly receives or retains', in one and the same section relieves the prosecutor of proving more than that the accused 'either received or retained' the property (of course in either case dishonestly), that is to say, the prosecutor need not prove that it was dishonestly received as distinct

²¹ *Villensky*, [1892] 2 Q. B. 597.

²² *Dolan*, (1885) 6 Cox 449; *Schmidt*, (1866) L. R. 1 C. C. R. 15.

²³ The Indian Sale of Goods Act (III of 1930),

L. C.—65

s. 27.

²⁴ *Schmidt*, (1866) L. R. 1 C. C. R. 15.

²⁵ *Villensky*, [1892] 2 Q. B. 597.

¹ *Hancock*, (1878) 38 L. T. 787.

from dishonestly retained, or dishonestly retained as distinct from dishonestly received: it is enough to prove facts which justify the inference that the accused either dishonestly received the property or having received it honestly, dishonestly retained it. A similar use of an alternative expression is common throughout the Code in offences where a thing is said to be done 'with the intention of causing a specified effect', or with the knowledge that 'the effect is likely to be caused'. In such cases the prosecution need not prove and the Court need not find the intention as distinct from the knowledge; it is sufficient to prove or to find one or the other to have existed."²

The offence of dishonest retention of property is almost contemporaneous with the offence of dishonestly receiving it. A man who dishonestly receives property, if he retains it, must obviously continue dishonestly to retain it. It would be different if the reception of the property were innocent, for then it would be for the prosecution to show at what stage guilty knowledge of the receiver supervened to make the retention dishonest.³ Where the stolen properties were pledged with the accused, it was held that he could not be convicted under s. 411.⁴

Thus a person cannot be convicted of 'receiving' if he had no guilty knowledge at the time of receipt. But he is guilty of 'retaining' if he subsequently knows or has reason to believe that the property was stolen. The offence of dishonest retention of stolen property may be complete without any guilty knowledge at the time of receipt.⁵ But in order to support a conviction of dishonestly retaining stolen property, it ought to be shown that the accused, being in innocent possession of the property, acquired the knowledge that it was stolen, and thereafter retained it dishonestly.⁶ A person who is proved to have dishonestly misappropriated property cannot be convicted of retaining it.⁷

As to the meaning of 'dishonestly', see s. 24, *supra*.

There must be dishonest receiving or retaining.⁸ The removal of a birth register from the possession of an official without his consent for producing it in Court to prove the date of birth of a certain person is held to be not an offence under this section or any other.⁹

Manual possession not necessary for receiving.—It is not necessary that the accused should have had manual possession of the goods; but directing a servant to dispose of them as by pawning or otherwise, will be sufficient to support the charge. Where stolen property was brought by the thief into A's shop, A, with guilty knowledge, called her servant and directed her to take the stolen goods to the pawn office and "pawn them for the girl" (the thief), and the servant did so accordingly and brought back the money, which she handed to the thief in her mistress's presence, it was held that this amounted to a receiving by A of the stolen property, though she had never the manual possession of either the goods or the money.¹⁰ Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter, it was held that the goods had come to be not merely in the potential possession of the consignee but actually within his power and unrestricted control, though he had not removed them from the station where they were then lying, nor made any attempt to do so, and that he had received them within the meaning of this section.¹¹

If exclusive possession remain in the thief, there cannot be a conviction for receiving. A and B, two thieves, were seen to come at midnight out of a house belonging to C's father, under the following circumstances. A carried a sack containing stolen goods, B accompanied him; C preceded them, carrying a lighted candle. All three went into an adjoining stable belonging to C, and then shut the door. Policemen entered the stable and found the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining: but no particular words were heard. It was held that on this evidence C could not be convicted of receiving stolen goods; inasmuch as although there was evidence of a criminal intent to receive, and of

² Per Plowden, J., in *Muhammad*, (1889) P. R. No. 15 of 1889, at p. 62.

³ *Saifal*, (1936) 18 Lah. 227, dissenting from *Najibulla Khan*, (1884) P. R. No. 18 of 1884.

⁴ *Rangayya*, [1939] M. W. N. 413, 49 L. W. 544, 40 Cr. L. J. 828.

⁵ (1869) 4 M. H. C. (Appx.) 42, 1 Weir 469.

⁶ *Khona*, (1879) P. R. No. 31 of 1879.

⁷ *Shanno Thi*, (1906) 3 L. B. R. 254, 5 Cr. L.

J. 413.

⁸ *Phul Chand Dube*, [1930] A. L. J. R. 220, 30 Cr. L. J. 1133, [1929] AIR (A) 917.

⁹ *Chuni*, (1914) 15 P. L. R. 177, sub. nom. *Chima*, (1914) 15 Cr. L. J. 522, [1914] AIR (L) 174.

¹⁰ *Miller*, (1853) 6 Cox 353; *Thomas Smith*, (1855) 24 L. J. (M. C.) 135.

¹¹ *Shewdhar Sukul*, (1913) 40 Cal. 99C.

a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C had no possession, either actual or constructive.¹² Where the accused, along with several others, was found in the house of one of them, quarrelling over the division of certain stolen property, which consisted of packages of cloth which had been cut through and were lying open in the house, it was held that the accused was in possession of the property and was guilty under this section and s. 414.¹³

Though manual possession is not necessary yet proof of an actual taking into some kind of possession is necessary. A stole fowls, and sent them by coach to Birmingham, in a box, not addressed to anyone; but A made a verbal statement, when he sent them, that a person would call for them at Birmingham. B inquired for the box; it was shown to her, and she claimed it but it was not delivered to her. It was held that B could not be properly convicted as a receiver.¹⁴

Any profit to receiver not necessary.—It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief.¹⁵

False claim is not receipt.—The circumstance that a person knew that the property was not his own and yet claimed it before the Magistrate in his deposition in a case, was held to be not sufficient for his conviction.¹⁶

It is legally possible for a person to abandon his property. Such property becomes first the property of nobody and then the property of the first person who reduces it into possession. Things of which the ownership has been abandoned are not capable of being stolen.¹⁷

"Res nullius" cannot be subject of receiving.—Where a bull was let loose, as part of a religious ceremony, and was the property of no one, it was held that it could not be the subject of an offence under this section, as the original owner had surrendered all his rights as its proprietor and that it was, therefore, *nullius in terra*.¹⁸

Receiving stolen property from child.—Where a child committed theft and was discharged under s. 83, this fact was held to be no bar to the conviction of the person who received the stolen property from the child under this section because the child had attained sufficient maturity of understanding so as to know the nature of the act.¹⁹

Joint possession.—A person having joint possession with the thief may be convicted as a receiver.²⁰ If the stolen property is found in joint possession of two or more persons then all of them may be convicted. There is no justification for the view that there cannot be joint criminal possession.²¹

Where property is found in a house in the possession of more persons than one, mere discovery of any stolen property in that house is not in itself sufficient to prove that the possession was of any of those persons.²² Three bags of grain, alleged to be stolen property, were found in a room which was in the occupation of two persons, and was locked at the time of the search. Both of them were convicted for being in possession of stolen property. It was held that looking to the nature of the stolen property, both the accused must have known that the grain was in their room, and the presumption was that they were both accomplices and in possession of the property. The Court said: "The rule as to exclusive possession is based on the principle that possession must be conscious and voluntary. When the article is so small that it might have been placed in the house by another inmate and overlooked by the accused, the accused is not in possession, for he was not conscious of the presence of the article".²³

Joint family possession.—Where stolen property is found in a house occupied by several persons, it is not enough to show that the property was found in the house,

¹² *John Wiley*, (1850) 4 Cox 412. See *Muhammad Ali Shet*, (1908) 19 M. L. J. 301, 9 Cr. L. J. 52.

¹³ *Parmeshwar Dayal*, (1926) 7 P. L. T. 567, 27 Cr. L. J. 657, [1926] AIR (P) 316.

¹⁴ *Catherine Hill*, (1849) 18 L. J. (M.C.) N. S. 199.

¹⁵ *Davis*, (1833) 6 C. & P. 177.

¹⁶ *Mutaya*, (1888) Unrep. Cr. C. 416.

¹⁷ *Tan Soon Li v. Burma Oil Co., Ltd.*, [1941] Ran. 153.

¹⁸ *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 343; *Jamuna*, (1884) 4 A. W. N. 87.

¹⁹ *Begarayi Krishna Saranu*, (1883) 6 Mad. 373.

²⁰ *Thomas Smith*, (1855) 24 L. J. (M. C.) 155.

²¹ *Diwan Singh*, (1932) 34 P. L. J. 576, 34 Cr. L. J. 634, [1933] AIR (L) 148.

²² *Muhammad Ali Shet*, (1908) 19 M. L. J. 301, 9 Cr. L. J. 52; *Ram Charan*, [1933] A. L. J. R. 1388, 34 Cr. L. J. 930, [1933] AIR (A) 437.

²³ *Jumo*, (1907) 1 S. L. R. 66, 67, 8 Cr. L. J. 184, 185.

to convict a member of the family who might have had nothing to do with bringing or keeping it there.²⁴ Where a boy had taken part in the commission of a dacoity, the presumption, which would naturally be drawn, would be that a wearing cloth which had been stolen and found in the house had remained in his possession, and the boy's father could not be made accountable for it merely because it was in the house which he and his son jointly occupied.²⁵ The manager of a joint Hindu family is *prima facie* responsible for the illegal possession of stolen articles found in his house, unless the presumption is rebutted upon the particular facts and circumstances of the case.¹ Where the only evidence of the receiving of stolen property by a wife was that the property was found in the house where she lived with her husband, it was held that the offence was not established, because the evidence pointed to the possession of the husband rather than that of the wife.² The bare finding of stolen property in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.³ The managing member of a joint Hindu family may be convicted of retaining stolen property. If knowledge of the presence in the house of the stolen property is established against the managing member, he must, as the house-master, be presumed to have been in possession of it.⁴

In a house occupied by a joint family including several male and female members certain stolen property was found in a locked box, the key of which was in the possession of the wife of one of the men who, however, was not in the house. The husband was convicted under this section. It was held that it could not be presumed that in every case of this kind the possession of the wife is *per se* the possession of the husband, and as there was nothing to connect the husband with the possession beyond the mere fact that he was the husband of the woman who had the key of the box, the conclusion that he was in possession of the property was not justified.⁵

Husband and wife.—*English law.*—Upon a joint charge against husband and wife, of receiving stolen goods, the wife cannot properly be convicted if the husband is.⁶ If the wife has voluntarily committed theft, the husband can be convicted of receiving stolen property from the wife.⁷ But if the wife has received stolen goods without the control or knowledge of and apart from her husband, the husband cannot be held guilty of receiving even though he afterwards adopts his wife's receipt.⁸ Bare acquiescence in the receipt of stolen property is not the adoption of receipt, so as to constitute receiving.⁹ A wife, in the absence of her husband, and without his knowledge, received stolen goods, and paid money on account of them. The thief and the husband afterwards met. The latter then learnt that the goods were stolen, he had agreed on the price which he was to pay for them, and paid the balance to the thief. It was held that the husband might be convicted of receiving the goods knowing them to be stolen.¹⁰

A husband and wife were jointly indicted for receiving stolen goods. There was evidence that the wife had received part of the stolen property from one of the thieves; there was no evidence that the husband was present at the time, and there was no evidence that the wife was acting under his compulsion. It was held that the wife was properly convicted of receiving stolen goods.¹¹

A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. The receiver, however, may be indicted for common law misdemeanour.¹²

²⁴ *Bashir Ahmad Khan*, (1919) 22 O. C. 256, 21 Cr. L. J. 40, [1939] AIR (O) 32; *Deonandan Jha*, [1937] P. W. N. 39, 37 Cr. L. J. 1123, [1936] AIR (P) 534.

²⁵ *Dwarika Lohar*, (1940) 42 Cr. L. J. 258, [1941] AIR (P) 223.

¹ *Musai Kamat*, (1920) 1 P. L. T. 481, 21 Cr. L. J. 757, [1920] AIR (P) 190.

² *Desilva*, (1873) 5 N. W. P. 120. See *Wardroper's Case*, (1860) Bell Cr. C. 249.

³ *Nirmal Das*, (1900) 22 All. 445; *Sangam Lal*, (1893) 15 All. 129; *Ram Autar*, (1925) 47 All. 511.

⁴ *Budh Lal*, (1907) 29 All. 598; *Sangam Lal*, (1893) 15 All. 129, 131.

⁵ *Khushi Ram*, (1922) 20 A. L. J. R. 162, 23 Cr. L. J. 386, [1922] AIR (A) 83; *Qaim Din*, (1924) 26 P. L. R. 522, 27 Cr. L. J. 249.

⁶ *Archer's Case*, (1826) 1 Mood. Cr. C. 143.

⁷ *M'Athey*, (1862) 9 Cox 251.

⁸ *Dring's Case*, (1857) Dears. & B. 329.

⁹ *James Orris*, (1908) 1 Cr. App. R. 199.

¹⁰ *Woodward*, (1862) 31 L. J. (M. C.) 91.

¹¹ *Mary Baines*, (1900) 19 Cox 524.

¹² *Kenny*, (1877) 2 Q. B. D. 307; *Streeter*, [1900] 2 Q. B. 601.

Where the only circumstance proved against the accused was that his wife produced the stolen properties from the house where both were living, it was held that this would not warrant the conviction of the accused under this section.¹³

'Stolen property.'—Property into or for which the stolen property has been converted or exchanged is not stolen property.¹⁴ Hence, money obtained upon forged money-orders¹⁵ is not stolen property; but mutton obtained by killing sheep which was stolen alive,¹⁶ or an ingot of gold or silver obtained by melting gold or silver articles which were stolen, does not cease to be stolen property.¹⁷

Under the English law it is held that money obtained by sale of property stolen,¹⁸ or currency notes of smaller denomination obtained in exchange of currency notes of higher denomination which were stolen¹⁹ are not stolen property. The Chief Court of Sind has held that when notes of higher denomination entrusted to a person are changed by him into notes of lower denomination the person holding those notes holds them in trust for the person who had given him and if misappropriated would be regarded as stolen property.²⁰

2. **'Knowing or having reason to believe the same to be stolen property'.**—The offence made punishable is not the receiving of stolen property from any particular person, but the receiving of such property knowing it to be stolen. "The word 'believe'... is a very much stronger word than 'suspect,' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property". "It was not sufficient [in such a case] to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired".²¹ A person is not guilty of this offence although at the time of receiving the property he erroneously believes it to be stolen;²² or where the articles are not of an unusual character but are such as easily pass from hand to hand.²³

"A person must be held to have 'reason to believe' property to be stolen within the meaning of s. 411... when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property, although the circumstances may fall short of carrying absolute conviction to his mind on the point".²⁴ See also s. 26, *supra*, as to the meaning of 'reason to believe'.

It is immaterial whether the receiver knows or not who stole them. The section does not apply to the actual thief. The class of persons against whom it is directed is a class to whom these alternative words apply, "knowing or having reason to believe the same to be stolen property".²⁵ Retention of property stolen during the mutiny in 1857 was held punishable.¹

Servant receiving goods knowing them to have been stolen.—Where A, knowing that goods were stolen, directed B, his servant, to receive them into his premises,

¹³ *Marimuthu Kavandan*, [1941] M. W. N. 479 (2), (1941) 42 Cr. L. J. 738, [1941] AIR (M) 694.

¹⁴ *Subha Chand*, (1881) P. R. No. 39 of 1881.

¹⁵ *Monmohun Roy*, (1875) 24 W. R. (Cr.) 33.

¹⁶ *Cowell v. Green*, (1796) 2 East P. C. 617.

¹⁷ *Ganu Vitlu Ghode*, (1942) Criminal Appeal No. 187 of 1942, decided by Beaumont, C. J., and Wassoodew, J., on June 30, 1942 (Unrep. Bom.). "It is necessary to prove that the property, which is produced, is the property which was stolen, but it need not necessarily be produced in the form which it possessed when it was stolen. If a gold necklace is stolen, and exchanged for another necklace or a bullock, it is obvious that the second necklace or the bullock is not stolen property. But, if the gold necklace is melted down and converted into an ingot, it does not cease to be the same gold as was in the necklace. What was stolen was gold in the form of a necklace, and what is produced is the same gold in the form of an ingot."

¹⁸ *Chapple*, (1840) 9 C. & P. 355.

¹⁹ *Walkley*, (1829) 4 C. & P. 133.

²⁰ *Sugnomal Bhojraj*, (1944) 46 Cr. L. J. 243, [1944] AIR (S) 237.

²¹ Per Melville, J., in *Rango Timaji*, (1880) 6 Bom. 402, 403, followed in *Kanniappa Naicker*, [1918] M. W. N. 696, 14 Cr. L. J. 591; *The Crown Prosecutor v. Sankara Narayana Chetti*, (1916) 4 L. W. 53, 17 Cr. L. J. 312; *Muhammad Ibrahim*, (1915) 17 Cr. L. J. 25; *Abdur Rahim*, (1926) 27 Cr. L. J. 1144, [1927] AIR (N) 40; *A. G. Edgecombe*, [1928] AIR (C) 264; *Suraj Prasad*, [1929] 6 O. W. N. 208, 30 Cr. L. J. 969, [1929] AIR (O) 213; *Bhagga*, (1935) 11 Luck. 70.

²² *Issup*, (1888) Cr. R. No. 41 of 1888, Unrep. Cr. C. 389.

²³ *Ravaji*, (1892) Cr. R. No. 13 of 1892, Unrep. Cr. C. 594; *Mowlabux*, (1910) 4 S. L. R. 159, 11 Cr. L. J. 730; *Gaya Prasad*, (1931) 8 O. W. N. 517, 32 Cr. L. J. 1184; *Gian Chand*, (1932) 33 P. L. R. 572, 33 Cr. L. J. 764.

²⁴ Per Rattigan, J., in *Gulbad Shah*, (1888) P. R. No. 37 of 1888, p. 95.

²⁵ *Johri*, (1901) 23 All. 266.

Sita Ram, (1891) 1 O. D. 391.

and B, in pursuance of that direction, afterwards received them in A's absence, B knowing that they had been stolen, they were jointly indicted for receiving them.²

Amendment.—After the expression 'in respect of which' there were the words 'the offence of'. But the word 'the' was repealed by Act XII of 1891; and the words 'offence of', by Act VIII of 1882, s. 9, as a result of the decision in *Moorga Chetty's* case.³

The words 'whether the transfer, etc., British India' were, as heretofore said, inserted by Act VIII of 1882, s. 9.

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property.⁴

The goods received must be the identical goods which were stolen, and not something for which they had been sold or exchanged.⁵ The finding must be that the accused received the very property stolen, not property like it.⁶ If it is manifestly impossible to recognize the stolen property no conviction could be made.⁷

Where the stolen property consisted of cereals, the fact that the cereals found in the house of a person residing in the same village corresponded with the alleged stolen cereals was held to be not sufficient to establish the identity of the stolen cereals with those found.⁸

(2) That the accused received or retained such property.

There must be some proof that some person other than the accused had possession of the property before the accused got possession of it.⁹

Where property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner, it is for the party in whose possession the property is found duly to account for its possession, and, unless he can do so, a jury might fairly infer in such circumstances that it was with a guilty knowledge that the accused took that which he knew to be not his own.¹⁰ The prosecution must establish not only that the stolen property was recovered from the house, or other place in the occupation of the culprit, but also that the incriminating article was in the house or other place and the culprit was fully aware of its presence there.¹¹ But possession of property which has been stolen from the owner is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume, in the absence of explanation, that the person in whose possession the property is found must have obtained the possession by stealing.¹² If, however, the person gives a reasonable explanation of the possession, the Court should not find him guilty even if it is not affirmatively satisfied that such explanation is true. Where the accused has not been asked to offer any explanation of possession, his conviction cannot be maintained even if the evidence as to possession is accepted.¹³ Mere recent possession of stolen property is not alone sufficient, as such possession is in general evidence of stealing and not of receiving.¹⁴ The possession of stolen goods by the accused must be possession soon after the theft or the stolen goods must have been 'recently' stolen.¹⁵ Possession of stolen goods a few months after theft raises no presumption that the possessor knew or had reason to believe the goods to be stolen.¹⁶ If the possession is not a recent possession the accused ought not

² *Parr*, (1841) 2 Mood. & Rob. 346.

³ (1881) 5 Bom. 338, F.B.

⁴ *Buldeo Pershad*, (1870) 2 N. W. P. 187; *Ishan Chandra Chandra*, (1893) 21 Cal. 328; *T. Burke*, (1884) 6 All. 224; *Mutaya*, (1888) Unrep. Cr. C. 416.

⁵ *Subha Chand*, (1881) P. R. No. 39 of 1881.

⁶ *Bava Chela*, (1886) Cr. R. No. 5 of 1886, Unrep. Cr. C. 227; *Gobinda Maharana*, (1941) 43 Cr. L. J. 648, [1942] AIR (P) 304 (1).

⁷ *Lal*, (1912) 13 P. L. R. 616, 13 Cr. L. J. 720.

⁸ *Shaikh Sharafat*, (1920) 1 P. L. T. 727; 21 Cr. L. J. 673; *Udho Singh*, (1941) 42 Cr. L. J. 810, [1941] AIR (P) 614.

⁹ *Ishan Muchi*, (1888) 15 Cal. 511; *Shivram*, (1875) Unrep. Cr. C. 98. See *Nga Kywet*, (1900)

1 L. B. R. 39, where this rule which is based on English precedents, is not followed.

¹⁰ *Shuruffooddeen*, (1870) 13 W. R. (Cr.) 26; *Ramjoy Kurmoker*, (1876) 25 W. R. (Cr.) 10; *Hari Ramji*, (1906) 9 Bom. L. R. 27, 5 Cr. L. J. 63.

¹¹ *Maharaj Singh*, [1945] All. 290.

¹² *Poromeshur Aheer*, (1875) 23 W. R. (Cr.) 16; *Sami*, (1890) 13 Mad. 426.

¹³ *Baidyanath Mahanty*, (1940) 23 P. L. T. 500, 43 Cr. L. J. 234, [1942] AIR (P) 145.

¹⁴ *Nihal Singh*, (1866) P. R. No. 31 of 1866; *Najibulla Khan*, (1884) P. R. No. 18 of 1884; *Jowaya*, (1887) P. R. No. 46 of 1887.

¹⁵ *Hathim Mondal*, (1920) 31 C. L. J. 310, 24 C. W. N. 619, 21 Cr. L. J. 455, [1920] AIR (C) 342; *Baboo Lal*, (1932) 9 O. W. N. 1169.

¹⁶ *Aha*, (1924) 1 Lah. C. 471.

to be called upon to explain how his possession was acquired. The question of what is, or what is not, recent possession is to be considered with reference to the nature of the article stolen.¹⁷ Where a revolver was stolen in October and was recovered from the possession of the accused in the following May it was held that it could be presumed that the accused was either the thief or retainer of stolen goods.¹⁸ Where a stolen revolver was found in the possession of the accused who were engaged in collecting arms and explosive substances and it appeared that the theft was not at all recent, it was held that the mere fact of possession was not sufficient for a conviction under this section.¹⁹ Whether a presumption of theft or of receipt of stolen property should be drawn would depend on the circumstances, the length of time that has elapsed after the theft, how much of stolen property is found in the possession of the person in question, the circumstances which led to the recovery and other facts connected with the discovery of the property.²⁰ It is a presumption of fact, and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing, or of receiving, has been committed. Where the accused was found in the recent possession of some stolen sheep, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself, it was held that there was evidence for the jury that he received them knowing them to have been stolen.²¹ Where a stolen horse was found in the possession of the accused six months after it was lost, and there was no other evidence against the accused, was not called upon for his defence as the possession was not sufficiently recent.²² Possession of a stolen buffalo five or six, or even four or five months, after the offence, is not such possession as will constitute proof of an offence under this section.²³ Some bullocks were stolen, and one of them was discovered in the house of the accused fifteen months after the theft. It was held that in view of this long lapse of time between the theft and the discovery of the stolen property, the onus of proving innocent possession should not have been cast on the accused. The fact that the accused when asked to explain his possession of the animal gave an explanation which was not satisfactory was not a sufficient ground for his conviction.²⁴ Where ordinary keys of the value of Rs. 2-8-0 were found in the possession of a man of substance more than three months after the theft, it was held that having regard to the length of time there was no presumption that the accused knew or had reason to believe the property to be stolen.²⁵ Where the accused was found in possession of stolen property two months after the theft was committed, and gave no account of how he became possessed of it, but denied that he was ever in possession of any of the articles stolen, it was held that the accused should be convicted under this section and not under s. 379.¹ Where valuable jewellery which was stolen or otherwise lost to the owner was found under circumstances of grave suspicion in the possession of the accused about two years after the theft or loss, and the accused refused to disclose the name of the person from whom he received the same or to give the particulars as to the origin of his possession, the Court drew an inference of guilty knowledge on the part of the accused.² Where the accused, the father-in-law of one S, who was the cousin of the thief, was found in possession of the stolen property three days after the theft and he disposed of it in a somewhat suspicious manner, it was held that the circumstances, though they formed grounds for grave suspicion against

¹⁷ *Ina Sheikh*, (1885) 11 Cal. 160; *Ravaji*, (1892) Cr. R. No. 13 of 1942, Unrep. Cr. C. 594; *The District Magistrate of Bellary v. Obbava*, [1912] M. W. N. 529; *Nga E*, (1885) S. J. L. B. 354; *Phul Khan*, (1936) 38 P. L. R. 975, 38 Cr. L. J. 871, [1937] AIR (L) 246.

¹⁸ *Reoti*, (1933) 34 Cr. L. J. 1018, [1933] A. L. J. R. 523, [1933] AIR (A) 461.

¹⁹ *Dharani Kanta Chakrabarty*, (1932) 57 C. L. J. 57, 35 Cr. L. J. 226, [1933] AIR (C) 594.

²⁰ *Sessions Judge of Vizagapatam v. Gorle Kandungadu*, [1912] M. W. N. 97, 13 Cr. L. J. 140; *Imamuddin Khan*, (1936) 17 P. L. T. 754, [1936] P. W. N. 677, 38 Cr. L. J. 349, [1937] AIR (P) 112.

²¹ *Langmead*, (1864) 9 Cox 464; *McMahon*, (1875) 13 Cox 275.

²² *Cooper*, (1852) 3 C. & K. 318. See, to the

same effect, *Ram Chandra Saha v. Haji Meah Haji Abdullah*, (1913) 17 C. W. N. 1129, 14 Cr. L. J. 571, [1914] AIR (C) 273, where the Court refused even to issue process against a shroff in whose possession a Government currency-note of the value of Rs. 1,000 was traced seven months after its loss. See also *Vellai Ocha Thevan*, [1912] M. W. N. 362, 13 Cr. L. J. 475; *Mangaya Shah*, (1915) 17 P. L. R. 175, 17 Cr. L. J. 68, [1916] AIR (L) 288; *Muthu Veera Velan*, [1929] M. W. N. 517, 30 Cr. L. J. 542.

²³ *Hashim Umar*, [1942] Kar. 186.

²⁴ *Narain Singh*, (1928) 29 P. L. R. 441, 29 Cr. L. J. 464, [1928] AIR (L) 687.

²⁵ *Joenullah Bepari*, (1918) 22 C. W. N. 597, 19 Cr. L. J. 702.

¹ *Madappa Teva*, (1888) 1 Weir 471.

² *Ram Pershad*, (1924) 2 Ran. 80.

the accused, did not furnish conclusive evidence against him for his conviction under this section.³ Lapse of time after the article was stolen is usually an important factor in determining the guilt of the accused, but the importance to be attached to it must vary with the circumstances of the individual case and will depend largely on the frequency with which the property is likely to have changed hands. No maximum period can be suggested as that beyond which no inference of guilt can be drawn.⁴ There can be no hard and fast rule as to time when an accused person should not be called upon to explain the possession of ordinary articles found with him after the commission of dacoity at which they were stolen. Two and a half months after a dacoity is, however, not a long time and where such articles are recovered two and a half months after the dacoity it cannot be presumed that the accused had no guilty knowledge.⁵ Where the stolen property is traced to the accused's possession two months after the theft there is no presumption against him under this section.⁶ Where property is alleged to have been stolen some three years before it is found in possession of a person, very clear evidence is required to show that he must have known it to be stolen.⁷

Illustration (a) to s. 114 of the Indian Evidence Act means that where the accused person has been found in possession of stolen goods soon after the theft, the Court may draw a presumption and may act on it if the accused cannot account for his possession, but this illustration does not mean that the burden of proof is shifted to the accused, so that he must prove affirmatively that he came by the goods innocently. It is sufficient if he can give an explanation which may raise doubt in the mind of the Court as to the guilt of the accused—which in the opinion of the Court may possibly be true. So, where a conviction under this section was based on the presumption aforesaid, the Court saying that the burden of proving his bona fides was thrown on the accused and that the oral testimony on behalf of the accused to prove that he had purchased the goods from a certain person was not very reliable, it was held that the conviction was illegal.⁸ Even if it be found that the accused was the sole occupant of the room it does not necessarily follow that he must have been aware of the presence in the room of all the articles that were found therein. It is incumbent upon the Court to consider the circumstances of the occupation of the room and to consider whether it was reasonably possible for other persons to introduce the articles into the room without the accused's knowledge.⁹ Upon the prosecution establishing that the accused was in possession of goods recently stolen, the jury may, in the absence of any explanation by the accused of the way in which the goods came into his possession which might reasonably be true, find him guilty, but that if an explanation were given which the jury think might reasonably be true, and which is consistent with his innocence although they were not convinced of its truth, the accused is entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused.¹⁰ If a person of his own accord hands over stolen property to the police in order to assist them in investigation, it cannot be said to give rise to a presumption that he is the receiver of the stolen property in the criminal sense. On the contrary, the presumption would rather be that he had a clear conscience in the matter.¹¹

Under s. 410 property which has been criminally appropriated is designated stolen property and there is no logical reason why a man who is in possession of goods soon after they have been criminally misappropriated, if he cannot account for his possession, should be regarded as less likely to have misappropriated them or to have received them knowing them to have been misappropriated than if they had been the subject of theft.¹²

Recognition of things not before the eyes of deposing witnesses is not evidence against a person accused of having been in possession of those things.¹³

³ *Asvini Kumar Roy*, (1905) 10 C. W. N. 219, 3 Cr. L. J. 195.

⁴ *Smith*, (1917) 19 Cr. L. J. 189, [1918] AIR (M) 111.

⁵ *Jwala*, (1927) 28 Cr. L. J. 638, [1927] AIR (O) 277.

⁶ *Ramudu Aiyar*, (1922) 44 M. L. J. 243, 17 L. W. 370, [1923] AIR (M) 365.

⁷ *Lal Singh*, (1914) 15 P. L. R. 373, [1914] AIR (L) 84, 15 Cr. L. J. 521.

⁸ *Hori Lal*, (1933) 56 All. 250; *Jagannath*, [1945] All. 11.

⁹ *Indu Bhusan Pal*, (1942) 43 Cr. L. J. 561, [1942] AIR (C) 440.

¹⁰ *Gfeller*, [1943] A. L. J. R. 502, (1943) 45 Cr. L. J. 241, (1943) AIR (P. C.) 211.

¹¹ *Hata*, (1941) 44 Cr. L. J. 186, [1943] AIR (L) 4.

¹² *Rami Reddi*, (1944) 58 L. W. 209, [1945] 1 M. L. J. 207, [1945] M. W. N. 107, [1945] AIR (M) 208.

¹³ *Mussamut Joonnee*, (1867) 8 W. R. (Cr.) 16.

Joint possession.—Where the stolen articles are merely pointed out and produced by the accused from a place of which he has only joint possession, the possession of the articles must be clearly traced to him.¹⁴ Where incriminating articles are recovered from a place in the occupation or possession of more persons than one and it is not possible to fix the liability on any particular individual a Court is not bound to hold that the said articles were in possession or under the control of the head of the family.¹⁵

(3) That he did so dishonestly.¹⁶ Where a person is found in possession of stolen property dishonest retention on his part must be proved. The mere fact that his conduct is suspicious is not sufficient to repose a conviction upon.¹⁷ The onus is on the prosecution to prove that the accused received the property dishonestly, and not on the accused to show that he received it honestly.¹⁸

In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, possession should be clearly traced to the accused.¹⁹

Where there was not only the recovery of the stolen property at the instance of the accused but there was the evidence of witnesses to show that the accused had for sale certain property proved to be stolen and the accused offered no explanation as to how he came into possession of that property, it was held that he was guilty under this section.²⁰

(4) That he knew or had reason to believe that the property was stolen property.²¹

As to the proof of the receiver's guilty knowledge, from the caution necessary in this sort of traffic, it must often happen that no express disclosure is made to him and yet that he knows the property to have been stolen as well as if he had actually witnessed the theft. In this, as in other cases, it is sufficient if circumstances are proved, which, to persons of ordinary understanding in the situation of the accused person, must have led to the conclusion that the property was stolen or otherwise dishonestly acquired. Thus, if it is shown that the accused received large quantities of money, ornaments, bundles of clothes of various kinds or movables of any sort from persons destitute of property and without any apparent lawful means of acquiring it, and especially if it is proved that the property was brought at untimely hours and under circumstances of evident concealment, it may well be concluded that it was received with a full understanding of the guilty mode by which it has been acquired. And this will be still further confirmed, if it appears that the property was purchased for a sum far below its real value, or was concealed in places not usually employed for keeping such property, or if the marks on it are effaced, or if false or inconsistent stories are told as to the mode of its acquisition. Another circumstance from which such guilty knowledge may be inferred is that the property has been received from a notorious thief or one from whom stolen property has on previous occasions been received.²² Where a question of value of the property stolen is to arise there must be direct evidence of value.²³

Where the circumstances do not raise the presumption that a person received the property knowing it to be stolen, the accused cannot be convicted of this offence merely because he is in possession of the property and does not account for his possession.²⁴ The Court must be satisfied that the property was stolen by some other person to the knowledge of the accused and there should be some evidence to show that such was the case.²⁵ The stealing by the other person must be proved, otherwise the receiver must be acquitted.¹

¹⁴ *Chandappa Pujari*, (1944) 47 Bom. L. R. 63; *Maharaj Singh*, [1945] All. 290; *Ramaswamy*, [1946] 2 M. L. J. 435, [1946] M. W. 732, 48 Cr. L. J. 720.

¹⁵ *Santa Singh*, (1944) 26 Lah. 137.

¹⁶ *T. Burke*, (1884) 6 All. 224.

¹⁷ *Ghansham Das*, (1925) 26 P. L. R. 165.

¹⁸ *Kartar Singh*, (1928) 29 Cr. L. J. 594.

¹⁹ *Malhari*, (1882) 6 Bom. 731.

²⁰ *Abdul Rahim*, (1934) 11 O. W. N. 905, 35 Cr. L. J. 1130, [1934] AIR (O) 399.

²¹ *Doyal Shilydar*, (1866) 6 W. R. (Cr.) 87; *Meer Yar Ali*, (1870) 13 W. R. (Cr.) 70;

Dussorut Dass, (1872) 18 W. R. (Cr.) 63; *Bujo Huri*, (1873) 19 W. R. (Cr.) 37.

²² *M. & M.* 373.

²³ *Mahboob*, (1920) 21 Cr. L. J. 552.

²⁴ *T. Burke*, (1884) 6 All. 224; *Bharos*, (1928) 21 A. L. J. R. 836, 25 Cr. L. J. 942, [1924] AIR (A) 192; *Yasinkhan*, (1923) 19 N. L. R. 176, 24 Cr. L. J. 960, [1924] AIR (N) 48; *Fateh Ali*, (1941) 46 C. W. N. 54.

²⁵ *Densley*, (1834) 6 C. & P. 399; *Rajendra Nath Laha*, (1935) 18 P. L. T. 210, [1936] P. W. N. 98, 38 Cr. L. J. 129, [1937] AIR (P) 191.

¹ *Woolford*, (1834) 1 Mood. & Rob. 384.

The mere fact that a person points out a place where stolen property is concealed, if the place is not in his own house or in his own field, but is in the field of another man, is not sufficient to entitle the Court to find that the person who pointed out the stolen article had received it, or retained it, knowing it to be stolen. There must be some evidence which suggests that the accused himself concealed the article in the place where it was found.²

A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.³ The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity,⁴ or some such other offence.

On an indictment against A for stealing, and B for receiving stolen goods, evidence was given that on various former occasions portions of the commodity stolen had been missed, and the accused had, after such occasions, been found selling such commodity; and that on the last occasion it was part of what was stolen. It was held that this was sufficient to fix the receiver with a guilty knowledge.⁵

Upon the trial of an accused person for feloniously receiving stolen property, a list of the stolen articles which the accused, who was a marine-store dealer, had bought, was received in evidence in order to show that he had bought at an under-value. The circumstances under which the list was written were as follows: A police constable asked the accused to consider when he had bought the stolen property, to which the accused replied that his wife should make out a list of it, and on the next day the accused's wife in her husband's hearing said, "this is a list of what we bought, and what we gave for them." On the question whether the list was properly admitted in evidence, it was held that it was clearly admissible in evidence.⁶

A principal felon is a competent witness against an accessory for receiving stolen property.⁷ An admission of his guilt, made by the thief while in custody, in the presence of the receiver, is evidence against the receiver.⁸ But it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed.⁹ The mere fact that stolen goods were found on the accused's premises is not sufficient to confirm the evidence of the thief.¹⁰

Where stolen property is found in the possession of dacoits the offence of "knowingly having in possession" is to be considered as included in the original one of dacoity, unless there are circumstances clearly separating the one crime from the other, e.g., length of time, or distance.¹¹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if the property is not worth more than Rs. 50.

A Magistrate cannot assume jurisdiction to try an offence under this section, in a summary form, unless he satisfies himself that the property in respect of which he is trying the accused is less than Rs. 50 in value, and he must record the fact in the form prescribed in s. 263 of the Criminal Procedure Code. Where there is no such reference in the record of the case, the conviction is bad.¹²

Venue.—A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were

² *Gobinda*, (1895) 17 All. 576; *Paimullah*, (1911) 16 C. W. N. 288, 13 Cr. L. J. 127; *Public Prosecutor v. Pakriswamy*, [1929] M. W. N. 785, 30 L. W. 791, 57 M. L. J. 548, 31 Cr. L. J. 449, [1929] AIR (M) 846; *Hamada*, (1906) 4 Cr. L. J. 176; *Pir Bakhs*, (1911) 13 P. L. R. 140, 13 Cr. L. J. 28; *Mehru*, (1913) 14 P. L. R. 1058, 14 Cr. L. J. 602; *Barkat Ali*, (1916) P. R. No. 2 of 1917, 18 Cr. L. J. 29; *Indar Singh*, (1920) 24 Cr. L. J. 587, [1921] AIR (L) 385; *Mata Prashad*, [1943] O. W. N. 96, (1943) 44 Cr. L. J. 473, [1943] AIR (O) 298.

³ Illustration (a) to s. 14, Indian Evidence Act.

⁴ *Malhari*, (1882) 6 Bom. 731.

⁵ *William Nicholls*, (1858) 1 F. & F. 51.

⁶ *Mallory*, (1884) 13 Q. B. D. 33.

⁷ *Haslam's Case*, (1876) 1 Leach 418.

⁸ *Moulton Cox*, (1858) 1 F. & F. 90.

⁹ *Robinson*, (1864) 4 F. & F. 43.

¹⁰ *Pratt*, (1865) 4 F. & F. 315.

¹¹ *Abool Hossein*, (1814) 1 W. R. (Cr.) 148.

¹² *Brij Nandan Panday*, (1922) 6 P. L. T. 114, 25 Cr. L. J. 545, [1922] AIR (P) 227.

stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.¹³

Property belonging to different owners.—Where a person was found in possession of stolen property, identified as belonging to different owners, but it did appear that he had received such property at different times, it was held that such person could not properly be tried and convicted under this section separately in respect of the property identified by each owner.¹⁴ The onus in such a case lies on the prosecution to establish that the property was received by the accused at different times, and it is not for the accused to prove that he had received the same at one time.¹⁵

Separate trials in respect of different items of stolen property.—In the house belonging to two brothers, three items of stolen property were discovered, namely, a quantity of unused postage stamps, some carpets, and some buckets and padlocks. There was no evidence to show that the stamps and carpets had been received by the brothers on different dates. On a charge of dishonestly retaining the carpets, one brother was acquitted and the other convicted. Proceedings against them were also instituted in respect of dishonest retention of the stamps. The accused pleaded that as the stamps had been discovered at their house on the same date and at the same place as the carpets, only one offence in respect of these two items of property had been committed and that as they had already been tried in respect of the carpets they could not be tried in respect of the stamps. It was held that they could not be so tried.¹⁶ Where the property stolen formed the contents of a single parcel, a single offence in respect of all the articles contained in the parcel and not separate offences in respect of the different articles should be treated as the basis of the conviction.¹⁷

When a person is in possession of various stolen articles he cannot be convicted separately in respect of each article unless the prosecution establish that there were different acts of receiving in respect of these articles.¹⁸

Person committing theft or breach of trust not liable as receiver.—A person cannot be convicted under this section in respect of property for which he himself has been convicted.¹⁹ The theft and taking and retention of stolen goods form one and the same offence, and cannot be punished separately.²⁰ When the chief offence charged and proved by the evidence is theft, the fact of the stolen property being found in the possession of the offender should be considered as a portion of the evidence by which the chief offence is proved; and the verdict of 'not guilty' should be entered upon the charge of dishonestly receiving or retaining such property.²¹

Direction to jury.—It is no misdirection for a Judge to tell the jury that, if the accused could not prove how he became possessed of certain articles, it was their duty to convict him, for the presumption in such a case was legally valid that he knew that the property had been unlawfully acquired.²² The Sessions Judge should direct the jury to find (1) whether the property was stolen, (2) whether it was dishonestly retained, and (3) whether the accused knew or had reason to believe the same to be stolen property.²³ The proper way to charge the jury in a case under ss. 411 and 414 would be to tell that when once the presumption under s. 114, Indian Evidence Act, ceased to be applicable, there is no evidence of guilty knowledge at all. Omission to state this is a misdirection. The omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant, particularly in a case where the jury had been addressed by advocates on each side. But the omission to make it clear to them exactly what they have to decide and how they have to proceed to decide it, or the stating of points in a manner which is positively misleading is a very serious misdirection, since it is the business of the Judge to explain clearly to the jury what is the point which they have to decide.²⁴ In cases of receiving

¹³ Criminal Procedure Code, s. 180, ill. (b).

¹⁴ *Makhan*, (1898) 15 All. 317; *Sheo Charan*, (1923) 45 All. 485; *Ganesh Sahu*, (1923) 50 Cal. 594; *Maiku*, (1890) O. S. C. 167, 1 O. D. 252; *Munwa*, (1923) 26 Cr. L. J. 1, [1925] AIR (O) 298; *Chanan Singh*, (1936) 37 Cr. L. J. 752.

¹⁵ *Hayat*, (1928) 10 Lab. 158.

¹⁶ *Bishun Singh*, (1924) 3 Pat. 503.

¹⁷ *Ram Pershad*, (1924) 2 Ran. 80.

¹⁸ *Jalal*, (1932) 34 Cr. L. J. 458, 34 P. L. R.

433, [1932] AIR (L) 615.

¹⁹ *Shunkur*, (1870) 2 N. W. P. 312.

²⁰ *Sreemunt Adup*, (1865) 2 W. R. (Cr.) 68; *Seeb Churn Haree*, (1869) 11 W. R. (Cr.) 12.

²¹ (1864) 1 W. R. (Cr. Cir.) 2.

²² *Narain Bagdee*, (1866) 5 W. R. (Cr.) 3.

²³ *Balya Somya*, (1890) 15 Bom. 369.

²⁴ *Rajendra Nath Laha*, (1935) 38 Cr. L. J. 129, 18 P. L. T. 210, [1936] P. W. N. 98, [1937] AIR (P) 191.

stolen property the onus of proof never passes to the accused. The Crown must prove guilty knowledge. Under s. 114, ill. (a), of the Indian Evidence Act, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen unless he can account for his possession. If he gives an account of his possession which may reasonably be true, though the jury are not convinced that it is true, and there is no other evidence of his guilty knowledge, the accused is entitled to an acquittal.²⁵

Joint trial.—Under s. 239 of the Criminal Procedure Code, several accused can be tried jointly for offences under this section, provided the property was originally stolen on one occasion.¹ If more than one offence of theft has been committed in respect of certain property which could be designated as stolen property, within the meaning of s. 410, then the persons in possession of such stolen property which has been secured by means of the commission several offences of theft or robbery, etc., cannot be tried jointly according to the provisions of cl. (f) of s. 239 of the Code of Criminal Procedure.² A person accused of an offence under s. 457 can, by virtue of s. 239 (e), Criminal Procedure Code, be legally charged and tried with persons accused of receiving or retaining the stolen property.³

Charge.—The charge should state that the articles found in possession of the accused were the property of a certain person, who was the owner thereof.⁴ It should also set forth that the accused knew or had reason to believe that the property he received was stolen property, for without this knowledge or belief, the offence is not complete.⁵

The charge should be as follows :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, dishonestly received (or retained) stolen property, to wit—, belonging to one AB, knowing or having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under s. 411 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—In general a sentence of fine in the case of a receiver of stolen property is an improper and a futile sentence, inasmuch as the fine is a mere temporary diminution of the receiver's illegitimate profits.⁶ That one of the accused is a member of the criminal tribe is no ground for differentiation of sentence so far as he is concerned for an offence under this section.⁷

412. Whoever dishonestly¹ receives or retains² any stolen property,³ the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity,⁴ or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The object of this section is to stamp out the offence of dacoity which was very common when the Code was enacted.

²⁵ *Daud Shaikh*, (1985) 40 C. W. N. 159, 62 C. L. J. 257, 37 Cr. L. J. 976.

¹ *Lakha Amra*, (1931) 34 Bom. L. R. 301, 33 Cr. L. J. 394, [1932] AIR (B) 201; *Musammatt Guljania*, (1927) 6 Pat. 583; *Shakur*, [1935] O. W. N. 911, 36 Cr. L. J. 1206.

² *Bhaggan*, (1935) 11 Luck. 70.

³ *Nawab*, (1936) 18 Lah. 62.

⁴ *Siddu Balnath*, (1863) 1 B. H. C. 95.

⁵ (1865) 4 W. R. (Cr. L.) 11.

⁶ Per Batchelor, J., in *Isarising*, Cr. Reference No. 97 of 1915, decided on November 16, 1915 (Unrep. Bom.).

⁷ *Somanna*, [1941] 2 M. L. J. 253, [1941] M. W. N. 480, (1940) 54 L. W. 479, 42 Cr. L. J. 824, [1941] AIR (M) 708.

This section refers to persons other than the actual dacoits. It implies receipt from another person or an act by one not himself the dacoit.⁸ The receiver is punishable under it as severely as those who commit dacoity. The offence under this section is much more serious than the offence under the preceding section.

1. 'Dishonestly'.—See s. 24, *supra*.

2. 'Receives or retains'.—See s. 411, *supra*. A person cannot be convicted for "receiving or retaining stolen goods" unless he is shown at the material time to have been in possession or control of the place where they were discovered or at least to have had some knowledge of their deposit there.⁹

Such receipt or retention must have taken place in British India to give jurisdiction to Courts. Certain persons, who were not proved to be British subjects, were found in possession in a Native State, of property, the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under this section. It was held that no offence was proved to have been committed within the jurisdiction of a British Court.¹⁰

3. 'Stolen property'.—See s. 410, *supra*.

4. 'Possession... transferred by the commission of dacoity'.—See s. 27, *supra*. The possession contemplated is exclusive possession, otherwise the receiver or the possessor of the stolen property would run the risk of losing the stolen property, if some one else could get hold of it. Where in a case of dacoity the only evidence against the accused was that he produced stolen property from under a tree in a certain field not belonging to him, it was held that the evidence was not enough to prove his complicity in the commission of the dacoity. The accused could not be said to be in exclusive possession of the stolen property as anybody could have access to the tree in the field where it was buried, and so he could not be convicted under this section or s. 411.¹¹ Mere recent possession of property taken in dacoity does not necessarily lead to the presumption that the person in possession is guilty under this section. In most cases the presumption would be of an offence under s. 411.¹² In a trial for an offence under this section, the presumption permitted by s. 114 of the Indian Evidence Act, 1872, does not arise until the prosecution has established three facts—namely the ownership of the articles in question, the theft of them, and their recent possession by the accused. It is not a reasonable explanation of his possession for the accused to deny the existence of these facts. The explanation which renders the presumption unavailable to the prosecution is an explanation of how articles belonging to the complainant are found in possession of the accused shortly after they had been stolen from the possession of the complainant. It is only when the explanation offered by the accused is with regard to that possession, that the presumption does not arise.¹³

'Reason to believe'.—See s. 26, *supra*. 'Dacoity'.—See s. 391, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property in question was stolen property.¹⁴

(2) That the possession of such property was transferred by the commission of dacoity.

(3) That the accused received or retained such stolen property.

Where no stolen property was recovered from the accused, but some of it was given up by his step-father with whom the accused was living, it was held that the accused could not be convicted under this section, without sufficient proof that the property had been taken by the accused to the house inhabited by him and his step-father.¹⁵

⁸ *Bahiru*, (1886) Cr. R. No. 65 of 1886, Unrep. Cr. C. 312.

⁹ *Aftab Mohammad Khan*, [1940] A. L. J. R. 206, (1939) 41 Cr. L. J. 647, [1940] AIR (A) 291.

¹⁰ *Kirpal Singh*, (1887) 9 All. 523; *Muhammad Hussain*, (1923) 23 Cr. L. J. 560; *Gunna*, (1926) 48 All. 687.

¹¹ *Ram Aular*, (1936) 12 Luck. 88.

¹² *Chavadappa Pujari*, (1944) 47 Bom. L. R. 63.

¹³ *Dhyanigope*, (1946) 25 Pat. 262.

¹⁴ *Vide* s. 410, *sup*.

¹⁵ *Mahabir*, (1933) 10 O. W. N. 842, 33 Cr. L. J. 165, [1933] AIR (O) 423.

(4) That he did as in (3) dishonestly.¹⁶

(5) That he knew or had reason to believe the circumstances stated in (2).¹⁷

Or prove (1) that the property in question was stolen property.

(2) That the accused received it.

(3) That he received it from a person who belonged to or had belonged to a gang of dacoits.

(4) That he did as in (3) dishonestly.

(5) That he knew or had reason to believe that the person from whom he received the property belonged to or had belonged to a gang of dacoits.

(6) That he knew or had reason to believe that the property was stolen property.

Onus.—It is for the prosecution to prove guilty knowledge. The onus of proof never passes to the accused.¹⁸

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where the accused is apprehended soon after a dacoity, with part of the plunder in his possession, there is as good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.¹⁹ But when stolen property is found in the possession of dacoits, the offence of 'knowingly having it in possession' is to be considered included in the original one of dacoity, unless there are circumstances clearly separating the one crime from the other, e.g., length of time or distance.²⁰ Separate convictions and sentences under s. 395 and this section with respect to the same property are, therefore, obviously improper.²¹ It is quite meaningless to convict the accused both under s. 395 and this section with regard to the evidence about the finding of certain articles in their possession. If the jury are prepared to draw an inference from the fact that a particular person is a thief there would be no difficulty in convicting him under s. 395, when it is proved that the actual property was stolen in the course of a dacoity. If they are not so satisfied, the position becomes very different because there being no evidence from which a jury could be asked to say that these individual accused knew or had reason to believe that the stolen properties were transferred by the commission of dacoity. If the charge under s. 395 failed the only alternative would be one under s. 411.²²

Sentence.—A sentence of transportation under this section and s. 59 cannot exceed ten years.²³

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, dishonestly received [*or retained*] stolen property, to wit—, belonging to one AB, knowing or having reason to believe that the possession of the same had been transferred by the commission of dacoity; and thereby committed an offence punishable under s. 412 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

413. Whoever habitually receives or deals in property which

Habitually dealing in stolen property. he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

¹⁶ *Vide* s. 24, *sup.*

¹⁷ *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73 [109]; *Bishoo Manjee*, (1868) 9 W. R. (Cr.) 16; *Samiuddin*, (1872) 18 W. R. (Cr.) 25; *Daji Mahadhu*, (1895) Cr. No. 19 of 1895, Unrep. Cr. C. 756; *Surendra*, (1937) 41 C. W. N. 639; *Meghu Chamar*, (1941) 43 Cr. L. J. 911, [1942] AIR (P) 439 (1); *Sheo Bux Singh*, [1945] O. W. N. 118, 46 Cr. L. J. 600; *Narayan Dinba*, [1946] N. L. J. 566, 47 Cr. L. J. 822.

¹⁸ *Daud Shaikh*, (1935) 40 C. W. N. 159, 62

C. L. J. 257, 37 Cr. L. J. 976.

¹⁹ *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66; *Cassy Mul*, (1865) 3 W. R. (Cr.) 10.

²⁰ *Abool Hoosein*, (1864) 1 W. R. (Cr.) 48; *Shahabut Sheikh*, (1870) 13 W. R. (Cr.) 42.

²¹ *Bahiru*, (1886) Cr. R. No. 65 of 1886, Unrep. Cr. C. 312.

²² *Abdul Jabbar Molla*, (1943) 45 Cr. L. J. 468, [1944] AIR (C) 39.

²³ *Mohanundo Bhundary*, (1866) 5 W. R. (Cr.) 16.

COMMENT.

This section punishes severely the common receiver or professional dealer in stolen property. One who casually receives stolen property is punished under the two preceding sections according to the taint attaching to the property.

In order to support a conviction of being an habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates. A person cannot be said to be an habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day.²⁴ Because the "very essence of that offence... is the habitual, that is to say, constant, receipt of or dealing in goods which the prisoner knew or had reason to believe were stolen".²⁵

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property.

(2) That the accused received it or dealt in it.

(3) That he did so habitually.

(4) That he did so knowing or having reason to believe it to be stolen property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Trial for offences under ss. 411 and 413.—An accused person cannot be tried at the same trial for receiving or retaining (s. 411), and habitually receiving or dealing in (s. 413), stolen property. The proper course is to try the accused first for the offence under s. 411, and, if he is convicted, to try him under s. 413, putting in evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge under s. 411 could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code.¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the ----day of----, at----, were a habitual receiver or dealer in property, which you knew (*or had reason to believe*) to be stolen property, and that you thereby committed an offence punishable under s. 413 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

414. Whoever voluntarily assists in concealing or disposing of or making away with property¹ which he knows or has reason to believe to be stolen property,² shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Assisting in concealment of stolen property.

COMMENT.

This section punishes those acts of receiving or retaining stolen property which do not come under the purview of ss. 411, 412 and 413.

Scope.—This section is intended to apply to cases where there has not been such a possession as would support an indictment against the party, as a receiver, under s. 411. "When a person is shown to stand in such a relation to stolen property as falls short of possession by him of such property, his manner of dealing with the property may warrant a charge of assisting in concealing or disposing of or making away with the property, with a guilty knowledge".² The Bombay High Court in a case held that the section applied only where there was no actual receipt of the property.³ But subsequently it has dissented from this view and has held that a person receiving stolen articles could be convicted of concealing or disposing of them.⁴

²⁴ *Baburam Kansari*, (1891) 19 Cal. 190.

²⁵ Per Norris and Beverley, JJ., in *ibid.* p. 191.

¹ *Uttom Koondoo*, (1882) 8 Cal. 634.

² Per Plowden, J., in *Khona*, (1879) P. R. No. 31 of 1879, at p. 84.

³ *Alu Kala*, (1891) Unrep. Cr. C. 553, Cr. R. No. 28 of 1891; (1868) 4 M. H. C. (Appx.) 13, 1 Weir 409; *Subha Chand*, (1881) P. R. No. 39 of 1881.

⁴ *Abdul Gani*, (1925) 27 Bom. L. R. 1374-40 Bom. 878.

Ingredients.—This section requires two things :—

1. Voluntary assistance in concealing or disposing of or making away with property.

2. Knowledge or reason to believe that such property is stolen property.

1. '**Voluntarily assists in concealing or disposing of or making away with property**'.—As to the meaning of 'voluntarily', see s. 39, *supra*. The words 'disposing of' must be interpreted in the light of the words they are associated with, viz., 'concealing' and 'making away with', and cannot be taken to include restoring to the owners. They cannot be divorced from their context. The intention of the section is to punish persons who subsequent to the commission of the offence either conceal it or make away with it by destroying or otherwise disposing of it. The section is intended to penalise persons who deal with stolen property in such a way that it becomes impossible to identify it or use it as evidence. It cannot apply to the case of a person spending money stolen by another.⁵ Where the accused was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, it was held that the Magistrate was right in convicting and punishing the accused for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193, and of voluntarily assisting in concealing stolen property under this section.⁶ Where the accused was found to have restored to the owners jewellery believed to have been stolen by his son, and then to save his son from punishment denied all knowledge of the matter, and on this ground was convicted under this section, it was held that the accused had committed no offence.⁷

The accused was the driver of a taxi, which was carrying several persons who had hired it. While on its way the taxi stopped at a place for some reason, not known, and two of the passengers got down from the taxi and within a distance of about 3½ yards from the taxi they suddenly and without premeditation attacked, injured and robbed a man of his purse containing about Rs. 50. The robbers then boarded the taxi, and the driver, in spite of the cries of the victim, drove away as fast as he could. It was held that the driver assisted the robbers in making away with the money so robbed and had committed this offence.⁸

2. '**Knows or has reason to believe to be stolen property**'.—The person voluntarily assisting in concealing or disposing of or making away with property must have a definite knowledge that such property was stolen property.

"The word 'believe'... is a very much stronger word than 'suspect,' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property". "It was not sufficient [in such a case] to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired".⁹ The mere fact that jewellery handed over to the accused for sale by a European soldier was such as was usually worn by Indian females, and a European is not expected to own it, was held, standing by itself, not sufficient to support the finding that the accused believed or had reason to believe that the jewellery was stolen.¹⁰ See also s. 26, *supra*, as to the meaning of 'reason to believe'.

It is not necessary to establish that the property was the subject-matter of any particular theft; but it must be shown that it was the subject-matter of some theft or other. The essence of this section is the concealment of stolen property which the accused knew or had reason to believe to be stolen property. If, therefore, an accused thinking that an article, which is in his possession, is stolen property, tries to conceal that property, when as a matter of fact it is not stolen property at all but property honestly come by, he does not commit an offence under this section. The fact that

⁵ *Amar Nath*, (1935) 36 Cr. L. J. 1459.

⁶ *Rameshwar Rai*, (1877) 1 All. 379.

⁷ *Nga Yan E*, (1910) 1 U. B. R. 8, 11 Cr. L. J. 493.

⁸ *Hari Singh*, [1940] 2 Cal. 9.

⁹ *Per Melvill, J.*, in *Rango Timaji*, (1880) 6 Bom. 402, 403, followed in *Kanniappa Naicker*,

[1913] M. W. N. 696, 14 Cr. L. J. 591; *Sankara Narayana Chetti*, (1916) 4 L. W. 53, 17 Cr. L. J. 312, [1917] AIR (M) 418; *Muhammad Ibrahim*, (1915) 17 Cr. L. J. 25; *Abdur Rahim*, (1926) 27 Cr. L. J. 1144, [1927] AIR (N) 40.

¹⁰ *Gian Chand*, (1932) 33 P. L. R. 572, 33 Cr. L. J. 764, [1932] AIR (L) 434.

the property dealt with is stolen property may in some instances be inferred indirectly from circumstantial evidence as from the way in which it is dealt with by the party dealing with it, but the circumstances must be such as would justify the conclusion that the property is actually stolen property.¹¹

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property.¹²

(2) That the accused assisted in concealing or disposing of, or making away with, such property.

This section does not impose on the prosecution the requirement that it should in all cases trace the owners of the property stolen. All that is needed is to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property.¹³

(3) That he did as in (2) voluntarily.

(4) That he knew or had reason to believe that the property was stolen property.¹⁴

When persons are charged with assisting in concealing or disposing of property which they know or have reason to believe to be stolen, the nature of the property, as well as the circumstances under which it was being made away with, must be taken into consideration.¹⁵ An accused person's merely pointing out the place where some of the stolen property is recovered and his making an admission before the police of having concealed it there, which admission is not admissible in evidence, are not sufficient for convicting him under this section in the absence of any other independent proof connecting him with the commission of the crime.¹⁶

Where an accused pleads guilty and admits himself to be the thief and not merely the receiver, the conviction should obviously be under this section and not under s. 411.¹⁷

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if property is not worth more than Rs. 50.

The same person cannot be properly convicted for theft and for attempting to conceal the stolen property¹⁸ or for theft and for dishonestly disposing of the same property.¹⁹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, voluntarily assisted in concealing (*or disposing of, or making away with*) property, to wit—, which you knew (*or had reason to believe*) to be stolen property, and that you thereby committed an offence punishable under s. 414 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

Sentence.—Where an accused is convicted of an offence under ss. 411 and 414, it is not permissible to pass on him separate and consecutive sentences under each head of the charges, but in such a case only one sentence must be passed on him for both offences.²⁰ The charges under these sections should ordinarily be made alternatively, and not cumulatively.²¹

¹¹ *Samachari*, (1923) 45 M. L. J. 728, 18 L. W. 743, 25 Cr. L. J. 790, [1924] AIR (M) 350.

¹² *Vide* s. 410, sup.

¹³ *Budhankhan Inayathkhan*, (1912) 14 Bom. L. R. 893, 13 Cr. L. J. 793; *Abdul Gani*, (1925) 27 Bom. L. R. 1873, 49 Bom. 873.

¹⁴ *Rameshar Rai*, (1877) 1 All. 379.

¹⁵ *Harishmakar Fakirbhai*, (1865) 2 B. H. C. 130.

¹⁶ *Kaka Singh*, (1908) 9 P. L. R. 400, 8 Cr.

L.C.—66

L. J. 460.

¹⁷ *Khair Din*, (1940) 41 Cr. L. J. 823, [1940] AIR (L) 319.

¹⁸ *Zinda*, (1896) P. R. No. 15 of 1896.

¹⁹ *Nga Po Kyow*, (1885) S. J. L. B. 334.

²⁰ *Sakharam*, (1889) Cr. R. No. 8 of 1889, Unrep. Cr. C. 449; *Alu Kala*, (1891) Cr. R. No. 28 of 1891, Unrep. Cr. C. 553.

²¹ *Yeshwant*, (1908) 10 Bom. L. R. J. 125.

Of Cheating.

415. Whoever, by deceiving any person,¹ fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property,² or intentionally induces the person so deceived to do or omit to do anything³ which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause⁴ damage or harm to that person in body, mind, reputation or property,⁵ is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

ILLUSTRATIONS.

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which he knows are not diamonds intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

COMMENT.

The definition of cheating contains two parts. First comes the main part "whoever, by deceiving any person..." words which obviously apply to the whole section. Then comes the first part "fraudulently, or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property". Then comes part 2, which is an alternative to sub-part 1, viz., "or intentionally induces...mind, reputation or property". Then come the closing words "is said to cheat". The words "and which act or omission...reputation or property" form a portion of part 2 and are not applicable to part 1 at all.²² The definition of the offence of cheating embraces some cases in which no transfer

²² *Ishar Das*, (1908) P. R. No. 10 of 1908, 7 Cr. L. J. 290.

of property is occasioned by the deception and some in which such a transfer occurs ; for these cases generally a general provision is made in s. 417 of the Code. For the cases in which property is transferred a more specific provision is made by s. 420.²³ But in an earlier case it has been laid down that an offence of cheating accompanied by a delivery of property may be punished under either of the sections : but where the case appears to be of a serious nature steps must be taken to send it to the Court of Session for trial under s. 420.²⁴

The offence of cheating is not committed if a third party, on whom no deception has been practised, sustains pecuniary loss in consequence of the accused's act.²⁵

The authors of the Code say : " We propose to make it cheating to obtain property by deception in all cases where the property is fraudulently obtained ; that is to say, in all cases where the intention of the person who has by deceit obtained the property was to cause a distribution of property which the law pronounces to be a wrongful distribution, and in no other case whatever. However immoral a deception may be, we do not consider it as an offence against the rights of property if its object is only to cause a distribution of property which the law recognizes as rightful. . .

" We propose to punish as guilty of cheating a man who, by false representations, obtains a loan of money, not meaning to repay it ; a man who, by false representations, obtains an advance of money, not meaning to perform the service or to deliver the article for which the advance is given ; a man who, by falsely pretending to have performed work for which he was hired, obtains pay to which he is not entitled.

" In all these cases there is deception. In all, the deceiver's object is fraudulent. He intends in all these cases to acquire or retain wrongful possession of that, to which some other person has a better claim, and which that other person is entitled to recover by law. In all these cases, therefore, the object has been wrongful gain, attended with wrongful loss. In all, therefore, there has, according to our definition, been cheating ".¹

" In the definition of cheating in sec. 415 there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced to deliver any property to any person or to consent that any person shall retain any property. In order to constitute the offence of cheating the person who induces another to do this class of acts must fraudulently or dishonestly induce the persons deceived to do that kind of act. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In order to constitute the offence of cheating with regard to this class of acts the person who induces another to do them must intentionally induce him to do them. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional ".²

English law.—Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour.³ There are two vital points in which the English law differs from the Code :—

(1) A promise as to future conduct not intended to be kept is not by itself a cheating.⁴ Under the Code this will amount to cheating : see ill. (f) and (g).

(2) The object of the accused must be to obtain any chattel, money, or valuable security. The definition of cheating as given in this section is much wider and includes damage or harm to a person in body, mind, reputation, or property.

False pretence in English law is narrower in its application than what is contemplated by 'cheating' in this section. It does not cover cases dealing with the second part of the definition of cheating but concerns only where delivery of chattel, money, or valuable security is obtained.⁵

²³ *Bavaji*, (1875) Unrep. Cr. C. 96, Cr. R. September 23, 1875.

²⁴ *Bapu*, (1864) Unrep. Cr. C. 2.

²⁵ *Sundar Singh*, (1904) P. R. No. 25 of 1904, 2 Cr. L.J. 37.

¹ Note N, pp. 164, 166.

² Per Geidt, J., in *Kishori Lal Chatterji*,

(1905) 9 C. W. N. 764, 767, 2 Cr. L. J. 422, 427.

³ Larceny Act, 1861 (24 & 25 Vic., c. 96), s. 88.

⁴ 62 & 63 Vic., c. 22, s. 3.

⁵ *Thakur Mandal*, (1941) 43 Cr. L. J. 65, 67, [1942] AIR (P) 53.

Scope.—There is nothing in this section to exclude from the scope of its provisions cheating which has relation to immoveable property. The representation which must be fraudulent or dishonest and which must have induced the person deceived to deliver property may as well be perpetrated in relation to immoveable property as to moveable property. It is true that so far as that part of the section which relates to dishonest concealment of facts is concerned, it must be read subject to the qualification that there is no duty on a seller to disclose defects in title in immoveable property which the buyer with ordinary care could discover.⁶

Cheating and breach of contract.—The distinction between mere breach of contract and cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. Mere breach of contract cannot give rise to a criminal prosecution.⁷

Cheating and extortion.—The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is, that the extortioner obtains the consent by intimidation, and the cheat by deception.⁸

Cheating and criminal breach of trust and criminal misappropriation.—Cheating differs from the last two offences in the fact that the cheat takes possession of the property by deception. There is wrongful gain or loss in both cases and in both cases there is an inducement to deliver property. Cheating is a complete offence by itself and is not a form of criminal breach of trust. A person who tricks another into delivering property to him bears no resemblance to a trustee in the ordinary acceptance of that term.⁹

Ingredients.—This section requires—

1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property, or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

1. 'Deceiving any person'.—It means causing to believe what is false; or misleading as to a matter of fact, or leading into error.¹⁰ The person deceived need not be a definite person to whom the false representation is made. To constitute cheating there must be a deception which must precede and induce under the first part of the section, the delivery or retention of property or the act or omission referred to in the second part. Such deception may be by words or conduct. As to what is sufficient to constitute a deception must be decided in each case on its own facts.¹¹

When a person fraudulently represents as an existing fact that which is not an existing fact, he commits this offence. A wilful misrepresentation of a definite fact with intent to defraud, cognizable by the senses—as where a seller represents the quantity of coals to be fourteen cwt., whereas it is in fact only eight cwt., but so packed as to look more; or where the seller, by manoeuvring, contrives to pass off tasters of cheese as if extracted from the cheese offered for sale, whereas it is not—is cheating.¹²

Where a charge of cheating rests upon a representation which is impugned as false and which relates not to an existing fact but to a certain future event, it must be shown that the representation was false to the accused's knowledge at the time when it was made. It is but little to the purpose to show that in fact the representation has turned out to be untrue.¹³

⁶ *Shivnath Sahibram v. Jethanand Moorijmal*, (1936) 38 Cr. L. J. 510, [1937] AIR (S) 56.

⁷ *Sheosagar Pandey*, (1935) 16 P. L. T. 553, 37 Cr. L. J. 38; *Ram Bharose Singh*, [1926] O. W. N. 754, 37 Cr. L. J. 907, [1936] AIR (O) 372.

⁸ Note N, p. 163.

⁹ *John McIver*, (1936) 43 L. W. 548, 70 M. L. J. 635, [1936] M. W. N. 281, 37 Cr. L. J.

657, [1936] AIR (M) 353, F.B.

¹⁰ Dr. Murray's New English Dictionary; *Woolley*, (1850) 4 Cox 193.

¹¹ *Rammath Kalapahar*, (1905) 2 C. L. J. 524, 3 Cr. L. J. 160.

¹² *Goss*, (1860) 8 Cox 262.

¹³ *Ebrahimji Mulla Jeevanji*, (1912) 15 Bom. L. R. 297, 14 Cr. L. J. 232.

It is not necessary that the false pretence should be made in express words. if it can be inferred from all the circumstances attending the obtaining of the property.¹⁴ Fraudulent intent is absolutely essential. An illegal demand if not fraudulent does not amount to cheating. The accused, who was the landlord of the complainant, sent for the latter, and on the latter appearing demanded payment of rent. The complainant left for home to fetch the money requesting the accused and his clerk to have in the meantime his dues worked out and have a receipt written. He returned soon with Rs. 90 and paid the same to the accused, who drove him away refusing to give a receipt or return the money unless and until Rs. 25 more were paid to make up the sum, the said amount having been deducted towards certain subscription. It was held that no criminal offence was committed.¹⁵

The deceit referred to in this section and its ill. (f) may be by conduct. The nature of the transaction itself may imply an assertion. The words "not intending to pay" in ill. (f) to this section cover a case where the accused will not be able to pay except for a miracle.¹⁶

Where a person knows that the statements made by another are false, but still acts upon them with a view to entrap that person, it will not amount to cheating but will amount to attempt to cheat. A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore not cheated.¹⁷ M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and inquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon inquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M and returned by him to the Currency Office. It was held that, although there was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat.¹⁸ The accused described himself as the principal of the 'British Health Institute' and issued advertisements stating that arrangements had been made for testing urine, if desired, at a nominal fee of 1s. 6d. Two individuals, who suspected the genuineness of the advertisement forwarded to the accused a solution of water with colouring ingredients mixed with soap, and asked for an analysis of their "water". Letters were received from the accused advising a course of treatment to cost not less than one guinea in each case. It was held that the accused was guilty of attempting to obtain money by false pretences although the persons to whom the false pretence was made knew it to be false.¹⁹ Where the accused posed that he could double currency notes and a police-officer knowing that he could not do so but with a view to get him convicted gave him some notes and caught him while, after going through a mock process of doubling notes, he tried to substitute some pages of a book in their place, it was held that the accused went far beyond the stage of preparation and was liable to be convicted of the offence of attempting to cheat.²⁰

It is not necessary that there should be false representation by words. Where the accused wore a *khaki* shirt and threatened to take the complainant to the *thana*, it was held that it could be inferred that the accused gave the complainant to understand that he was a police-officer (which he was not) and that he had the authority to take him to the *thana* (which authority he did not possess) and that the accused's action amounted to deception.²¹

¹⁴ *Maria Giles*, (1865) 10 Cox 44; *Khoda Bux v. Bakeya Mundari*, (1905) 32 Cal. 941; *Ram Chand v. Jai Dial*, (1912) 13 P. L. R. 345, 13 Cr. L. J. 456, on remand, (1915) 16 Cr. L. J. 657.

¹⁵ *Kumeda Charan Ghose*, (1911) 15 C. L. J. 515, 13 Cr. L. J. 512. See also *Birraj Marwari*, (1912) 17 C. W. N. 294, 14 Cr. L. J. 120; *Nathuram*, (1902) 4 Bom. L. R. 442; *Deodhari Mahto*, (1920) 2 P. L. T. 211, 22 Cr. L. J. 169, [1921] AIR (P) 80.

¹⁶ *Mohsinbhai*, (1931) 34 Bom. L. R. 313, 56

Bom. 204.

¹⁷ *Heusler*, (1870) 11 Cox 570; *The Government of Bengal v. Umesh Chunder Mitter*, (1888) 16 Cal. 310.

¹⁸ *The Government of Bengal v. Umesh Chunder Mitter*, *ibid.*

¹⁹ *Light*, (1915) 24 Cox 718.

²⁰ *Raghunath alias Ram Singh*, (1940) 16 Luck. 194.

²¹ *Ali Hussain*, (1932) 56 C. L. J. 73, 34 Cr. L. J. 530, [1933] AIR (C) 308.

Fraudulent prospectus.—Where a prospectus put forward a highly speculative and palpably unworkable scheme, but made no false statements and concealed nothing and merely appealed to the gambling instinct, and the members of the public who contributed to the scheme were either too obtuse to realise its weakness which was patent or actuated by a vague hope that their money would somehow be repaid before the cash came, it was held that no conviction for the offence of cheating could be founded on the issue of such a prospectus alone.²² In order to make a company prospectus fraudulent, it is not necessary that there should be a false representation in it, even if every word is true. The suppression of material facts may render it fraudulent. To judge its effects, it should be read as a whole. If two or more persons agree to issue a prospectus and by the concealment of facts to deceive the public and fraudulently or dishonestly induce them to take shares in a company, the offence of conspiracy to cheat is completed.²³

Snowball scheme.—Promoters of financial snowball scheme, which could run only so long as there would be a continuous uninterrupted and enormously progressive increase in subscribers, but which could not go on indefinitely, would not be guilty of cheating, in the absence of false representations and dishonest concealment of fact either in the prospectus issued or in the conduct of the promoters, calculated to deceive the public and thereby induce it to contribute money to the scheme. When, however, a prospectus states that payment to the subscribers would be possible by investing the money contributed in some lucrative businesses mentioned therein, which it was never the intention of the promoters to start, they would be guilty under this section.²⁴

It is immaterial whether prosecutor has means of detecting fraud or not.—A person who fraudulently offered a £1 bank-note as a note for £5 and got it changed upon that representation, was held guilty of obtaining money by false pretences, although the prosecutor might, by the exercise of reasonable caution, have detected the imposition.²⁵ The question in every case is, whether, in truth, the false statement did impose upon the prosecutor or not.¹

2. 'Fraudulently or dishonestly induces the person so deceived to deliver any property . . . or to consent that any person shall retain any property'.—As to the meaning of 'fraudulently', see s. 25, and of 'dishonestly' s. 24, *supra*. The word 'fraudulently' being used in the section together with the word 'dishonestly', must mean, if it is to have any meaning at all, something different from 'dishonestly'.² The words 'fraudulently' and 'dishonestly' do not govern the whole of the definition of cheating. The section is divided into two parts. Under the first part the person deceived must have been fraudulently or dishonestly induced to deliver any property to any other person, or to consent that the said other person should retain any property. The second part provides for the case of a person who by deceiving another intentionally induces the person so deceived to do an act which causes or is likely to cause damage or harm, although the deceiver has not acted fraudulently or dishonestly.³ The evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the act in respect of which the cheating is alleged.⁴ Once a person obtains possession of property by a trick, the offence of cheating is complete.⁵ To describe consequences of an act to be more serious than, in fact, they were likely to be, may be to deceive, but is not cheating if done without any fraudulent or dishonest intention. Thus, to induce a son to pay his father's debts, by acting merely on his fear of consequences to his father, is not cheating.⁶ A owed B a debt, of which B could not get payment. C, a servant of B, went to A's wife and obtained two sacks of malt of her, saying that B had bought them of A. C knew this to be false, and took the malt to B, his master, to enable him to pay himself the debt. It was held that if C did not

²² *Radha Ballav Pal*, (1939) 43 C. W. N. 388, 40 Cr. L. J. 600; *Maung Ba Thwin*, (1937) 40 Cr. L. J. 20.

²³ *Srinivasan*, [1944] M. W. N. 312.

²⁴ *Hari Das Burat*, [1939] 2 Cal. 81.

²⁵ *Jessop*, (1858) 7 Cox 399.

¹ *Woolley*, (1850) 4 Cox 193.

² *Per Henderson, J., in Baburam Rai*, (1905)

32 Cal. 775, 779.

³ *Mohabat*, (1889) P. R. No. 20 of 1889.

⁴ *Viraswami*, (1881) 1 Weir 478; *G. W. Dick*, (1914) 12 A. L. J. R. 1258, 16 Cr. L. J. 49, [1914] AIR (A) 538.

⁵ *Arab*, [1942] Kar. 284.

⁶ *Raj Coomarr Banerjee*, (1864) W. R. (Gap. No.) (Cr.) 25.

intend to defraud A, but merely to put into his master's power to compel A to pay him a just debt, C ought not to be convicted of obtaining the malt by false pretences.⁷

A concealment of facts cannot be said to be dishonest unless the accused was under an obligation to disclose the facts concealed.⁸ There is no obligation on the seller to disclose any defect unless it is a defect which the buyer could not with ordinary care discover. The existence of prior mortgage or the claims of a coparcener of a Hindu joint family are defects which the buyer could discover with ordinary care and the failure on the part of the seller to disclose them does not therefore amount to cheating.⁹ Where a loan was made upon certain property burdened with a charge on the representation that the property was free of any charge and the questions specifically asked were answered falsely, and the charge upon the property was not a registered charge, it was held that it could not be said that the creditor could have discovered this charge by reference to the registers, and that as it was a false misrepresentation deliberately made for the purpose of deception it amounted to cheating.¹⁰

A person who sent an insured cover, purporting to contain Government currency notes, but which, on receipt by the addressee, was found to contain only a letter advising the despatch of notes, and pieces of waste-paper, was held not guilty of cheating. The Court observed: "All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover. He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover. That being so, we are unable to say that the charge of cheating has been brought home to the accused."¹¹ In response to a serious demand by complainant for repayment of a loan which accused had taken from him some time back, accused addressed an insured cover to the complainant. On opening this cover the complainant discovered that instead of Government currency notes it contained a number of Khilafat Bonds. Thereupon he reported the matter to the post office. In the course of an inquiry accused stated that he had sent Government currency notes and not the Khilafat Bonds. It was held that no offence under this section was committed. Sulaiman, J., observed: "The mere fact that a cover insured for a certain amount is sent raises no presumption in law that that cover contains the necessary amount of Government Currency Notes. It is, therefore, not easily conceivable what is the thing which the complainant would have done or omitted to do if the fraud contemplated by the accused had succeeded. The only thing that can be said is that the accused imagined that he would have had some sort of a proof that the debt had been paid off. Then the offence would be an attempt to fabricate false evidence within the meaning of s. 192 of the Indian Penal Code. The accused, however, has not been charged with any such offence."¹² Where the accused desiring to evade payment of his debt sent to his creditor a registered and insured cover containing only blank pieces of paper in order to obtain from him an acknowledgment of receipt which could subsequently be used in order to evade payment, it was held that the offence of cheating was actually committed, for where the creditor signed the acknowledgment which he would not have done if he had not been so deceived he committed an act which was likely to cause damage or harm to him within the meaning of this section and that the commission of the offence of cheating was not postponed until the creditor had attempted to use the acknowledgment as proof of payment. A person is guilty of cheating if by deceiving his creditor he obtains from him a document, not necessarily a legal quitance or a valuable security, but such a document as is likely to facilitate the evasion of payment by the debtor and to cause embarrassment to the creditor when he seeks to enforce his claim.¹³ The accused presented two letters to

⁷ *Williams*, (1836) 7 C. & P. 354.

⁸ *Paruchury Venkatappayya*, (1916) 18 Cr. L. J. 40, [1917] AIR (M) 732.

⁹ *The Karachi Municipality v. Bhograj*, (1915) 9 S. L. R. 97, 16 Cr. L. J. 706, [1915] AIR (S) 21.

¹⁰ *Shivnath Sahibram v. Jethanand Moorijmal*, (1936) 38 Cr. L. J. 110, [1937] AIR (S) 56.

¹¹ *Raman Behari Roy*, (1923) 50 Cal. 849, 852; *Vaithianathaswami Aiyar*, (1926) 51 M. L. J. 800, 24 L. W. 725, 38 Cr. L. J. 70, [1927] AIR (M) 199.

¹² *Tula Ram*, (1923) 21 A. L. J. R. 865, 867,

868, 26 Cr. L. J. 209, [1924] AIR (A) 205. *Sadho Lal*, (1916) 1 P. L. J. 391, 17 Cr. L. J. 272, [1917] AIR (P) 699, commented on. See *Vaithianathaswami Aiyar*, (1926) 51 M. L. J. 800, 24 L. W. 725, 38 Cr. L. J. 70, [1927] AIR (M) 199, on the point of an offence under ss. 193, 511.

¹³ *Bajjnath Sahay*, (1932) 14 P. L. T. 48, 34 Cr. L. J. 1020, [1933] AIR (P) 183, approving *Sadho Lal*, (1916) 1 P. L. J. 391, 17 Cr. L. J. 272, [1917] AIR (P) 699.

be registered at a post office for despatch to two different places. As the letters were said to contain currency notes, one was insured for Rs. 1,000 and the other for Rs. 2,000. When the letters were opened by their respective addressees they were found to contain waste-paper. The accused's defence was that the letters he handed in to the post office were stolen and the letters sent to the addressees were fraudulently substituted by some one in the post office. He offered a reward of Rs. 500 for the discovery of the person who had extracted the currency notes from the packets. On the evidence the High Court concluded that the currency notes were not put into the letters tendered by the accused and that he was therefore guilty of offences under ss. 420, 511, and 193.¹⁴ The former Chief Court of the Punjab also held, where the accused, who was indebted to the complainant, despatched to the latter an envelope insured for Rs. 530 containing two pieces of waste paper, intending to use the receipt for the same as evidence of payment of Rs. 530 towards the liquidation of his debt to the complainant, that the accused was guilty of an attempt to cheat.¹⁵

Where a person receives moneys due to him from another which that other person pays, with the intention not to credit the money to the real debt due, but to deceive him into paying money due on a real debt and keeps the money under the pretence of crediting it to a debt which the other person did not owe upon a bond which he did not execute, the person is guilty of cheating.¹⁶ A charge of cheating can be sustained even though the promise which induced the delivery of property was a promise to do a criminal act, or an act forbidden by law, and one which could not form a cause of action in a civil Court.¹⁷

Where a person orders goods on credit and promises expressly or impliedly to pay for them on a particular date, then if the prosecution proves that at the date of the contract the circumstances of the accused were such that he must have known that it was practically impossible that he would be able to pay for the goods, the offence of cheating is committed. The mere fact that the accused was in embarrassed circumstances is not enough. A man who is in embarrassed circumstances is not bound to disclose all his circumstances to the people with whom he deals on credit. But he is not entitled to make any untrue statement. If any question is put to him he must answer truthfully; if he does not, he is guilty of cheating. The question whether there was an intention to deceive must be answered as at the date when the contract is made.¹⁸

Cheque.—The act of drawing a cheque for payment of goods purchased implies at least three statements as to the state of affairs existing at the time when the cheque is drawn, first, that the drawer has an account with the bank in question; secondly, that he has authority to draw on it for the amount shown on the cheque; and, thirdly, that the cheque, as drawn, is a valid order for the payment of that amount, or that in the ordinary course of events the cheque, on future presentation, will be honoured. It does not, however, imply any representation that the drawer already has money in the bank to the amount shown in the cheque, for he may either have authority to overdraw, or have an honest intention of paying in the necessary money before the cheque can be presented.¹⁹ A post-dated cheque in payment of goods already received is a mere promise to pay on a future date and the fact that the cheque is dishonoured, which amounts only to a broken promise, is not a criminal offence. The accused was a motor bus owner and used to take on credit petrol and oil from the complainant. He gave a post-dated cheque which was dishonoured by the bank. Three months after he was prosecuted for cheating. It was held that no offence had been committed.²⁰ Giving of a cheque in lieu of money already due, with the knowledge that the drawer has no funds in the Bank does not amount to an offence but is only a civil wrong.²¹ But if

¹⁴ *Mahipat*, (1924) Criminal Appeal No. 453 of 1924, decided by Macleod, C. J., and Pratt, J. (Crump, J., dissenting), on November 28 and December 9, 1924, (Unrep. Bom.).

¹⁵ *Arura*, (1912) P. R. No. 20 of 1913, 16 Cr. L. J. 436.

¹⁶ *Ramuath Kalapahar*, (1905) 2 C. L. J. 524, 3 Cr. L. J. 160. Mookerjee, J., expressed a contrary opinion.

¹⁷ *Meera*, (1917) 18 Cr. L. J. 362, [1917] AIR

(LB) 105.

¹⁸ *Mohsinbhai*, (1931) 34 Bom. L. R. 313, 56 Bom. 204.

¹⁹ *Kanwar Sain*, [1938] Lah. 662.

²⁰ *Chidambaram Chettiar v. Shanmugham Pillai*, [1937] 2 M. L. J. 878, [1937] M. W. N. 999, 46 L. W. 629, 39 Cr. L. J. 261, [1938] AIR (M) 129.

²¹ *Ratra v. Ganesh Dass*, (1939) 41 P. L. R. 869, 41 Cr. L. J. 394.

a person gives a cheque in lieu of some goods and it is dishonoured and from the circumstances it could be presumed that he must have been aware that the cheque would be dishonoured so that the failure to meet payment of the cheque was not accidental, it was held that he was guilty under s. 420.²²

'Any property to any person'.—It is no objection to an indictment for this offence that the thing obtained was not in existence at the time of cheating, provided the thing when made is delivered under the influence thereof.²³

Whether an article is or is not 'property' does not depend upon its possessing a money or market value. If it has some special value for the person, or persons concerned, it is "property", even though its value cannot be measured in money.²⁵ A health certificate is property within the meaning of this section.¹ So is a certificate of having passed an examination,² or a ticket entitling its holder to enter an examination room,³ or a railway ticket,⁴ or a warrant⁵ or a motor car driving license in the possession of the licensing officer.⁶

Delivery to 'any person' includes even an agent, and the post office can be deemed to be such an agent.⁷

'To consent that any person shall retain any property'.—It is equally a cheat whether a deception causes a person fraudulently or dishonestly to acquire property by delivery, or to retain property already in his possession. If a man to whom property is lent or who is entrusted for a time with the charge of it deceives the owner and thereby induces him for some purpose of wrongful gain to the borrower or wrongful loss to the owner to allow the property to be retained in the borrower's possession, this amounts to cheating.⁸

Cases.—Inducing person deceived to deliver property.—Where a person hired certain property for use at a wedding, paying a portion of the hire, and giving a written promise to pay the balance of the hire, and to restore the property after the wedding, he being well aware that there was to be no wedding, and intending, when he got the property, to apply for its attachment in a civil suit in respect of an alleged claim;⁹ where the accused received a Government promissory note, promising to return certain jewels pledged to them but not intending to do so, and they subsequently claimed to retain the note for another debt alleged to be due to them by the sender;¹⁰ where a person obtained delivery of a valuable security under the inducement of a promise not intended to be kept and with fraudulent intention,¹¹ and where a person procured for another a motor driving license from the licensing officer without the latter undergoing the prescribed test,¹² this offence was held to have been committed.

The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4-0 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta, to have then requested the postal authorities at Calcutta, by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam; to have similarly requested the post-master at Rajam to pay the money orders to his clerk Sheshgiri Rau; and to have subsequently received the value of money orders made out in favour of Robert S. Wilson, from the post master of Rajam, signing receipts as Sheshgiri Rau. Robert S. Wilson and Sheshgiri Rau were alleged to be fictitious persons, and it was alleged that the accused had no book on English idioms ready to be despatched to purchasers. It was held that the above allegations supported the charges of cheating and forgery.¹³

²² *Kumar Sen*, (1932) 8 Luck. 286.

²³ *Martin*, (1867) L. R. 1 C. C. R. 56.

²⁵ *Local Government v. Gangaram*, (1921) 18 N. L. R. 52, 23 Cr. L. J. 443, [1922] AIR (N) 229.

¹ *Packianathan*, (1919) 11 L. W. 368, 21 Cr. L. J. 478.

² *Local Government v. Gangaram*, (1921) 18 N. L. R. 52, 23 Cr. L. J. 443, [1922] AIR (N) 229.

³ *Appasami*, (1889) 12 Mad. 151.

⁴ *Horace William Chapman*, (1910) 4 Cr. App. R. 276.

⁵ *Harishanker Gangaram*, (1904) 6 Bom. L. R. 375, 1 Cr. L. J. 332.

⁶ *Krishnan*, [1947] 2 M. L. J. 380, 60 L. W. 690, [1947] M. W. N. 762.

⁷ *Kaleek*, [1927] M. W. N. 221, 52 M. L. J. 511, 28 Cr. L. J. 452, [1927] AIR (M) 544.

⁸ *M. & M.* 382.

⁹ *Kadir Bux*, (1871) 3 N. W. P. 16.

¹⁰ *Sheodurshun Dass*, (1871) 3 N. W. P. 17.

¹¹ (1880) 1 Weir 478.

¹² *Krishnan*, sup.

¹³ *Pera Raju*, (1889) 13 Mad. 27.

Complainant's firm had advanced money to the accused on the understanding that the accused would purchase rice from the outlying shops and ship and deliver the same at the firm's place of business, where it would be sold, the profits on the sale going to the accused and the accused being liable to pay to the complainant's firm the capital advanced with interest and a commission of one anna per maund of rice sold. The accused failed to deliver the rice within the stipulated time and was charged with cheating. The representations made by the accused to the complainant's firm when getting the advance were not entirely false, and it appeared that the accused had to some extent endeavoured to carry out the terms of the agreement, though he was also found to have converted a small portion of the money to his own use in paying off his own debts. It was held that the case was really one of breach of contract. The mere fact that the accused converted a small portion of the money to his own use was not in itself sufficient to prove that his intention, when he received the money from the complainant's firm, was dishonest or that he obtained it by a fraudulent misrepresentation of facts. The important question to be considered was whether the accused, when he took over the money from the complainant's firm, had any intention of performing the contract.¹⁴

The accused obtained an advance for which he gave a promissory note, stating that he had two boat-loads of paddy in the adjoining creek and that he would bring the paddy to the complainant for sale: he then absconded. It was held that the conviction under this section was good; that the facts warranted the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise.¹⁵ The accused, who was the complainant's paddy-broker and regular paddy supplier, took from them advances for the purchase of paddy and gave promissory-notes for the advances in question. From time to time he had supplied paddy the total quantity of which, however, had not been sufficient to satisfy all the advances. He last obtained an advance of Rs. 4,000 when there was already due to the complainants a large sum on the previous advances, but only supplied a further small lot of paddy valued at Rs. 800, and was in consequence prosecuted in respect of that last advance. It was held that the facts did not warrant the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise and that, in the absence of proof of any representation at the time on the part of the accused, which he knew, or had reason to believe, to be false, there was no offence of cheating committed.¹⁶

The accused, a judgment-debtor, applied for permission to raise the amount of the decree by a private transfer of his house, which had already been sold in execution of the decree. The application was refused. The accused mortgaged the house to the complainant, representing that he was empowered to mortgage the house in order to pay off the decretal amount due to the decree-holder. He got the mortgagee to pay the amount due to the decree-holder and received the balance himself. He did not enter appearance in Court and the sale was confirmed. The mortgagee, failing to get refund of the money paid to the accused, charged him with cheating. It was held that he was guilty of cheating.¹⁷

The accused was in charge of a mare belonging to C who had given it to him for sale. One L made an offer for the mare and insisted on the offer being communicated to the owner. The accused showed L a telegram which the latter understood to have come from C refusing the offer. He thereupon raised the offer and purchased the mare. Subsequently, he instituted these proceedings against the accused on the ground that deception was practised on him, but, when he was examined, stated that he would have paid the same price had he known that the mare belonged to the accused. It was held that no wrongful loss was caused to L by reason of the fact that he was induced to bid up to what he considered to be the full value of the mare; and that by merely placing before L the telegram which purported to have been received from C, the accused could not be said to have acted fraudulently.¹⁸

¹⁴ *Dy. Legal Remembrancer v. Ijjatulla Kari*, (1906) 10 C. W. N. 1005, 4 Cr. L. J. 154.

¹⁵ *Poon v. Messrs. Mohr Brothers & Co., Ltd.*, (1911) 6 L. B. R. 38, 13 Cr. L. J. 50.

¹⁶ *Maug Po u.*, (1923) 1 Ran. 397.

¹⁷ *Ram Chand v. Jai Dial*, (1912) 13 P. L. R. 345, 13 Cr. L. J. 456.

¹⁸ *G. W. Dick*, (1914) 12 A. L. J. R. 1258, 16 Cr. L. J. 49.

A and B went to C and B asked for a loan on the security of a ring seemingly, but not really, of gold. A assured C that B was an honest man, and thereby induced C to advance the money. B was convicted of cheating. It was held in revision that B's conviction was wrong as A's assurance was the effective inducement for C's advancing the money irrespective of the question whether B's dishonesty was or was not proved.¹⁹ The accused drew a *hundi* and borrowed money on it, without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same. The money so borrowed was spent by him on his own purposes. The *hundi*, when presented for payment, was dishonoured by the drawee. The accused, though apprised of the dishonouring, took no steps either to have the *hundi* honoured or to repay the money borrowed on the *hundi*, but made himself scarce. It was held that the accused was guilty of cheating.²⁰

Where a person induced a clerk under a false representation to deliver a warrant of attachment to him, and made on it an endorsement to his own advantage, and but for the false representation the clerk would not have parted with the warrant, it was held that the person committed the offence of cheating.²¹ The accused went to the house of the complainant and said that he was a tinner and asked for work. The complainant gave him some utensils to repair. The utensils were not returned and the accused was prosecuted. It was held that the accused was guilty of cheating and not of criminal breach of trust (s. 406).²²

Accused No. 1, who was one of the three partners in a trading firm, borrowed Rs. 500 from the complainant under a promise to repay them on the following day. On the appointed day, accused Nos. 2 and 3 (other partners in the firm) offered to the complainant a cheque for Rs. 2,000 dated the following day and took from him in exchange a cheque for Rs. 1,500 in their favour. The complainant's cheque was duly cashed; but the accused's cheque when presented for payment was dishonoured. It was held that the accused committed the offence of cheating under this section read with s. 109, inasmuch as they acted in concert throughout the transaction and as the dishonest intention arising from the knowledge that the cheque would not and could not be paid on the due date must be imputed to all of them alike.²³

A charge of cheating on the allegations that the accused received an amount from the complainant with a representation that the accused would with that money bribe the Income-tax Officer was not held to be unsustainable on the ground that the amount paid could not be recovered in a civil Court, having been paid for an illegal object. But in the absence of evidence to show that at the time the money was paid there was an actual receipt in the sense that it was not the intention of the accused even to try to utilise the amount in that way it could not be held that the accused was guilty of cheating.²⁴

English cases.—Where a postman falsely pretended that 2s. was payable on a postal letter entrusted to him for delivery, whereas 1s. only was payable, this offence was held to have been committed.²⁵ It was the duty of the accused, who was an officer of a society, to return the names of members entitled to sick pay. He wrongfully entered on the list a member's name, which he gave to the secretary, and in due course received an order from the treasurer to pay the member the sum named. When the accused received the money he applied it in payment of a debt due from the member to himself. It was held that there was evidence upon which the jury might find that the money was obtained by the accused by a false pretence made by him to the treasurer.¹ Where a person put the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, it was held that he had committed this offence and not forgery.² Under the Code this will amount to forgery.

3. 'Intentionally induces the person so deceived to do or omit to do anything'.—By this clause "intentional deceptions are made punishable as cheats if they cause or are likely to cause any damage or harm whether to property or to re-

¹⁹ *Mata Prasad*, (1902) 18 A. L. J. R. 371, 21 Cr. L. J. 362, [1920] AIR (A) 66.

²⁰ *Uttam Lal Narottamdas*, (1920) 23 Bom. L. R. 340, 22 Cr. L. J. 305.

²¹ *Harishanker Gangaram*, (1904) 6 Bom. L. R. 375, 1 Cr. L. J. 332.

²² *Kundan*, [1942] Kar. 288.

²³ *Keshavji Madhavji*, (1930) 32 Bom. L. R. 562, 31 Cr. L. J. 1096, [1930] AIR (B) 179.

²⁴ *Public Prosecutor v. Bhimeswara Rao*, (1948) 61 L. W. 223.

²⁵ *Matthew Byrne*, (1866) 10 Cox 36.

¹ *Taylor*, (1901) 65 J. P. 457.

² *Closs*, (1857) 7 Cox 494.

putation. It is sufficient to constitute cheating within this clause if the deception is intended to cause any damage or harm whatsoever to the person deceived... The deception must be intended not only to induce the person deceived to do or omit to do something, but also to cause damage to that person. False statements are often made incautiously or carelessly or without sufficient information or inquiry and without any intention to deceive or injure. It may be observed of all incorrect or deceptive statements that they are not deceptions within this section, unless the person making them intends to induce the person to whom they are made to act upon the strength of such statements; even they are not deceptions within the definition unless the person who does or omits, etc., is induced to act by such statements and not by other independent motives; and lastly they will amount to the offence of cheating, only when they are intended to cause damage or harm to that person".³

The word 'intentionally' only applies to the act or omission which the person deceived is induced to do or omit to do, and it is not necessary in order to sustain a charge under this branch of the definition that the accused person should also have intended to cause harm or damage as the result of such act or omission. It is sufficient if he intentionally induces the person deceived to do or omit to do anything which he would not do or omit to do if he were not deceived and the act or omission causes damage or harm to that person in body, mind, reputation or property.⁴ The intention need not be fraudulent or dishonest. In the latter part of the section the words 'fraudulently' or 'dishonestly' do not find a place.⁵

"Intent" refers to the dominant motives of action, and not to a casual or merely possible result.⁶

Cases.—Inducing person deceived to do something.—Where a prostitute communicated syphilis to a man who had sexual intercourse with her on the strength of her misrepresentation that she was free from disease;⁷ where the accused passed off girls of a low caste as girls of a higher caste and thus obtained money from persons who married them;⁸ and where the accused applied to a Tahsildar for a quantity of land on *cowle* tenure free of tax for five years and falsely represented that the land was waste land,⁹ this offence was held to have been committed.

The accused, a coolie recruiter, induced the complainant to come to a coolie depot, and promising him domestic service entered his name in the books of the depot and wrote a letter to a coolie contractor in Calcutta offering the complainant as a coolie; on the same day the accused persuaded the complainant to go to a railway station to fetch a parcel and the accused bought a railway ticket for Calcutta for the complainant and tried to get him to enter the train, but the complainant refused to go. The object of the accused was to get the complainant to go to Calcutta that he might be sent from there to Assam as a tea-garden coolie. It was held that the act of the accused amounted to an attempt to cheat.¹⁰

The accused, a fireman, applied for employment to the Locomotive and Carriage Superintendent of Burma Railways. He forwarded with his application a copy of a certificate purporting to have been granted to him by the N. W. Railway authorities to the effect that the accused had been employed as an engine-driver on that railway for a considerable period and was of good conduct, when in fact no such certificate had ever been issued to him, nor had he ever worked as an engine-driver on that railway. It was held that he was guilty of an attempt to cheat and not of forgery.¹¹ Where a registered opium consumer got a license to purchase opium in one of his names and another license in the other of his names, and thereby obtained more opium than he would have done otherwise, it was held that he had committed the offence of cheating.¹²

The accused proposed to the father of a girl for the hand of his daughter and obtained his consent and was admitted into his house. Subsequently, information was

³ M. & M. 383.

⁴ *Nand Lal*, (1888) P. R. No. 36 of 1888.

⁵ *Baburam Rai*, (1905) 32 Cal. 775, 781.

⁶ *Harendra Nath Das v. Jyotish Chandra Datta*, (1924) 52 Cal. 188.

⁷ *Rakma*, (1886) 11 Bom. 59.

⁸ *Komul Dass*, (1865) 2 W. R. (Cr.) 7;
Puddomoni Boistobee, (1866) 5 W. R. (Cr.) 98;
Dabee Sing, (1867) 7 W. R. (Cr.) 55; *Sheoram*,

(1882) 2 A. W. N. 237.

⁹ (1868) 4 M. H. C. (Appx.) 12.

¹⁰ *Kishori Lal Chatterji*, (1905) 9 C. W. N. 764, 2 Cr. L. J. 422.

¹¹ *Fazal Din*, (1906) P. R. No. 1 of 1907, 4 Cr. L. J. 355.

¹² *Tha Byaw*, (1908) 4 L. B. R. 315, 9 Cr. L. J. 15, F.B.

received by the father that the accused was a married man; this the accused admitted to be true. Shortly after the daughter who was major left the father's protection of her own accord and went to the accused. On the complaint of the parents the accused was convicted of cheating. It was held that the facts did not bring the case within s. 417, read with this section.¹³

English cases.—The accused ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank and took away the goods. He had shortly before opened an account at the bank but had drawn out the amount deposited except a few shillings. It was held that he was guilty of cheating.¹⁴ Where the accused conspired to obtain a passport from the Foreign Officer by false representation in the name of M for his use in Russia intending that it should be used by some other person, it was held that they were guilty of cheating and criminal conspiracy.¹⁵ The accused ordered a meal in a restaurant: he made no verbal representation at the time as to payment, nor was any question asked him with regard to it. After the meal he said that he was unable to pay, and that he had only one half-penny in his possession. It was held that he could not be convicted of the offence of obtaining goods by false pretences, but he was liable to be convicted of obtaining credit by means of fraud within the meaning of the Debtors Act, 1869.¹⁶ In India such an act will be covered by the definition of cheating.

4. 'Causes or is likely to cause'.—These words are very wide. Thus, under illustrations (f) and (g) deception as to a future event is criminal: this is not the case under English law. The expression 'or is likely to cause' may apply to such cases as the following: A by deception is induced to make an entry in his shop books that certain goods have been paid for when in fact they have not; to give credit in account for a greater amount than has actually been paid; or to sign a receipt for a sum which has not been received. In these cases the thing which A is induced by the deception to do is one which is likely to cause damage to A; for such admissions in his own handwriting would be weighty evidence against A's claim if they were produced against him or against his representatives after his death in a Court of Justice.¹⁷

5. 'Damage or harm to that person in body, mind, reputation or property'.—"The illustrations throw no light on what is meant by damage or harm in body, mind or reputation and so far as such damage is concerned the offence is not very appropriately placed in the Chapter of the Code relating to offences against property. An essential ingredient of the offence is the damage or harm caused or likely to be caused in the said respects or in property. Generally speaking, a criminal offence consists in an act done by the accused with a specific criminal intent, or state of mind, constituting the *mens rea*. Difficulties connected with the notion of causation, common enough in other branches of the law, such as tort, seldom arise. It is true that negligence is sometimes punishable as an offence because it causes or is likely to cause hurt or injury to another (*cf. ss. 279 and 280 and 284-287 of the Code*). But cheating in the second form has this additional peculiarity. The damage is to be caused by the person deceived to himself. Indirectly it may be, the damage is to result from the deceit, but immediately it is to result from the induced act of the person deceived. This no doubt explains why the word 'injury', defined in s. 44 of the Code as 'any harm whatever illegally caused to any person in body, mind, reputation, or property' was not employed in s. 415. It does not appear to be necessary that the resulting damage or likelihood of damage should have been within the actual contemplation of the accused when the deceit was practised. But authorities in this Court lay down—(i) that the person deceived must have acted under the influence of the deceit. . . (ii) that the facts must establish damage or likelihood of damage. . . and (iii) that the damage must not be too remote. . . On the point of remoteness of damage, there seems no sound reason why a definition which presupposes wilful deceit on the part of the accused should be too narrowly interpreted. The word 'cause' doubtless excludes damage occurring as a mere fortuitous sequence, unconnected with the act induced by the deceit, except as every event is connected with preceding events in an unending chain. On the other

¹³ *Sergeant R. Milton v. Mr. & Mrs. Sherman*, (1918) 22 C. W. N. 1001, 19 Cr. L. J. 781.

¹⁴ *Hazzelton*, (1874) L. R. 2 C. C. R. 134; *Cosnett*, (1901) 20 Cox 6. See ill. (d) to s. 415.

¹⁵ *Brailsford*, [1905] 2 K. B. 730.

¹⁶ *Jones*, [1898] 1 Q. B. 119.

¹⁷ *M. & M.* 384.

hand the definition, as it stands, is wide enough to include all damage resulting or likely to result as a natural consequence of the induced act."¹⁸

The deception must be intended to cause damage or harm to the person deceived in body, mind, reputation or property. If A by deception induce B to make an incorrect statement to C, a master, concerning the conduct or character of one of his servants, which misstatement causes C to prosecute or dismiss the servant, here the deception causes no damage or harm to B, the person deceived, and is therefore not, so far as he is concerned, within the definition.¹⁹ The Lahore High Court has observed in a case that the definition of cheating requires modification in order to cover cases where one person is deceived and another person suffers, or is likely to suffer, damage or harm in body, mind, reputation or property. It has been revealed in a number of cases that serious deception has been practised on Government officials as a result of which certain other persons have suffered a great deal of harm in reputation or property. As the definition of 'cheating' at present stands, such cases are not covered by this section, and the punishment prescribed in ss. 419 and 420 cannot be awarded to persons who practise deception on Government servants which results in damage and harm to third parties. Persons who practise such deception may be convicted under s. 182, but the punishment prescribed for that offence is not sufficiently deterrent, and it is desirable that such convicts should be liable to be heavily punished under s. 420, which prescribes a maximum sentence of seven years' rigorous imprisonment."²⁰

Neither the section nor the illustrations indicate what the meaning of causing harm in 'body, mind or reputation' is. Each and every illustration is confined to the kind of cheating which causes wrongful gain or wrongful loss, or which causes harm only in respect of property. Injury to body or to 'reputation' is explicable. But 'harm in mind' is not. It is difficult to say whether the authors of the Code intended thereby to mean mental gain or injury to the mental powers.

Again, the 'damage or harm' caused, or likely to be caused, must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom;²¹ and not any remote possibility flowing from the act. The proximate and natural result only of the act induced has to be considered, and not any vague and contingent injury that may possibly arise.²² Loss from non-delivery of goods arises from breach of the contract and not from the act of acceptance of a bought note, and loss from subsequent rise of the market or harm to reputation from dealing with a bogus firm are remote contingencies not contemplated by this section.²³

Cases.—Damage or harm to complainant in body, mind, reputation or property.—The accused without any authority arranged a contract for the delivery of goods to the complainant's firm by B. & Co. On the repudiation of the contract by the latter, the former pressed their claim under the contract and instructed their pleader to write to the latter firm, and demand fulfilment of the contract. The accused then went to the pleader, falsely represented himself to be a member of the complainant's firm and instructed the pleader to write a letter in the name of the complainant's firm to B. & Co., stating that the contract was cancelled by the complainant's firm. The pleader wrote the letter but on reference to the complainant's firm refrained from despatching it. It was held that the accused had committed the offence under ss. 417 and 511 of the Code as he fraudulently induced the pleader to write a letter which he otherwise would not have written, and as, if the fraud had been successful, it must necessarily have caused injury to the pleader in mind, reputation, and perhaps in his business and might have involved him in litigation.²⁴

Where a person attempted to get himself reinstated in the post of a *karnam* by the production of a certificate of having passed a certain examination and representing that the certificate referred to him while in fact it referred to another man

¹⁸ Per Richardson, J., in *Legal Remembrancer v. Manmatha Bhusan Chatterjee*, (1923) 51 Cal. 250, 260.

¹⁹ M. & M. 384.

²⁰ *Muhammad Bakhsh*, (1941) 22 Lah. 718, 729.

²¹ *Mojey*, (1890) 17 Cal. 606; *Muhammad Shah*, (1918) P. R. No. 34 of 1918, 20 Cr. L. J. 77, [1919] AIR (L) 473; *Legal Remembrancer v.*

Manmatha Bhusan Chatterjee, (1923) 51 Cal. 250, 260.

²² *Harendra Nath Das v. Jyotish Chandra Datta*, (1924) 52 Cal. 188; *Ratan Singh*, (1934) 35 P. L. R. 666, 36 Cr. L. J. 274.

²³ *Ibid.*, *Sarda Saran*, (1923) 21 A.L. J. R. 873, 26 Cr. L. J. 213, [1924] AIR (A) 209.

²⁴ *Mahadev Lal v. Dhorraj Maisri*, (1908) 12 C. W. N. 750, 7 C. L. J. 375, 7 Cr. L. J. 342.

bearing the same name, it was held that in the absence of proof that the representation caused or was likely to cause damage or harm to the officer to whom the representation was made either in body, mind, reputation or property within the meaning of this section the accused could not be convicted under ss. 419 and 511.²⁵ The accused, a judgment-debtor, gave a cheque to the decree-holder not in token of immediate satisfaction of the decree but only as a security and as a measure of accommodation to enable the judgment-debtor to provide means for honouring the cheque within a convenient period after issue or to otherwise satisfy the decree, and one week's time for settlement was taken from the Court. The cheque was dishonoured, and the accused was thereupon prosecuted for cheating. It was held that the element of fraud or dishonesty was absent and there was no delivery of property and there was no damage or harm to the complainant in body, mind, reputation or property.¹

The accused applied to the postal authorities and obtained an appointment in the Postal Department but he had not mentioned in his application that he was dismissed from Government's service. He was charged with and convicted of cheating as he did not state the fact of his dismissal in his application. Knight, J., said: "I find no difficulty in concluding that the petitioner's silence regarding his previous employment deceived and was meant to deceive the authorities of the Post Office, and thereby procured him an appointment that he would not otherwise have obtained. But I do not think that this amounts to an offence under section 415, Indian Penal Code. For neither the act of appointment, nor the omission to inquire into the petitioner's antecedents caused, or was likely to cause, damage or harm 'to the body, mind, reputation, or property' of the person deceived. Such damage or harm must, I take it, be the proximate and natural result of the act or omission: and we cannot include in it such vague and contingent injury as might arise from the discredit that might attach to the Department, from the employment of a man of doubtful character. It has not been suggested that the damage to be apprehended was that which might be caused by the petitioner's dishonesty; and this too would be a consequence too remote for the purposes of the section. I therefore agree that the conviction should be quashed".² Where the manager of a firm was induced by the false representation of the accused to accept a bought note with a non-existent firm for the purchase of jute, and to sign a receipt for the note, it was held (as to the receipt) that the case did not fall within the first part of this section, as the accused had no intention to cause wrongful loss or wrongful gain to any one by inducing the manager to make out or give a receipt for the bought note, which had been actually made over to him, but at most an intention to hold him to the contract. As to the note it was held that the case did not fall within the second part of this section as no loss of property or harm to the manager's reputation resulted proximately and necessarily from the act itself which he was induced to do, viz. acceptance of the contract.³ A licensed bookmaker, on the assurance of the opposite party that he would pay up his losses, if any, punctually on the settling day, allowed the latter to take bets on credit. The opposite party failed to pay his debts and on different dates paid cheques to the petitioner and induced him to accept further bets on credit. It was held that although the petitioner was deceived and thereby induced to take bets on credit from the opposite party, it could not be said that the act which the petitioner was induced to do by reason of such deception had caused or was likely to cause damage or harm to him in body, mind, reputation or property. It did not follow that if the petitioner had refused to take bets on credit, the opposite party would of a certainty have had to offer bets by paying cash. The opposite party might not have offered any bets at all. Therefore the offence of cheating was not committed.⁴ The unauthorised allotment of more wagons to a colliery than they were entitled to, through the fraudulent or dishonest acts of the servants of a railway company would not cause, or would not be likely to cause, any appreciable damage to the railway company's reputation, as the damage would be too remote.⁵ Where the accused falsely induced the complainant

²⁵ *Manikam Pillai*, (1908) 19 M. L. J. 271, 8 Cr. L. J. 421.

¹ *Sheo Saran Vaish v. Jitendra Nath Daw*, (1928) 5 O. W. N. 357, 29 Cr. L. J. 657, [1928] AIR (O) 292.

² *Kashinath Mahadev Phatak*, (1910) Criminal Application for Revision No. 402 of 1909, decided on February 24, 1910, per Chandavar-

kar and Knight, J.J., (Unrep. Bom.).

³ *Harendra Nath Das v. Jyotish Chandra Datta*, (1924) 52 Cal. 188.

⁴ *H. K. Bhedwar v. Rao Shahat C. S. R. Rao*, (1923) 27 C. W. N. 919, 39 C. L. J. 273, 24 Cr. L. J. 748, [1924] AIR (C) 111.

⁵ *Legal Remembrancer v. Manmatha Bhusan Chatterjee*, (1923) 51 Cal. 250.

to compromise a criminal case, which was not compoundable, it was held that a charge of cheating would not lie.⁶

Certain recruits were rejected by a Recruiting Officer at Lahore as unfit. The accused took them to Lyallpur and offered them to a *lambardar* on condition that he would pay Rs. 50 for each recruit. It was arranged that this money would only be paid if the recruits were accepted by the Recruiting Officer. The *lambardar* asked the accused whether the recruits had already been rejected and they replied in the negative. The *lambardar* on presenting the recruits to the Lyallpur Recruiting Officer was told by that officer's orderly that they had already been rejected in Lahore. It was admitted that the *lambardar* was not liable to any punishment departmentally as merely presenting rejected recruits was not an offence unless it was done knowingly. It was held that no offence under ss. 420 and 511 had been established as the money was not to be paid to the accused by the *lambardar* unless the recruits were accepted. It was further held that the first and second ingredients of the offence of cheating existed, but not the third, seeing that the *lambardar's* action in presenting the recruits not knowing that they had been previously rejected was not likely to cause him any harm or injury at all. There was only a possibility that he might suffer annoyance or likely to be caused to the person deceived in mind, body, reputation or property in case his explanation was not at once accepted, while the damage or harm caused within the meaning of this section must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.⁷ Section 539B of the Criminal Procedure Code which empowers the Court to make a local inspection does not contemplate a procedure by which the presiding officer would to all intents and purposes put himself in the position of a witness in the case. Where the accused advertised a *gupta mantra* (secret incantation) by the reading of which the reader would achieve his object without any effort, and offered a cash prize in case of the failure of the *mantra*, and the accused while sending the *mantra* sent instructions that were very difficult to follow, it was held that the accused was guilty of cheating.⁸

Explanation.—Concealment of any facts which deceive a person must be dishonest; an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent. Where the cheating consists in concealment, it must be shown that *suppressio veri* was a violation of a legal duty or it was an illegal omission in fact.⁹ Accused No. 1 floated a company with a nominal capital and employed accused Nos. 2 to 4 either as agents or canvassers. The scheme of work of the company was to advance loans to applicants at the rate of one and a half per cent. per annum. Each applicant had to deposit a sum of money with the application, and the loan was to be made in specified instalments determined by drawing lots. The loan was made repayable after about five to eight years from its grant. If the loan was not made within a year, the applicant could get a refund of the application moneys. All these conditions were printed and attached to the forms of application. After the scheme was in operation for some time, some of the applicants got loans applied for in full. On a prosecution of the accused for the offence of cheating under s. 420 it was held, discharging the accused, that though the scheme was highly speculative it was not dishonest or fraudulent in the sense that it either represented to the public something which was not true or concealed from them something which the company ought to have disclosed.¹⁰

The Explanation to this section refers to the actual deception itself and not to the concealment of a deception by some one else.¹¹

A promise to do something in the future *per se* may not amount to a false pretence

⁶ *Banamali Charan Bhunia v. Dharani Dhar*, [1943] 1 Cal. 154.

⁷ *Muhammad Shah*, (1918) P. R. No. 34 of 1918, 20 Cr. L. J. 77, [1919] AIR (L) 473.

⁸ *Akil Kishore Ram*, (1937) 19 P. L. T. 375, [1918] P. W. N. 93, 39 Cr. L. J. 442, [1938] AIR (P) 185.

⁹ *Bishan Das*, (1905) 27 All. 561. See *Dori Lal*, (1919) 17 A. L. J. R. 500, 20 Cr. L. J. 313;

Sada Ram, (1920) 18 A. L. J. R. 408, 21 Cr. L. J. 749, [1920] AIR (A) 289.

¹⁰ *Durgadas*, (1933) 35 Bom. L. R. 1181, 35 Cr. L. J. 644, [1934] AIR (B) 48; *Jatindra Nath Sircar*, (1934) 38 Cr. L. J. 209, [1936] AIR (C) 449.

¹¹ *Nga Po Maung*, (1895) 1 U. B. R. (1892-1896) 255.

or to cheating, but, it may at the same time, in certain cases, involve a false pretence that the promisor has the power to do that thing for which false pretence the promisor may be indictable.¹²

Puffing.—The authors of the Code say: "If all the misrepresentations and exaggerations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law. It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees, and by the buyer to be dear at eight rupees. The seller comes down to eleven rupees, and declares that to be his last word; the buyer rises to nine, and says that he will go no higher; the seller falsely pretends that the article is unusually good of its kind, the buyer that it is unusually bad of its kind; the seller that the price is likely soon to rise, the buyer that it is likely soon to fall. Here we have deceptions practised for the sake of gain, yet no judicious legislator would punish these deceptions...The moralist may regret this; but the legislator sees that the result of the attempts of the buyer and seller to gain an unfair advantage over each other is that, in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch; and therefore he does not think it necessary to interfere. It is enough for him to know that all this great mass of falsehood practically produces the same effect which would be produced by truth; and that any law directed against such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazaars of India produce in a century".¹³

Where the allegation against the accused was that he advertised in the papers that he was willing to sell an almost new jazz set, and the complainant answered the advertisement and after some correspondence sent the price settled to the accused, and on receipt of the goods the complainant found that they were not of the quality he expected according to the advertisement and certain articles mentioned in the list were not sent, and the accused was summoned to answer a charge of cheating; it was held that the allegations were insufficient to justify the prosecution of the accused for a criminal offence, and the proceedings against the accused were quashed. The giving of untrue praise of articles by a seller does not amount to a criminal offence.¹⁴

English cases.—A simple misrepresentation of the quality of goods is not a false pretence.¹⁵ In order to obtain an advance of money on a large quantity of plated spoons, the defendants represented to a pawnbroker that they were of the best quality, that they were equal to Elkington's A, that the foundation was the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them an advance of money was made. It was held that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence.¹⁶ This case was governed by the maxim *simple commendatio non obligat*. Any exaggeration or deception in the ordinary course of dealings between the buyer and the seller during the progress of a bargain cannot be the subject of a criminal prosecution. But when the thing sold is of an entirely different description from what it is represented to be and the statements made are not in form an expression of opinion or mere praise, the offence of cheating will be committed. Where, therefore, the accused induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15-carat gold, when, in fact, it was only a trifle better than 6-carat, knowing at the time that he was falsely representing the quality of the chain as 15-carat gold, it was held that the statement that the chain was 15-carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the accused, was a false pretence.¹⁷

The accused induced the prosecutor to buy certain plated goods plate at an auction for £7 on the representation that they were the best silver lined with gold

¹² *Girdhari Lal*, (1910) P. W. R. No. 26 of 1910 (Cr.) P. R. No. 12 of 1913, 11 Cr. L. J. 428.

¹³ Note N, p. 163.

¹⁴ *W. H. Da Costa v. J. P. Deefholts*, (1924) 29 C. W. N. 362, 26 Cr. L. J. 921, [1925] AIR

L.C.—67

(C) 605.

¹⁵ *Bryan*, (1857) 7 Cox 312.

¹⁶ *Ibid.*

¹⁷ *Ardley*, (1871) L. R. 1 C. C. R. 301; *Roebuck*, (1856) 25 L. J. (M. C.) 101.

and worth £20. The foundation of the goods was Britannia metal, instead of nickel as in the best goods, covered with a transparent film of silver, and they were worth only about 30s. It was held that there was no false pretence. The Court said: "It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of goods. There is always a conflict of knowledge and skill between a buyer and seller, the one wishing to buy as advantageously, and the other to sell as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases. At present the line is fixed, and there must be a false representation of an existing fact, operating upon the mind of a buyer, and deceiving him in such a manner that he cannot protect himself against it."¹⁸

Statutory application.—The Bombay City Police Act (Bom. Act IV of 1902), s. 126; the Madras City Police Act (Mad. Act III of 1888), s. 51.

CASES.

Vendor and purchaser.—The selling of milk and water in about equal proportion as pure milk would support a finding of cheating.¹⁹ Where a person was purposely sent to buy milk knowing it was watered, in order to prosecute the seller, it was held that as there was no deception a conviction for cheating would not stand.²⁰ But according to *Government of Bengal v. Umesh Chunder Mitter*,²¹ the seller would probably be guilty of an attempt to cheat. Where the accused sold nasty sweetmeats, it was held that he could not be held guilty of this offence as the purchaser might have tasted the sweetmeats before buying them.²² Where the accused sold liquor, measuring it with a glass which was not a prescribed measure, and of which they fraudulently misrepresented the capacity, it was held that they ought to have been tried for this offence and not for one under s. 265.²³ Where a licensed opium vendor sold opium at rates higher than those fixed by the Government, it was held that he had committed this offence.²⁴ Where the vendor of immovable property omitted to mention that there was an incumbrance on the property, it was held that he could not be convicted of cheating unless it was shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unincumbered.²⁵

The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit. It was subsequently discovered that the vendee had, after his purchase but before the suit, mortgaged the property, which was the subject of the suit for pre-emption. It was held that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of cheating.¹ D sold certain trees to S which stood on land in respect of which D held a mortgage. D brought the land to sale under the mortgage and purchased it before the sale of the trees by him to S; but in the interim the mortgagor had given the trees in suit to other persons as compensation for certain trees which the mortgagor had wrongfully cut down. S was resisted in cutting the trees and found that the trees belonged to certain other persons. S complained to D but D put him off and eventually drove him away with abuse and would not return the money. It was held that D was guilty of dishonestly concealing the facts within the meaning of the Explanation of this section.²

The accused contracted to supply to the complainants 260 bales of fully good machine-ginned cotton. In fulfilment of this contract, he delivered as many bales largely composed of cotton-seed, raw cotton and rubbish, carefully packed into the middle, while all round the sides was placed good ginned cotton. The percentage of the admixture was from 6 to 15 per cent. as against the normal admixture of $\frac{1}{2}$ or 1 per cent. The accused was shown to have business relations with a factory which owned

¹⁸ *Levine and Wood*, (1867) 10 Cox 374, 376.

¹⁹ *Nana*, (1880) Unrep. Cr. C. 145.

²⁰ *Kalee Modock*, (1872) 18 W. R. (Cr.) 61.

²¹ (1884) 16 Cal. 310.

²² *Kalee Modock*, sup.

²³ *Nurodin*, (1888) Cr. R. No. 36 of 1888, Unrep. Cr. C. 386.

²⁴ *Pandurang Ramchandra*, (1902) 4 Bom. L. R. 823.

²⁵ *Bishan Das*, (1905) 27 All. 561. *The Karachi Municipality v. Bhojraj*, (1915) 9 S. L. R. 97, 16 Cr. L. J. 706; *Ramdayal Mahto*, (1927) 9 P. L. T. 303, 29 Cr. L. J. 700, [1928] AIR (P) 337.

¹ *Gendun Lal v. Abdul Aziz Khan*, (1904) 27 All. 302.

² *Dori Lal*, (1919) 17 A. L. J. R. 500, 20 Cr. L. J. 331.

ginning machines which were capable of making the admixture, and was found to be present there whilst the machines were ginning such adulterated cotton. It was held that the accused was guilty of cheating.³

Misstatement as to nature of goods.—The accused, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. It was held that he was guilty of false pretence.⁴

Where the offence charged consisted of selling or pawning as genuine gold mohurs of the reign of Shahajahan silver rupees of that reign which had been gilt or in some way covered over with gold, it was held that this offence had been committed.⁵

Where property is delivered, fraudulent or dishonest intention on part of accused is necessary : where any act is done, through deception, that act should have caused damage or harm.—Where the accused gave a false name and address in order to shield prosecution for an offence;⁶ where the accused falsely told his master's brother that his master was ill in a certain village and so induced him to go to that village;⁷ and where the accused presented a stolen note to a shopkeeper for encashment, and in reply to the inquiry of the shopkeeper after he had cashed the note gave his name falsely,⁸ it was held that this offence was not committed. Where the accused secretly entered an exhibition building without having purchased a ticket, and was there apprehended, it was held that such act did not amount to cheating because he had not made a false representation to anyone.⁹ If the accused had said to the doorkeeper that he had a ticket, and had thus obtained access to the building, that would have been cheating. Where a person, who purchased rice from a famine-relief officer, at a certain rate, on condition that he should sell it at a pound less, was convicted of cheating because he did not sell it at the rate agreed on, it was held that as there was no wrongful gain or loss to anyone, no offence was committed.¹⁰ For, the rice having been sold to him, and he having paid for it, it was not unlawful for him to sell it again at such price as he thought fit. The fact that a trader in a statement of his account included, amongst other articles delivered, an article, which the complainant alleged she had returned, was held not to amount to cheating unless it was proved that he had done so with an intention to defraud and had obtained a payment of the whole bill or of the bill in part including the price of that article.¹¹ Where a person attempted to obtain his recruitment in the police by giving certain information, which he knew to be false, to the District Superintendent of Police, it was held that he had not thereby committed the offence of attempting to cheat, because the act was not likely to cause damage or harm to the person deceived in body, mind, reputation or property.¹² Where the accused promised to withdraw his charge against the complainant's brother-in-law and others without intending to do so, and thereby deceived the complainant and induced him to withdraw his charge against the accused, it was held that the act of the complainant so induced by the accused's deceit could not be said to be one likely to cause damage or harm to him in body, mind, reputation or property within the meaning of this section and that the accused was not, therefore, guilty of cheating.¹³ Where the accused, a public servant, purchased at an auction a quantity of waste-paper, bidding for it under an assumed name, it was held that in the absence of any rule forbidding employees in the office to bid at such sales; the conviction of the accused under this section could not be sustained.¹⁴ The accused were charged before the District Magistrate with cheating in that they waylaid certain intending customers of the complainant and falsely represented themselves as belonging to the complainant's shop, took them to their own shop on the pretence that it was the shop of the complainant and sold sweets to them. It appeared that the customers sustained no pecuniary loss in consequence of the accused's acts who apparently had not tried to

³ *Kanji Shivaji*, (1912) 14 Bom. L. R. 137, 13 Cr. L. J. 285.

⁴ *Foster*, (1877) 2 Q. B. D. 301.

⁵ *Khushali*, (1906) 29 All. 141.

⁶ *Ladka*, (1893) Cr. R. No. 10 of 1893, Unrep. Cr. C. 635.

⁷ *Punjia*, (1888) Unrep. Cr. C. 423.

Shank Basit, (1883) 1 Weir 479.

⁸ *Mehervanji Bejanji*, (1869) 6 B. H. C. (Cr. C.) 6.

¹⁰ *Lal Mahomed*, (1874) 22 W. R. (Cr.) 82.

¹¹ *Baij Nath Ram Marwari v. Burgess*, (1900) 5 C. W. N. 255.

¹² *Dwarka Prasad*, (1883) 6 All. 97.

¹³ *P. Durgiah*, (1892) 1 Weir 477.

¹⁴ *Kutab Ali*, (1903) 23 A. W. N. 231.

make anything out of their victims and had only charged the market rate for the sweets. The Magistrate convicted the accused of cheating, holding that the deception must have injuriously affected the business of the complainant. It was held that the conviction was bad.¹⁵

The accused, a shopkeeper, having sold goods worth Rs. 2-13-0 to a customer, received in payment two currency notes one of Rs. 2-8-0 and the other of Re. 1. Instead of returning eleven annas, as he ought to have done, he paid only Re. 0-9-3 to the customer, saying that the notes were not worth their face value. It was held that the offence of cheating was not committed, for there was no deceit, inasmuch as the customer was not induced to hand over the notes by any representation on the part of the accused that he would get change calculated on the face value of the notes but the notes were handed over in the ordinary course of the sale and purchase and what really happened was that a dispute then arose as to the correct amount of the change due to the customer.¹⁶

With a view to escape the payment of just dues of their creditors, the accused, who were retail traders, fraudulently induced the creditors before the closing of the civil Courts for vacation, to grant them some time to pay up. Their object in gaining time was to remove the goods from their shop. The civil Courts having closed within the time thus granted, the creditors were prevented from seeking any remedy in the civil Courts. It was held that as time was obtained fraudulently the accused were guilty of cheating.¹⁷

The accused, who was the complainant's paddy-broker and regular paddy-supplier, took from them advances for the purchase of paddy and gave promissory notes for the advances in question. From time to time he had supplied paddy the total quantity of which, however, had not been sufficient to satisfy all the advances. He last obtained an advance of Rs. 4,000 when there was already due to the complainants a large sum on the previous advances, but only supplied a further small lot of paddy, valued at Rs. 800, and was in consequence prosecuted in respect of this last advance. It was held that the facts did not warrant the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise, and that, in the absence of proof of any representation at the time on the part of the accused, which he knew or had reason to believe to be false, no offence of cheating was committed.¹⁸

False entries.—Where the accused was requested to make an entry in a book of accounts, belonging to the complainant, to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry entered in a language not known to the complainant that this sum had been paid to the complainant, it was held that he had committed an offence of attempt to cheat, and not one under s. 465.¹⁹ Where the lessee of a forest presented false accounts to a Forest Officer in order to defraud the Government, it was held that the offence committed was that of attempt to cheat.²⁰

False compromise.—The charge under s. 408 is not compoundable and even where the accused makes some promise and the case is dropped, the promise would not be enforceable and it would always be open to the complainant to have the case revived if the Magistrate is so disposed. Hence in such a case the accused cannot be prosecuted for cheating for having induced the complainant to "compromise the case".²¹

Fraud by railway passengers.—Where a passenger travelled in a carriage of higher class than that for which he had paid fare;²² and where a passenger gave some part of his luggage to a co-passenger to evade the charge for over-weight,²³ this offence was held not to have been committed. Where a man endeavoured to evade payment of a railway fare by the production of an old pass altered as to date and number of

¹⁵ *Sundar Singh*, (1904) P. R. No. 25 of 1904, 2 Cr. L. J. 126.

¹⁶ *Muraji Raghunath*, (1919) 21 Bom. L. R. 763, 43 Bom. 842.

¹⁷ *Ramshwar v. Gobind Prasad*, (1925) 23 A. L. J. R. 433, 26 Cr. L. J. 970, [1925] AIR (A) 473.

¹⁸ *Maung Po Lu*, (1923) 1 Rán. 397.

¹⁹ *Kunju Nayar*, (1888) 12 Mad. 114.

²⁰ *Ramajirav Jirbajirav*, (1875) 12 B. H. C.

(Cr. C.) 1.

²¹ *Banamali Charan Bhunia v. Dharani Dhar*, [1943] 1 Cal. 154.

²² *Dayabhai Parjaram*, (1864) 1 B. H. C. 140; but such a person becomes liable to pay excess fare and penalty under s. 113 (2) of the Indian Railways Act, 1890, which does not require intention to defraud: *Horniman*, (1932) 34 Bom. L. R. 1666, 34 Cr. L. J. 239.

²³ *Paras Ram*, (1903) P. R. No. 25 of 1903.

persons, it was held that he was guilty of an attempt to cheat.²⁴ Where a railway employee obtained a free pass for his wife and mother and handed it over to a woman who was neither his wife nor his mother and she used it, it was held that he was guilty of cheating under s. 420 of the Code and not under s. 112 of the Railways Act.²⁵

Abetment.—The forwarding of fictitious consignment notes was held to be abetment.¹ The accused by falsely representing F, a notorious and practised gambler well skilled in all the tricks of gambling, to be a rich merchant, induced the prosecutor to gamble with him, on the representation that the merchant would fall an easy prey if the prosecutor gambled with him, and he (the prosecutor) was thus induced to part with all his property. It was held that those facts were sufficient to sustain a conviction for abetment of cheating.²

416. A person is said to “cheat by personation” if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

ILLUSTRATIONS.

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

COMMENT.

Ingredients.—This section requires any one of the following essentials:—

1. Pretension by a person to be some other person.
2. Knowingly substituting one person for another.³
3. Representation that the person representing or any other person is a person other than he or such other person really is.

“To ‘personate’ means to pretend to be a particular person”.⁴ “As soon as a man by word, act, or sign holds himself forth as a person entitled to vote with the object of passing himself off as that person, and exercising the right which that person has, he has personated him”.⁵ If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner’s cap and gown, and obtain goods, this appearing in a cap and gown is a sufficient thing although nothing passed in words.⁶

Explanation.—The person personated may be a real or an imaginary person.

CASES.

False personation at examination.—Where A falsely represented himself to be B at a University Examination, got a hall-ticket under B’s name, and wrote papers in B’s name, it was held that A had committed the offence of forgery and cheating by personation.⁷

Personation before public servant.—A female vendor started for D, in company with three persons, to get her deed of sale registered. She fell ill on the way, and her three companions went to the Registrar’s office. One of them, a woman, there personated the vendor, and got registry of the deed. She was convicted under this section and the other two of abetting the offence. It was held that as there was no

²⁴ *Gunpat*, (1868) P. R. No. 6 of 1868.

²⁵ *Ram Dayal*, (1925) 2 O. W. N. 510, 26 Cr. L. J. 1164.

¹ *Raghunath*, (1889) Unrep. Cr. C. 470.

² *Jahana*, (1904) P. R. No. 4 of 1905, 2 Cr. L. J. 38.

³ *Gian Singh*, (1938) 40 Cr. L. J. 371.

⁴ Per Crompton, J., in *Hague*, (1864) 4 B. & S. 715, 720, 33 L. J. (M. C.) 81, 82.

⁵ Per Blackburn, J., in *ibid.*, pp. 721, 83.

⁶ *Barnard*, (1837) 7 C. & P. 784.

⁷ *Appasami*, (1889) 12 Mad. 151; *Ashwani Kumar Gupta*, [1937] 1 Cal. 71. See *Ganesh Khanderao*, (1889) 13 Bom. 506.

apparent intention on the part of the accused to injure or defraud any one, the convictions should have been under the Registration Act and not under the Code.⁸ Similarly, where a servant purchased a stamp paper for his master, giving his master's name as if it had been his own, it was held that a conviction under this section was bad, inasmuch as although there might have been personation, there was no cheating as there had been no fraudulent intent.⁹

Where the accused was found to have knowingly represented one J to be B, the mother of a sepoy K, who had been killed in action, and thereby induced the military authorities to grant a pension to J to which she was not entitled, it was held that he had committed this offence.¹⁰

Where the accused travelled by rail without ticket and on arriving at the place of destination presented a forged railway pass made out in the name of the "Servant of Mr. Brown, Assistant Auditor"—a description which did not apply and never had applied to him, it was held that as it was not proved whether he had shown the pass to a Ticket Examiner before the completion of his journey, he was guilty of an attempt to cheat under this section.¹¹ A and L induced the *muhammad* at a fair to write out a certificate of sale of a mare giving S as the name of the seller and L as the purchaser. A posed as S and affixed thereto his thumb-mark. It was held that as the *muhammad* was deceived, A and L were guilty of an offence under this section whatever reason they had for deceiving him and inducing him to write a false certificate.¹²

Where a person falsely personated another and induced a Health Officer to deliver to him a health certificate it was held that he was guilty of this offence.¹³ Where a person purchased a stamp-paper from a licensed vendor, representing himself to be H and the vendor entered H's name in the register as purchaser, it was held that a charge of cheating could not be sustained. Though the accused by personating H deceived the stamp-vendor and induced him to make an incorrect entry in the register, which act was likely to cause damage to the stamp-vendor, it was not shown that the accused had any fraudulent design upon the vendor, and it was not enough if his intention was to use the stamp to the injury of H.¹⁴ Where the accused presented a certificate given to another person terminating his service on account of reduction, to a railway officer to employ him, and the railway officer employed him not on account of the certificate but owing to his personal qualifications, it was held that handing over the certificate was an act of deception but as it was not proved that the railway officer was induced to appoint him on the production of the certificate he was not guilty under this section.¹⁵

Personation by witness.—A witness falsely deposing in another's name should be charged with giving false evidence, under s. 198, and not with cheating by personation.¹⁶

False representation as to caste.—Where the accused represented to the prosecutor that a girl was a Brahmin and thereby induced him to part with his money on consideration of the marriage of the girl to his brother, when the girl really was Sudra, it was held that he was guilty of cheating by false personation.¹⁷ Where the accused falsely represented to the mother of a girl that he was a *Barendra* Brahmin, whereas in fact he really belonged to another sub-caste, namely, *Barna* Brahmin, and thereby procured his marriage with the girl to which the mother would not have agreed but for such false representation and as a result of which marriage the mother was excommunicated from her caste, it was held that the accused was guilty of cheating by false personation under s. 419.¹⁸ The former Chief Court of the Punjab had held that a person could not be convicted of an offence under this section for disposing of

⁸ *Looty Bewa*, (1869) 11 W. R. (Cr.) 24, 2 Beng. L. R. (A. Cr. J.) 25. See *Mojey*, (1890) 17 Cal. 606, followed in *Balaku Vithu*, Criminal Revision No. 202 of 1909, decided on December 15, 1909, per Chandavarkar and Knight, JJ., (Unrep. Bom.).

⁹ *Karuppanna Pillai*, (1883) 1 Weir 480.
¹⁰ *Kirat Singh*, (1907) 27 A. W. N. 291, 6 Cr. L. J. 426.

¹¹ *Gorindaswamy Naidu*, (1911) 21 M. L. J. 748, 12 Cr. L. J. 406.

¹² *Ahmada*, (1913) P. R. No. 9 of 1914, 16 Cr. L. J. 139, [1914] AIR (L) 558.

¹³ *Packinathan*, (1919) 11 L. W. 368, 21 Cr. L. J. 478.

¹⁴ *Girdharee*, (1876) P. R. No. 16 of 1876.

¹⁵ *Thakur Mandal*, (1941) 43 Cr. L. J. 65, [1942] AIR (P) 53.

¹⁶ *Prerna Bhika*, (1863) 1 B. H. C. 89.

¹⁷ *Mohim Chunder Sil*, (1871) 16 W. R. (Cr.) 42. See *Komul Dass*, (1865) 2 W. R. (Cr.) 7; *Poddomonte Boistobee*, (1866) 5 W. R. (Cr.) 98; *Dabee Sing*, (1867) 7 W. R. (Cr.) 55; *Bhaiji*, (1866) Cr. No. 49 of 1886, Unrep. Cr. C. 301.

¹⁸ *Kshiteesh Chandra Chakrabarti*, [1937] 2 Cal. 221.

a girl representing her to be of a different caste from that to which she belonged.¹⁹ Describing a Brahmin woman as a Kirari,²⁰ or a sweeper woman whose husband was alive as a *jat* widow,²¹ was held to be not an offence under this section but one under s. 420.

Misrepresentation as to one's position.—The first illustration indicates that a misrepresentation by false description of one's position in life falls under this section. Where, therefore, a document purported to have been signed by G. L. a *putwaree*, and it was said that it was signed by G. L., but at a time when G. L. was not a *putwaree*, it was held that this offence had been committed.²² Similarly, where a person represented a girl to be the daughter of a certain woman of good family, when she was within his knowledge the daughter of another woman, it was held that he was guilty of this offence.²³

False statements as to name and performances.—Entries for two handicaps were sent to the secretary of an athletic meeting, in the name of Sims, containing statements as to the recent performances of Sims, which were very moderate, and in consequence Sims was given long starts. The entries were not written by either Sims or the accused. At the meeting the accused, who was a good runner, personated Sims, who was absent, and came first in both the races. After the first race the handicapper asked the accused whether he was really Sims, whether the performances given in the entry form were really his, and whether he had never won a race, as stated in the entry. He answered these questions falsely in the affirmative. It was held that the accused was rightly convicted of attempting to obtain property by false pretences.²⁴ Under the Code this offence will fall under this section.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes simple cases of cheating. When there is delivery of any property or destruction of any valuable security s. 420 is the proper section to apply.²⁵ The offence under this section is non-cognizable, the one under s. 420 is cognizable.

PRACTICE.

Evidence.—Prove (1) that the person deceived delivered to someone, or consented that some person shall retain certain property.

(2) That the person deceived was induced by the accused to do as above.

(3) That such person acted upon such inducement in consequence of his having been deceived by the accused.

(4) That the accused acted fraudulently or dishonestly when so inducing that person.

Or prove (1) that the person deceived did, or omitted to do, something which he was not bound to do or omit to do.

(2) and (3) as above.

(4) That the accused so induced that person intentionally.

(5) That such act or omission caused, or was likely to cause, damage or harm to that person in body, mind, reputation or property.

There must be some evidence of fraudulent or dishonest intention at the time of the omission of the act in respect of which the cheating is alleged.¹ Subsequent conduct of the accused would be evidence to show the previous dishonest intention.² The test to be applied in considering whether, on the trial of an indictment charging

¹⁹ *Singhara*, (1903) P. R. No. 17 of 1903.

²⁰ *Durga Das*, (1904) P. R. No. 13 of 1904, 1 Cr. L. J. 949.

²¹ *Jhanda Singh*, (1917) P. R. No. 6 of 1918, 19 Cr. L. J. 335 [1918] AIR (L) 377 (2); *Raj Bahadur*, (1918) P. R. No. 23 of 1918, 19 Cr. L. J. 931, [1918] AIR (L) 49.

²² *Joy Kurn Singh v. Man Patuck*, (1874) 21 W. R. (Cr.) 41.

²³ *Dhunput Ojha*, (1867) 7 W. R. (Cr.) 51.

²⁴ *Button*, [1900] 2 Q. B. 597.

²⁵ *Sher Singh*, (1928) 10 Lah. 513.

¹ *Hargovandas*, (1872) 9 B. H. C. 448; *Fazu*, (1886) Cr. R. No. 66 of 1887, Unrep. Cr. C. 312; *Venkatarhala Pillai*, (1883) 1 Weir 476; *Vira-swami*, (1881) 1 Weir 478.

² *Heeramun Hulweye*, (1866) 5 W. R. (Cr.) 5.

obtaining money, goods, or credit by false pretences, evidence of acts of the accused subsequent to those which are the subject of the indictment is admissible, is whether the evidence is relevant. A connection must be shown to exist between the acts which are the subject of the indictment and the acts sought to be proved. The fact that the subsequent acts show that the accused has committed an offence distinct from that which is charged in the indictment is not sufficient to make evidence of the subsequent acts admissible if a connection is shown to exist between the transactions.³ The accused was tried for obtaining eggs by false pretences; it was proved that he had falsely represented by advertisement in newspapers that he was carrying on a bona fide dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements. It was held that such evidence was admissible.⁴ The accused was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to the prosecutor, was a good and valid order for the payment of money. The prosecutor deposed that he gave his cheque to the accused on the faith of the accused's statement that a cheque, which the accused then gave to the prosecutor, was a good cheque. The cheque given by the accused was dishonoured. The accused stated that when he gave the cheque he expected a payment which would have enabled him to meet it. The accused was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called, and gave the same evidence as in the first case. It was held that his evidence was admissible for the purpose of proving guilty knowledge.⁵

At the trial of an accused person on an indictment charging him with obtaining a pony and cart by false pretences on June 4, 1909, evidence was admitted that, on May 14, 1909, and on July 8, 1909, the accused had obtained provender from other persons by false pretences different from those alleged in the indictment. The accused was convicted. It was held that the evidence was wrongfully admitted, as it did not show a systematic course of fraud, but merely that the accused was of a general fraudulent disposition, and therefore it did not tend to prove the falsity of the representations alleged in the indictment; that although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to the other cases might have influenced the jury and the conviction must, therefore, be set aside.⁶

Evidence with regard to a previous act of fraud alleged to have been committed by an accused who is on his trial on a charge under s. 420 is inadmissible in law. Such evidence cannot be brought in either under s. 14 or s. 15 of the Indian Evidence Act, the case being one in which the innocence or guilt of the accused depends upon proof of actual facts and not upon the state of the accused's mind.⁷ On a charge against the accused of cheating by falsely representing that he was the *derwan* of an estate and could procure for the complainant an appointment to the vacant post of manager to the estate and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was admissible under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.⁸

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

A criminal Court should not, save for very exceptional reasons, go behind the finding of a civil Court and convict of cheating a person who upon the very same facts has succeeded in satisfying a civil Court upon the merits of the case or the justice of his claim. Parties should not be encouraged to resort to the criminal Court in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court.⁹

³ *Smith*, (1905) 20 Cox 804.

⁴ *Rhodes*, [1899] 1 Q. B. 77.

⁵ *Ollis*, [1900] 2 Q. B. 758.

⁶ *Fisher*, [1919] 1 K. B. 149.

⁷ *Gokul Khatik*, (1924) 20 C. W. N. 483, 26

Cr. L. J. 906, [1925] AIR (C) 674.

⁸ *Debendra Prosad*, (1909) 36 Cal. 573.

⁹ *Bishan Dass*, (1909) P. R. No. 233 of 1910.
12 Cr. L. J. 50.

Attempt to cheat.—In a prosecution on a charge of attempting to cheat a certain person, that person need not be the complainant.¹⁰

Jurisdiction.—The accused sent from Madras by value payable parcel to a person at Hyderabad four boxes of tea. The person got delivery at Hyderabad on payment of Rs. 168. But when he opened the boxes he found they contained saw dust. The accused was charged with an offence under s. 419. It was held that the offence was committed at Hyderabad and the Madras Court had no jurisdiction. The deceit and the delivery in consequence of the deceit were complete when the money was handed to the post office. And the subsequent delivery by the post office to the accused was not a necessary ingredient of the offence to bring it within the operation of s. 179, Criminal Procedure Code.¹¹

Charge.—In the case of cheating the charge must set out the manner in which the offence was committed. Whether the words of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet depends upon the circumstances of each particular case. The omission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice.¹²

K was convicted of the offence of cheating for obtaining goods from a shop by tendering a post-dated cheque. The charge framed merely stated that the accused cheated the complainant by dishonestly inducing him to deliver certain property; it did not indicate the nature of the representations by which the complainant was induced to make over the goods. It was held that in framing such a charge it was necessary to set out not merely the fact that the accused had obtained goods by dishonest means but also the deception which had been practised so that the accused might have an opportunity of saying either that he never made such representation or that representation was not in fact false, or that it was not in consequence of this representation that the goods were obtained, the need of framing a precise charge being all the stronger in a transaction of this kind in which the representation was implied rather than directly expressed.¹³

Where an accused person attempts to cheat a whole body of villagers and speaks to them in a body and not to each individual villager for the purpose, he may be tried on one charge for each attempt to get money from them.¹⁴ There should be as many charges as there are persons cheated.¹⁵

The charge should run thus :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, (*set out the manner in which the cheating was committed*), and thereby committed cheating, an offence punishable under s. 417 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

¹⁰ *Mahadev Lal v. Dhonraj Maisri*, (1908) 12 C. W. N. 750, 7 C. L. J. 375, 7 Cr. L. J. 342.

¹¹ *Ka'ceek*, [1927] M. W. N. 221, 52 M. L. J. 511 28 Cr. L. J. 452, [1927] AIR (M) 544.

¹² *Kedarnath Chakravarti*, (1924) 41 C. L. J.

172, 29 C. W. N. 408, 28 Cr. L. J. 849, [1925] AIR (C) 603.

¹³ *Kunwar Sain*, [1938] Lah. 662.

¹⁴ *Johan Subarna*, (1905) 2 C. L. J. 618, 10 C. W. N. 520, 3 Cr. L. J. 111.

¹⁵ *Kailash Chandra Pal*, (1918) 46 Cal. 712.

COMMENT.

This section applies to cases of cheating by a guardian, a trustee, a solicitor, an agent, or manager of a Hindu family, a *kurnavan of turward* in Malabar or by directors or managers of a bank in fraud of the shareholders. It is the abuse of trust that is visited with severe punishment. A Mahomedan, who represents himself to be a Hindu for the purpose of getting an employment with a Hindu, who would not employ a Mahomedan, commits an offence under this section.¹⁶

False balance-sheets.—If the directors, manager and accountant, dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, put before the shareholders balance-sheets which they knew to be materially false and misleading and likely to mislead the public as to the condition of the bank, and conceal its true condition and thereby induce depositors to allow their money to remain in deposit in the bank, they commit an offence under this section.¹⁷ But the mere fact that directors pass an incorrect balance-sheet is not sufficient to charge them with cheating. The guilty knowledge of each director cannot be presumed from the fact that he authorizes the issue of a balance-sheet containing false entries. The nature of false statements, the ease or difficulty with which their truth or falsity can be ascertained, the course of business of the company, and the position, experience and attainment of each individual director, are some of the circumstances that should be considered.¹⁸

False prospectus.—The following observations of Lord Halsbury L. C. are very important in fixing liability for false prospectus:—"If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in shewing that any specific statement is untrue".¹⁹

PRACTICE.

Evidence.—Prove (1) that the accused cheated some person (see s. 417).

(2) That he was under a legal obligation to protect the interest of that person.

(3) That the cheating had relation thereto.

(4) That he knew he was likely to cause wrongful loss to such person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, cheated XY by doing an act, to wit—, with the knowledge that you were thereby likely to cause wrongful loss to the said XY whose interest in the transaction to which the cheating related you were bound either by law (*or a legal contract*) to protect, and that you thereby committed an offence punishable under s. 418 of the Indian Penal Code, and within my cognizance [*or the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for cheating by personation.

COMMENT.

This section provides punishment for the offence described in s. 416.

PRACTICE.

Evidence.—Prove (1) that the accused cheated the complainant.

¹⁶ *Sherbaz*, (1923) 18 S. L. R. 59, 25 Cr. L. J. 789, [1925] AIR (S) 57.

¹⁷ *Moss*, (1893) 16 All. 88. See G. S. Clifford, (1913) 7 L. B. R. 143, 15 Cr. L. J. 80, F.B.

¹⁸ *Giles Seddon v. Loane*, (1910) 11 Cr. L. J. 624.

¹⁹ *Aaron's Reefs v. Twiss*, [1896] A. C. 273, 281; *Kylsant (Lord)*, [1932] 1 K. B. 442.

(2) That he did so by pretending to be some other person; or by knowingly substituting one person for another; or by representing that he, or some other person, is a person other than the person he really is.

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of —, at—, pretending to be (*specify the person personated*) [*or knowingly substituted A for B or represented that you or A were so and so*], and thereby committed an offence punishable under s. 419 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

420. Whoever cheats and thereby¹ dishonestly² induces the person deceived to deliver any property³ to any person, or to make, alter or destroy the whole or any part of a valuable security,⁴ or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Simple cheating is punishable under s. 417. But where there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving, the proper section to apply is this section and not s. 417. Section 417 covers cases of cheating in which though there is fraud yet there is no intention of causing wrongful loss, or wrongful gain. The word 'fraudulently' is not used in s. 420.

1. 'And thereby'.—These words do not imply that some further act of delivery is necessary after the offence of cheating is completed, for the offence of cheating is not complete unless the deception is effective. They are only designed to introduce a description of a particular sort of cheating, i.e. when the effect of cheating is to induce the delivery of property or the alteration or destruction of a valuable security.²⁰

2. 'Dishonestly'.—See s. 24, *supra*. The word "dishonestly" implies a deliberate intention to cause wrongful gain, or wrongful loss, and when this is coupled with cheating and delivery of property the offence is punishable under this section.²¹ The requirement of dishonesty is satisfied if there was an intention to make wrongful gain on the part of the person cheating even if there was no intention to cause wrongful loss to the person cheated.²² The dishonest intention must either precede or accompany the act of dishonesty.²³ Subsequent denial of a transaction or refusal to return money does not show that there was the necessary criminal intent from the beginning.²⁴ A young boy was married to a girl who was much older. The girl having grown up to womanhood, the mother and the elder brother of the boy suggested to the father of the girl to return certain ornaments which had been given to the bride at the time of marriage and thus put an end to the marriage. The father called a *panchayat* of leading men, and in accordance with their advice the ornaments demanded were made over and a formal receipt written and signed by the parties. Subsequently, the bride's father charged the boy's mother and brother with cheating. It was held that the charge of cheating could not be entertained as it was found that there was no dishonest

²⁰ *Sanwaldas*, (1917) 11 S. L. R. 67, 18 Cr. L. J. 990, [1917] AIR (S) 89.

²¹ *Ba Shein*, (1920) 10 L. B. R. 366, 22 Cr. L. J. 721.

²² *Solomon Ezekiel*, (1939) 69 C. L. J. 298.

²³ *Hemraj*, (1910) 11 Cr. L. J. 295; *Ram Bharose Singh*, (1936) 37 Cr. L. J. 907, [1936] O. W. N. 754, [1936] AIR (O) 372.

²⁴ *Harnam Singh*, (1937) 39 P. L. R. 300. 3 Cr. L. J. 845.

inducement.²⁵ Two contracts were entered into between the complainant and the accused, one for the sale by the complainant of a certain number of shares of a particular kind and the other for the purchase by the complainant of certain shares of another kind. Subsequently, when the position between the parties was that the contract regarding the purchase by the complainant was either cancelled or so disputed that it could not be enforced except by litigation the accused induced the complainant to part with his shares promising to give him back cash for it but instead of doing it he offered to credit the value thereof against the sum due to him under the other contract and subsequently tendered the amount less the loss sustained by him for the non-fulfilment of the other contract, it was held that the action of the accused was dishonest and fraudulent within the meaning of this section.¹ Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in a civil Court, the matter should not be allowed to be fought in a criminal Court.²

3. 'Deliver any property'.—'Property' in this section refers only to movable property.³ 'Movable property' is defined in s. 22, *supra*. It includes money.⁴ Whether an article is or is not 'property' does not depend upon its possessing a money or market value. If it has some special value for the person or persons concerned, it is 'property' even though its value cannot be measured in money. A certificate of having passed an examination is therefore 'property' within the meaning of this section.⁵ So is a promissory note. The accused, who had left certain promissory notes with the complainant as security for a loan, dishonestly induced him to return the promissory notes pretending that they were required to collect money from the debtors with the aid of which the complainant would be paid, but instead of doing so disposed of them and did not pay the complainant. It was held that the act of the accused in dishonestly inducing the complainant to return the notes to him constituted cheating.⁶ When property is delivered by means of cheating the offence falls under the first clause.⁷ Where a person issued cheques for some goods which were dishonoured and from the circumstances it could be presumed that he must have been aware that the cheques would be dishonoured so that the failure to meet payment of the cheques was not accidental, it was held that he was guilty under s. 420.⁸

Delivery of money.—The accused falsely representing himself to be the manager of an estate induced one G to borrow some money and pay it to him as advance of security money to be deposited for a post promised by him to G. He then put off G from time to time and at length when he was found out, he promised to return the money. It was held that the offence of cheating was completed as soon as the accused obtained the money by a promise which he knew he could not fulfil. The fact that long afterwards the accused paid back under pressure a part of the money, did not in any way affect his criminality. The test of criminality is what was in his mind at the time when the money was given to him and whether he at that time intended to repay the same.⁹ G, by falsely representing to L that G had been instructed by a competent authority to recruit unskilled labour for service in Africa and that G would, on payment of a certain sum of money as a fee for registering L's name, be able to engage L for service in that country, induced L to pay G the said fee, it was held that G had committed this offence.¹⁰ Where an accused person had taken a ransom for the restoration of stolen

²⁵ *Jumman*, (1923) 21 A. L. J. R. 321.

¹ *Aswini Kumar Chatterji*, (1921) 25 C. W. N. 618, 23 Cr. L. J. 221, [1921] AIR (C) 119.

² *Sheosagar Pandey*, (1935) 16 P. L. T. 553, 37 Cr. L. J. 38.

³ *Abdul Ahad*, (1882) 2 A. W. N. 6.

⁴ *Birendra Lal Bhaduri*, (1904) 32 Cal. 22.

⁵ *Local Government v. Gangaram*, (1921) 18 N. L. R. 52, 23 Cr. L. J. 443, [1922] AIR (N) 220.

⁶ *Venkatagurunatha Sastri*, (1923) 45 M. L. J. 133, [1923] M. W. N. 313, 17 L. W. 580, 24 Cr. L. J. 452, [1923] AIR (M) 597.

⁷ *Sadanund Doss* alias *Sona Biswas*, (1865) 2 W. R. (Cr.) 29; *Bavaji*, (1875) Unrep. Cr. C. 96.

⁸ *Kunwar Sen*, (1932) 8 Luck. 286.

⁹ *Debendra Prosad*, (1909) 36 Cal. 573.

¹⁰ *Girdhari Lal*, (1910) P. R. No. 12 of 1913, P. W. R. No. 26 of 1910 (Cr.), 11 Cr. L. J. 428.

property, and failed to return that property to the person who had paid him the ransom, it was held that he ought to be convicted of the more serious offence of cheating under this section.¹¹ The accused drew a *hundi* and borrowed money on it, without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same. The money so borrowed was spent by him on his own purposes. The *hundi*, when presented for payment, was dishonoured by the drawee. The accused, though apprised of the dishonouring, took no steps either to have the *hundi* honoured or to repay the money borrowed on the *hundi* but made himself scarce. It was held that he was guilty of cheating under this section.¹² Accused adulterated saccharine with bicarbonate of soda and put the mixture into tins which he gave to a broker to sell. The broker sold the mixture as genuine saccharine and received money for it, which he made over to the accused. It was held that the accused was guilty of cheating and abetting that offence.¹³ Where the accused sold Indian liquor representing it a genuine Scotch Whisky with false labels, it was held that he was guilty under this section.¹⁴ The accused, an auditor, took a sum of Rs. 1,000 from two persons whose income-tax affairs he was looking after in order to give it to the income-tax officer. The amount was not paid to the income-tax officer and the accused was charged with an offence under this section for having dishonestly induced his two clients to deliver it to him. It was held that, in the absence of proof that at the time the money was paid to the accused, he did not intend to utilise it for the purpose intended, he could not be convicted of an offence under this section.¹⁵

Suppression of facts.—Mere suppression of some facts at the time of borrowing money does not amount to cheating where there is no evidence of either active deception or dishonest or fraudulent action. So where a person mortgaged to another for Rs. 1,000 a mortgage executed in his favour of a house for Rs. 2,000 and also agreed that in case of his mortgagee not being able to recover his money from the mortgage rights he would make good the money from his other property, it was held that there was no element of cheating in that person's act even if he knew at the time of borrowing money that his mortgagor's title to the house was defective, and did not disclose that defect to his creditor.¹⁶ But where the vendor of property deceived the purchaser into believing that there was only a particular incumbrance on the property sold whereas in fact there were other incumbrances known to the former, it was held that the vendor would be guilty of cheating even if the purchaser was empowered by a covenant in the sale-deed to recover any further moneys for which the property might be liable.¹⁷ Under s. 100 of the Transfer of Property Act no charge can be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. A person, who conceals the charge from such a transferor is not guilty of the offence of cheating.¹⁸

Delivery of money under immoral or illegal contract.—The accused agreed to let her daughter on hire to the complainant for concubinage for one year in consideration of Rs. 70, out of which she received Rs. 35 in advance. Later, she refused to carry out the contract or to return the advance. She was convicted of cheating. It was held, reversing the conviction, that a party to an immoral contract should not be allowed to prosecute on a criminal charge when he could not get performance of the contract in a civil Court.¹⁹ Where, while certain persons were being tried for an offence, the accused representing that he could influence the Court in their favour received money from them and on his being prosecuted for cheating pleaded that the money having been received for an illegal purpose, it should not form the basis of a prosecution, it was held that such a contention was unsound.²⁰ Where the accused took a young girl who was already married from her mother's house with her consent and got her married to a rich man at another village who paid a certain amount to the accused as

¹¹ *Nga Shan*, (1922) 11 L. B. R. 422, 24 Cr. L. J. 529, [1923] AIR (R) 37.

¹² *Uttamlal Narottamdas*, (1920) 32 Bom. L. R. 340, 22 Cr. L. J. 305.

¹³ *Bholasing Amersingh*, (1924) 26 Bom. L. R. 211, 25 Cr. L. J. 1102, [1924] AIR (B) 303.

¹⁴ *J. E. Gubbay*, (1939) 41 Cr. L. J. 556, [1940] AIR (C) 205.

¹⁵ *Public Prosecutor v. Bhimeswara Rao*, [1947] 2 M. L. J. 594, [1948] M. W. N. 5.

¹⁶ *Hari Kishan*, (1910) 11 Cr. L. J. 610.

¹⁷ *Lal Bahadur*, (1923) 33 Cr. L. J. 884, [1933] AIR (A) 42.

¹⁸ *Ramkrishna v. Ganesha*, (1934) 30 N. L. R. 303, 35 Cr. L. J. 1063, [1934] AIR (N) 149.

¹⁹ *Jani Hira*, (1912) 14 Bom. L. R. 503, 13 Cr. L. J. 521.

²⁰ *Yacoub*, (1933) 34 Cr. L. J. 1 255, [1933] AIR (R) 199.

bride price which the accused handed over to the mother, it was held that they were guilty of cheating.²¹

Delivery of goods.—A person whose duty it was to ascertain and report the current rates in the market, by arrangement with persons in the market, reported rates higher than those really current, and in consequence of which higher rates were paid to sellers than they were entitled to, it was held that he had committed this offence.²² Where the accused induced the complainant to deliver to him a bicycle under false representations that he was a commission agent and that the machine was required for an up-country purchaser, but after taking its delivery he negotiated its sale to a customer in Bombay, it was held that the offence of cheating and dishonestly inducing the delivery of property was complete as soon as the bicycle was handed over.²³ Where A went to an opium shop with B's ticket and explicitly or by implication represented himself to be B, and thereby induced the shopkeeper to deliver to him a certain quantity of opium, it was held that A had committed the offence of cheating by personation; and as opium was actually delivered in consequence of the cheating, he should be convicted under this section.²⁴ The accused, by making a false representation that he was an employee of the Calcutta Municipal Corporation, obtained rupees ten as subscription from the Health Officer of that Corporation towards the funds of a charitable society. The money was duly made over by the accused to the charity, but he was subsequently charged with the offence of cheating and was convicted under this section. It was held that the conviction and sentence should be set aside, there being no such deception in this case as to cause "wrongful loss" or "wrongful gain".²⁵ Where the accused, falsely pretending to be a pensioned Subedar, intentionally deceived the complainant and dishonestly induced him to let him have on credit certain articles for which he did not intend to pay, it was held that he was guilty under this section as the cheating was accompanied with a transfer of property.¹

Obtaining certificate.—A railway company offered some concession rates to student travellers, and a certificate was presented by somebody—not the accused—containing the names of students who had not applied for the certificate which the accused did not know and the endorsement of the railway official "may be issued" was made thereon, and the accused thereafter presented the same for the necessary pass to be issued. The company issued the pass and arrested the accused. It was held that the accused being himself entitled to travel at the reduced rate was not guilty of any fraudulent intent, no fraudulent intention could be assumed on the part of the accused to use the pass for persons not entitled to travel at the reduced rates and that as the company had not been defrauded the accused could not be convicted.² Where a person obtained a certificate from a Deputy Inspector of Schools by stating untruly that he had passed an examination in a certain year, when another person of the same name had passed, it was held that he had acted fraudulently within the meaning of s. 415, and was guilty of an offence punishable under this section.³ An owner of a tea estate made an application to a Committee for transfer of export quota rights in which he mentioned the export quota far in excess of what was fixed to his credit by the Committee. A clerk of the Committee wrote on the application that the quota mentioned therein was 'available' for transfer. Due to this false endorsement the transferor was granted the quota transfer certificate which enabled him to transfer export quota rights far in excess of what was to his credit and thereby made a huge wrongful gain. It was held that the fraud was committed at the instance of the transferor and as the quota transfer certificates were by themselves property and documents of title both the transferor and the clerk were guilty under this section and s. 120B.⁴

4. 'Valuable security'.—See s. 80, *supra*. A 'decree' does not come within the definition of "valuable security": it merely declares the existence of legal rights or the extinguishment, extension, transfer or restriction of legal rights, etc.; the rights are there, etc., and all that the decree does is that it formally expresses the

²¹ *Banamali Tripathy*, (1924) 22 Pat. 263.

²² *Parmeshwar Dat*, (1886) 8 All. 261.

²³ *Banaji Framji Munshi*, (1900) 2 Bom. L. R. 621.

²⁴ *Nga Po Lu*, (1902) 1 L. B. R. 356.

²⁵ *Ashutosh Mallick*, (1905) 33 Cal. 50.

¹ *Sher Singh*, (1928) 10 Lah. 513, 518.

² *James Fletcher*, [1910] 1 M. W. N. 510, 11 Cr. L. J. 339.

³ *Local Government v. Gangaram*, (1921) 18 N. L. R. 52, 23 Cr. L. J. 443, [1922] AIR (N) 229.

⁴ *J. S. Dhas*, [1939] M. W. N. 1125, (1939) 41 Cr. L. J. 388, [1946] AIR (M) 155.

adjudication by the Court on the rights of the parties. Therefore, a 'decree' is not a "valuable security", but even if a 'decree' did satisfy the definition of a "valuable security", there is no delivery of property. When the Court passes a decree, it does not deliver any property, because the original decree remains in Court, and the term "valuable security" can only apply to the original document and not to any copy of a decree which may be supplied on application to the parties. The same arguments would apply to orders in execution.⁵ A deed of divorce is a valuable security. The complainant was taken to a village on the pretence that a buffalo would be bought for him and that the money necessary for this purpose would be advanced to him. He was then given a large amount of liquor to drink and when in the state of intoxication a document purporting to be a bond was executed and his signature was obtained. This document was a deed of divorce of his wife who was then taken away by some of the accused. It was held that the offence committed came within the purview of this section and not s. 417.⁶

An acknowledgment of receipt of an insured parcel is not a "valuable security". It is merely evidence that a parcel of some sort was delivered to the addressee and it cannot operate as a discharge of any liability. Where the accused, in order to create false evidence that he had paid off a sum of Rs. 650, which he owed to complainant, filled a registered envelope with blank sheets of paper and posted it to the complainant after insuring it for Rs. 650, and the complainant gave an acknowledgment of receipt of the parcel to the post office on receiving the same, it was held that these facts amounted to an attempt to cheat.⁷ This case has not been approved of by the Allahabad High Court,⁸ and the Calcutta High Court has also held that such an act does not amount to cheating.⁹

A bill receipted as by a cheque is not a valuable security. Hence, a person paying a bill by a cheque of date or post-dated and obtaining the bill receipted as by the cheque cannot be charged with this offence on the cheque being dishonoured, inasmuch as he does not induce the delivery of any property or the making of any valuable security.¹⁰

The accused who owed the complainant a certain sum of money made a false representation that he wanted to settle the account and thereby induced the complainant to produce his account book. When the complainant opened the account book for the inspection of accounts the accused tore that part of the page which bore his thumb impression and decamped. It was held that the offence disclosed was one under s. 477 and not one under this section.¹¹

Attempt to cheat.—The accused, having manufactured at home certain spurious trinkets took them to a goldsmith, showed them to him, said they were of gold (which they were not), that they were stolen property (which was also untrue), and that he did not wish to sell them in the bazaar, and said 'buy them'. The goldsmith did not buy and the negotiations went no further. It was held that he was guilty of an attempt to cheat.¹² The accused insured his mill and stock, which were burnt by fire. He thereupon made a claim on the basis that 75,040 baskets of paddy were stored at the time of the fire. It was found that the mill godowns were not built to accommodate more than 15,000 baskets. It was held that the claim was not a mere exaggeration but was a false representation as to the quantity stored, that the accused having followed up the notice of the fire by actually sending in false claim papers his action must be regarded as an overt act towards the commission of the offence of cheating which had gone beyond the mere stage of preparation, and the accused was guilty of an attempt to cheat.¹³

Abetment.—Where a person quick-silvered a double-pice so as to make it look like a rupee, and gave it to one K to get it changed, it was held that if the idea

⁵ *Charu Chandra Ghose*, (1923) 28 C. W. N. 414, 422 423, 39 C. L. J. 122, 132, 25 Cr. L. J. 1034, [1924] AIR (C) 502.

⁶ *Bakhtawar Singh*, (1920) 23 Cr. L. J. 428, [1921] AIR (L) 63.

⁷ *Sadho Lal*, (1916) 1 P. L. J. 391, 17 Cr. L. J. 272, [1917] AIR (P) 699.

⁸ *Tula Ram*, (1923) 21 A. L. J. R. 865, 26 Cr. L. J. 209, [1924] AIR (A) 205.

⁹ *Raman Behari Roy*, (1923) 50 Cal. 849.

¹⁰ *H. K. Shaw*, (1935) 39 C. W. N. 1182, 62 C. L. J. 119, 37 Cr. L. J. 828, [1936] AIR (C) 324.

¹¹ *Ram Parshad v. Dhanna*, (1939) 41 P. L. R. 198.

¹² *Abdullah*, (1914) P. R. No. 14 of 1914, 15 Cr. L. J. 265, [1914] AIR (C) 315. See *P. E. Blinghurst v. Blackburn*, *H. P.*, (1923) 27 C. W. N. 821, 25 Cr. L. J. 1813, [1924] AIR (C) 18.

¹³ *Mawng Po Hmyin*, (1923) 2 Ran. 53.

of using the coin as a rupee was an afterthought he might be convicted under ss. 116 and 420 of abetting K to cheat the person to whom he was sent for change.¹⁴

PRACTICE.

The vital difference between offences under s. 417 and this section is that whereas an offence against the latter section is a cognizable one, that against the former is non-cognizable and investigation of it can only be undertaken by the police on the instructions of a Magistrate, whereas in the other case the police can act on their own motion under ss. 154 and 156, Criminal Procedure Code.¹⁵

Evidence.—Prove the same points as those for s. 417, with the modification that the latter part of this section is confined to cases of cheating where the injury caused is the delivery of property, or the making, altering or destroying wholly or partially a valuable security, or making, or destroying anything signed or sealed which is capable of being converted into a valuable security.¹⁶

Evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible not to establish the factum of the offence but to prove that the transaction in issue was one of a systematic series of frauds and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.¹⁷ In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him, or in which he was concerned, at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused, is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. Evidence merely to prove that the accused's character is such that he is likely to commit the act with which he is charged is not admissible.¹⁸

If this representation has to be proved it would be better to get the exact words used by the accused.¹⁹

There is no general principle that a criminal prosecution for cheating must fail if it is based upon a contract which could not be enforced in a civil Court.²⁰

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

When the facts charged indicate an offence under this section, a Second Class Magistrate should not try the accused under s. 417 by ignoring facts of aggravation.²¹

Acquittal of some members of conspiracy to cheat no bar to conviction of remaining member.—Where five persons are alleged to have combined to deceive another and are prosecuted for conspiracy to cheat under this section read with s. 120B, and four are given the benefit of doubt, the position of the remaining accused who is found guilty of deception is not affected. The participation of the others being eliminated, he is the only person who was responsible for deception which *ex hypothesi* did take place and his conviction under this section is not vitiated by the fact that four of his co-accused, who were said to have conspired with him, were acquitted.²²

Charge.—It should state that the property obtained was the property of the person defrauded.²³

It should run thus :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, cheated AB, by dishonestly inducing him to deliver——(*specify the property*) to you and which was the property of the said AB (*or to make, alter, or destroy, the whole or any part of a valuable*

¹⁴ *Miharban*, (1883) P. R. No. 9 of 1884.

¹⁵ *Nazir Ahmed*, (1944) 47 Bom. L. R. 245, 246, P.C.

¹⁶ See *Kalipuddo Poramanick*, (1875) 23 W. R. (Cr.) 43.

¹⁷ *Debiendra Prosad*, (1909) 36 Cal. 573.

¹⁸ *Girdhari Lal*, (1910) P. R. No. 12 of 1913, P. W. R. No. 26 of 1910, 11 Cr. L. J. 428.

¹⁹ *Chandra Narain Jha*, [1940] P. W. N. 557.

²⁰ *Raghunath*, [1940] O. W. N. 819, (1940) 41 Cr. L. J. 881, [1941] AIR (O) 3.

²¹ *Setti Rangayya v. Somappa*, (1924) 20 L. W. 919, 25 Cr. L. J. 1193, [1925] AIR (M) 367; *Mani Ram*, (1930) 32 Cr. L. J. 463.

²² *Jia Lal*, [1936] A. L. J. R. 413, 37 Cr. L. J. 697, [1936] AIR (A) 357.

²³ *Durga*, [1929] A. L. J. R. 400, 30 Cr. L. J. 340, [1929] AIR (A) 260.

security or anything which is signed or sealed, and which is capable of being converted into a valuable security), and that you thereby committed an offence punishable under s. 420 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—Where an offender is convicted under this section, some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine.²⁴ Where a person's proved connection with the specific offence of cheating is only through the general conspiracy to cheat and he has already received a sentence of two years' rigorous imprisonment for his part in the general conspiracy, there should be no additional sentence on the cheating charge.²⁵

Of Fraudulent Deeds and Dispositions of Property.

421. Whoever dishonestly¹ or fraudulently² removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property,³ intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This and the three following sections deal with fraudulent conveyances referred to in s. 53 of the Transfer of Property Act and the Presidency and Provincial Insolvency Acts (III of 1909, s. 56, and V of 1920, s. 54).

Object.—This section is intended to punish fraudulent debtors. It specially refers to frauds connected with insolvency. The offence under it consists in a dishonest disposition of property with intent to cause wrongful loss to the creditors. It is not necessary that the transferee should be privy to the fraud; but want of bona fides on the part of the transferee is necessary under civil law.

When a debtor with bankruptcy impending pays a creditor in the honest belief on reasonable grounds that he is legally bound to make the payment, it is not a fraudulent preference, even though the debtor is in fact under no legal obligation to make the payment.¹

Scope.—The section covers *benami* transactions in fraud of creditors.²

This section applies to property both movable and immovable.

1. '**Dishonestly**'.—See s. 24, *supra*. The property of a debtor cannot be distributed according to law save after the provisions of the relevant enactments have been complied with. A shopkeeper who has stocked his shop with goods obtained on credit and who sells these goods without making any payment to his creditors commits no offence under this section. In selling the goods, which are his own in spite of the fact that he has not yet paid for them, he is not causing wrongful gain to himself; neither is he causing wrongful loss to anybody, because unless the creditors have obtained some legal right over the property he is not by his action depriving them of any right of theirs.³

2. '**Fraudulently**'.—See s. 25, *supra*.

3. '**Property**'.—This word includes a chose in action. The right to cut trees under an agreement for the purpose of making charcoal from wood is movable property.⁴

²⁴ *Williams*, (1862) 1 M. H. C. 31; 1 Weir 471.

²⁵ *Solomon Ezekiel*, (1939) 69 C. L. J. 298, 41 Cr. L. J. 255, [1939] AIR (C) 376.

¹ *Vautin*; *Saffery*, [1900] 2 Q. B. 325.

² *Abdul Gani Suleman*, (1899) P. J. L. B. 593.

L. C.—68

³ *Ismail Peer Mohammed*, (1937) 39 Cr. L. J. 767, [1938] AIR (R) 242.

⁴ *Manchersha v. Ismail Ibrahim*, (1935) 38 Bom. L. R. 168, 60 Bom. 766.

PRACTICE.

Evidence.—Prove (1) that the accused removed, concealed, or delivered the property; or that he transferred it or caused it to be transferred to some one.

(2) That such transfer was without adequate consideration.

(3) That the accused thereby intended to prevent, or knew he was thereby likely to prevent, the distribution of that property according to law among his creditors, or creditors of another person.

(4) That he acted as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Jurisdiction.—The Magistrate's jurisdiction to entertain a complaint under this section is not taken away by the provisions of s. 103 of the Presidency-towns Insolvency Act, III of 1909,⁵ or the Provincial Insolvency Act, V of 1920, s. 69.⁶ The Magistrate's jurisdiction to try the insolvent under this section and s. 424 even after the death of the complainant is not taken away by the Presidency-towns Insolvency Act.⁷

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly (*or fraudulently*) removed (*or concealed, or delivered*) to a certain person, to wit——, without adequate consideration) certain property, to wit——, intending thereby to prevent or knowing it to be likely that you would thereby prevent the distribution of the said property according to law among your creditors (*or the creditors of——*); and that you thereby committed an offence punishable under s. 421 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonestly or fraudulently preventing debt being available for creditors.

COMMENT.

This section, like the preceding one, is intended to prevent the defrauding of creditors by masking property. Any proceeding to prevent the attachment and sale of debts due to the accused will fall under it. The offence consists in the dishonest or fraudulent evasion of one's own liability.

CASES.

Where A entered into an agreement with B not to compromise a case with C, because he had assigned the benefit of the suit to B as a security for the due payment of an instalment of money and A notwithstanding did afterwards compromise the suit with C, it was held that A could not be convicted under this section unless the compromise was made dishonestly or fraudulently towards B.⁸ The accused's estate was under mortgage and in the management of certain persons under certain conditions as to payment of moneys realized by them. In execution of a decree obtained by the managers in a suit brought by them in the name of the accused, a certain under-tenure was sold for Rs. 3,000. The judgment-debtor arranged with the accused that on payment of Rs. 1,000 the sale should be set aside and he accordingly paid that sum into Court, and an application was made by the accused to draw out the money upon which no order was made. They were, thereupon, convicted, at the instance of the managers, of an attempt to commit an offence under this section. It was held

⁵ *Mulshanker Harinand Bhat*, (1910) 35 Bom. 63, 12 Bom. L. R. 750.

⁶ *Segu Baliah v. Ramasamiah*, (1917) 6 L. W. 283, 18 Cr. L. J. 992.

⁷ *U Mo Gaung v. U Po Sin*, (1928) 6 Ran. 664.

⁸ *Nobin Chunder Mudduck*, (1874) 22 W. R. (Cr.) 46.

that the application to obtain the money paid into Court might have been a breach of their contract with the mortgagors, but such conduct would not necessarily be regarded as dishonest or fraudulent so as to render the accused liable to punishment; their attempt to get the money being more to put an end to the management than to prevent money from being available for the payment of their debt under the mortgage.⁹

PRACTICE.

Evidence.—Prove (1) that the debt or demand was due to the accused, or some other person.

(2) That the accused prevented such debt or demand from being made legally available for his debts, or for the debts of another person.

(3) That he did as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

423. Whoever dishonestly¹ or fraudulently² signs, executes or becomes a party to any deed or instrument³ which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer⁴ or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

One of the necessary elements under this section is that some dishonesty or fraud should be made out.¹⁰ The section deals with fraudulent and fictitious conveyances and trust. If the consideration for the sale of immovable property is, with the consent of the purchaser, exaggerated in a deed of sale in order to defeat the claim of the pre-emptor, the purchaser will be guilty of this offence.¹¹ In such cases it is necessary to prove the existence of a right of pre-emption in respect of the subject-matter of such sale, as it is not an offence if the property sold is not subject to such a right.¹²

Under this section the dishonest execution of a *benami* deed will be punishable. The institution of a civil suit is not a condition precedent to the maintenance of a charge in a criminal Court for this offence.¹³

1. 'Dishonestly'.—See s. 24, *supra*.

2. 'Fraudulently'.—See s. 25, *supra*. This word does not connote deprivation of property. It is not essential that the person deceived or to be deceived should be the same as the person injured or intended to be injured.¹⁴ Where the judgment-debtors executed a document with a false recital as to the consent of the decree-holder to take their land and this was found to have been done fraudulently with the intention of supporting at a later stage a case of satisfaction of the money decree which the decree-holder had obtained against them, it was held that this was enough to bring the act of the judgment-debtors within the purview of this section.¹⁵

3. 'Any deed or instrument'.—A *kabuliat* is not a document contemplated under this section. Although a *kabuliat*, when accepted, operates as a lease for some purposes, it is not a document which purports to transfer or subject to any charge any property or any interest therein.¹⁶

⁹ *Hara Karmay Choredharani v. Savi*, (1900) 28 Cal. 314.

¹⁰ *Hafim-un-nisa*, [1935] O. W. N. 879, 37 Cr. L. J. 1037, [1936] AIR (O) 195.

¹¹ *Gurditta Mal*, (1901) P. R. No. 10 of 1902; *Lachman Das*, (1907) P. R. No. 16 of 1907, 6 Cr. L. J. 111; *Mahabir Singh*, (1902) 25 All. 31.

¹² *Chhajju*, (1907) P. R. No. 16 of 1908, 8 Cr.

L. J. 486.

¹³ *Umrao Singh*, (1883) 3 A. W. N. 209.

¹⁴ *Legal Remembrancer v. Ahi Lal Mandal*, (1921) 48 Cal. 911.

¹⁵ *Amiri Singh*, (1933) 34 Cr. L. J. 846, [1933] AIR (P) 495.

¹⁶ *Mahammad Kazem Ali v. Jorabdi Naskar*, (1919) 46 Cal. 986.

4. 'False statement relating to the consideration for such transfer'.—

The law does not make punishable every false statement in an instrument of transfer. The false statement in order to become criminal must relate to the consideration or to the person to be benefited by it. The word 'consideration' cannot mean the property transferred. A statement that the vendee purchased the whole land while the vendor could only sell part of it, is not one coming under this section.¹⁷ Where an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered an agreement in her favour falsely reciting that he had married her, and purporting to convey to her a plot of land in lieu of her dower, it was held that he had an intention to cause injury to her and her husband, and to support his own false claim to that status, and that he was guilty under this section.¹⁸

PRACTICE.

Evidence.—Prove (1) that the accused signed, executed, or became a party to the deed, or instrument in question.

(2) That the purport of such document was to transfer, or to subject to a charge, the property or any interest in question.

(3) That such document contained a false statement relating to the consideration, or relating to the person for whose use or benefit it was really intended to operate.

(4) That the accused did as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

424. Whoever dishonestly or fraudulently conceals or removes

Dishonest or fraudulent removal or concealment of property.

any property¹ of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section provides for cases not coming within the purview of ss. 421 and 422. It contemplates such a concealment or removal of property from the place in which it is deposited, as can be considered dishonest or fraudulent, whether the fraud is intended to be practised on creditors or partners.¹⁹

1. 'Dishonestly or fraudulently conceals or removes any property'.—

The crucial question for determination under this section is whether the alleged removal of property is dishonest or fraudulent, and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or no has to be determined by the criminal Court before deciding upon conviction.²⁰

The removal is *ejusdem generis* with concealment which precedes it. The section has no application to a case where property is openly seized by a person in the exercise of an alleged right.²¹

CASES.

Removal by partner.—Where one of the several partners removed the partnership books at night, and when questioned denied having done so, this offence was held to have been committed.²² But a partner who retains the books of accounts of the partnership business cannot be prosecuted for an offence under this section.²³

¹⁷ *Mania Goundan*, (1917) 37 Mad. 47.

¹⁸ *Legal Remembrancer v. Ahil Lal Mandal*, (1921) 48 Cal. 911.

¹⁹ *Gour Benode Dutt*, (1873) 21 W. R. (Cr.) 10, 13 Beng. L. R. 308n.

²⁰ *Ghasi*, (1929) 52 All. 214, 216.

²¹ *Nand Kishore*, [1939] A. L. J. R. 941, 41 Cr. L. J. 111, [1939] AIR (A) 710.

²² *Gour Benode Dutt*, (1873) 21 W. R. (Cr.) 10, 13 Beng. L. R. 308n.

²³ *Man Mohan Das v. Mohendra Bhowal*, (1948) 52 C. W. N. 441.

Removal of property to save it from attachment.—Taking away property by others with a view that it might not be attached, if done with a dishonest intention, would amount to an offence under this section.²⁴

Removal during attachment.—Where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, this offence was held to have been committed.²⁵ But where the accused is not a judgment-debtor and has grown the crops which he contended could not be legally attached, he cannot be convicted under this section for harvesting them.¹

Removal when order of attachment illegal.—A removal of crops in violation of an order, which the person making it has no authority to make, does not constitute this offence.² Removal of crops to avoid an illegal distraint is not an offence under this section.³ Certain crops were attached in execution of a decree and placed in the custody of a bailiff. The crops did not belong to the judgment-debtors, and the owners cut and removed a portion of them in spite of the resistance of the bailiff. It was held that no offence was committed.⁴ Where property was attached after the date fixed for the return of the warrant of attachment,⁵ and where the warrant of attachment was itself illegal,⁶ it was held that the property was not lawfully attached and the owner did not commit an offence by removing the attached property. In execution of a decree against the accused the Amin purported to attach his crops but the attachment did not comply with the provisions of Order XXI, r. 44, Civil Procedure Code. Subsequently, the crops were removed by the accused and he was prosecuted under this section. It was held that the attachment being illegal, the accused could not be convicted under this section.⁷

Removal of crops by tenants.—Where ryots holding land on *veram* tenure removed crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zemindar to perform his part in harvesting or division, it was held that such a removal was not dishonest. But where it was proved that the crops had been removed dishonestly or fraudulently, it was held that this offence was committed, even though the Zemindar, under the terms of the tenancy, acquired no property in the share due to him until the ryots had delivered it to him.⁸ Similarly, where the accused who was a ryot under the Madras Estates Land Act and who was bound to share the produce of his land with the landholder in a certain proportion, dishonestly concealed or removed the produce, thus preventing the landholder from taking his due share, it was held that the accused was guilty under this section apart from the provisions of the Madras Estates Land Act.⁹

Removal during bona fide dispute.—Where the accused was convicted under this section, for dishonestly removing certain property from a shop upon which were the padlocks of two widows and it appeared that he removed the property at the instance of the widow who claimed to be entitled to the whole of it, it was held that if eventually it be decided that the other widow was not entitled to a share in the property, it would follow that the accused's action in removing the property from the locked shop was not a dishonest one within the meaning of this section.¹⁰

PRACTICE.

Evidence.—Prove (1) that the accused concealed or removed the property, or that he assisted in doing so.

²⁴ *Rajamraju v. Tirapatiraju*, [1930] M. W. N. 347, 32 L. W. 23, 31 Cr. L. J. 1086, [1930] AIR (M) 670.

²⁵ *Obayya*, (1898) 22 Mad. 151; *Daya Karsan*, (1899) 1 Bom. L. R. 515; *Appaiya Goundan*, (1883) 1 Weir 485; *Ram Bahal Ahir*, [1936] A. L. J. R. 283, 37 Cr. L. J. 675, [1936] AIR (A) 364.

¹ *Sohan Mundari*, (1929) 31 Cr. L. J. 435, [1929] AIR (P) 520.

² *Bavuri Magata*, (1882) 1 Weir 483; *Ananda Muthusami Aiyar*, (1883) 1 Weir 484.

³ *Gopalasamy*, (1902) 25 Mad. 729; *Nallamaden Chettiar*, [1930] M. W. N. 352, 58 M. L. J. 509, 31 L. W. 719, 31 Cr. L. J. 1196, [1930] AIR (M) 509.

⁴ *Ghasi*, (1929) 52 All. 214.

⁵ *Gurdial*, (1932) 55 All. 119.

⁶ *Chelli Latchanna*, (1941) 43 Cr. L. J. 795, [1942] AIR (P) 480.

⁷ *Sarsar Singh*, [1934] A. L. J. R. 749, 35 Cr. L. J. 1307, [1934] AIR (A) 711.

⁸ *Subudhi Rantho v. Balarama Pudi*, (1902) 26 Mad. 481; *Periana Thevan v. Karupiah Thevan*, [1931] M. W. N. 1049.

⁹ *Sivanupandia Thevan*, (1914) 38 Mad. 793; *Kuldip Panday*, (1916) 1 P. L. J. 353, 17 Cr. L. J. 315, [1916] AIR (P) 232; *Lalu Gope*, (1917) 1 Cr. L. J. 687, [1917] AIR (P) 522.

¹⁰ *Khusi Ram*, (1920) 22 Cr. L. J. 142, [1921] AIR (L) 184.

(2) That he did as above dishonestly,¹¹ or fraudulently.¹²

Or prove (1) that the accused was entitled to the demand or claim in question.

(2) That he released the same.

(3) That he did so dishonestly, or with intent to defraud.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

The legality or formality of the mode of attachment allowed by a civil Court is not a matter for a Deputy Magistrate's consideration.¹³ Civil rights are not to be disposed of in criminal Courts.¹⁴

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——; at——, dishonestly (*or fraudulently*) concealed (*or removed*) a certain property, to wit——, belonging to yourself (*or to——*) [*or dishonestly or fraudulently assisted in the concealment or removal thereof; or dishonestly released a certain demand, to wit——*] and that you thereby committed an offence punishable under s. 424 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Mischief.

425. Whoever, with intent to cause, or knowing that he is likely

Mischief.

to cause, wrongful loss or damage to the public or to any person,¹ causes the destruction of any property, or any such change in any property² or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously³, commits "mischief".

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

ILLUSTRATIONS.

(a) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(e) A having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.

(g) A having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

¹¹ *Halim-un-nissa*, [1935] O. W. N. 879, 37 Cr. L. J. 1037, [1936] AIR (O) 195.

¹² *Sohan Mundari*, (1929) 31 Cr. L. J. 435,

[1929] AIR (P) 520.

¹³ *Brojo Kishore Dutt*, (1867) 8 W. R. (Cr.) 17.

¹⁴ (1868) 1 Weir 483.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crops. A has committed mischief.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Punishment for mischief.

COMMENT.

The section deals only with a physical injury from a physical cause.¹⁵

Ingredients.—This section necessitates three things¹⁶:—

1. Intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person.
2. Causing the destruction of some property or any change in it or in its situation.
3. Such change must destroy or diminish its value or utility or affect it injuriously.

1. 'Intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or any person'.—As to the meaning of 'wrongful loss', see s. 23, *supra*; and of 'public', sec. s. 12, *supra*. 'Wrongful loss or damage' means loss or damage by unlawful means. The accused installed an oil engine on his property. The complainant, who was a neighbour of the accused, instituted criminal proceedings against the accused, alleging that his property was damaged by reason of vibrations from the engine. It was held that the accused was not liable to be convicted of mischief, for there was nothing unlawful in his installing an oil engine in his own property and working it in any way he chose, and that if the damage complained of was attributable to what was in its nature a lawful act of the accused, the matter could be dealt with in the civil Court.¹⁷

The Bombay High Court in an old case said that the gist of this offence lay in the intention.¹⁸ But in a subsequent case it has held that the terms of the section are satisfied when there is a distinct finding on the question of the accused's knowledge, and the question of intention is material only as regards the sentence.¹⁹ This is the correct view. A person commits mischief if he causes destruction of property knowing that he is likely to cause wrongful loss or damage to the public or any person even if an intention to cause that damage is not made out.²⁰

The offence of mischief imports an act done wilfully and not merely negligently.²¹

This section does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of a right, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it.²² The damage need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence (*vide ill. (d)*). Any person who contracts to purchase property, and pays in a portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of this section.²³ The probable consequential damage to other property would not of itself constitute mischief.²⁴

Cases.—**Wrongful loss or damage necessary.**—The accused's premises adjoined a public road on the opposite side of which there grew a chestnut-tree, which overhung the road to within a few feet of the accused's premises. The accused cut off

¹⁵ *Moti Lal*, (1901) 24 All. 155, 156.

¹⁶ (1868) 4 M. H. C. (Appx.) 15, 1 Weir 512; (1874) 7 M. H. C. (Appx.) 89; *Nga Tha Zan*, (1901) (1897-1901) 1 U. B. R. 348.

¹⁷ *Punjaji Bagul*, (1934) 37 Bom. L. R. 96, 59 Bom. 177.

¹⁸ *Shama*, (1874) Unrep. Cr. C. 88.

¹⁹ *Revsing*, (1894) Cr. R. No. 13 of 1894, Unrep. Cr. C. 690.

²⁰ *Kastur Chand*, (1933) 15 P. L. T. 107, 35 Cr. L. J. 1034, [1934] AIR (P) 221.

²¹ *Akidullah*, [1911] 5 S. L. R. 263, 13 Cr. L. J. 536.

²² *Juggeshwar Dass v. Koylash Chunder Chatterjee*, (1885) 12 Cal. 55.

²³ *Dharma Das Ghose v. Nusseruddin*, (1886) 12 Cal. 660.

²⁴ (1868) 4 M. J. C. (Appx.) 15, 1 Weir 512.

certain portions of the tree, contending that he had a right to do so in order to protect his property from the nuisance caused by stones which boys threw at the blossoms, and by the branches interfering with the entrance of light and air to his dwelling. It was held that he was guilty of causing damage to the tree.²⁵ Where tenants finding their fields flooded, cut a channel through a railway in order to let the water run off their fields, it was held that the act having been intentionally done amounted to mischief and it was no defence to say that their motive in doing it, namely, to free their fields from water, was an innocent one.¹ After driving a cow out of his master's field the accused threw at her two stones one of which fractured her leg. It was held that he was guilty of mischief under this section. If the animal had been maimed or rendered useless the conviction would be under s. 428.² The accused dug a trench in his own land but alongside of a wall belonging to the complainant and removed the lateral support of the wall so as to cause the wall to tumble down. The complainant had not acquired lateral support for his wall by prescription. It was held that the accused in digging a trench and thus removing such support could not be said to have an intention to cause "wrongful loss" to the complainant as the means adopted by him to cause the loss were not "unlawful".³ Over the *chabutra* of a mosque there was an image of a Hindu god. It was surrounded by a wall which belonged to the Mahomedan community. Accused, a Hindu, widened the doorway in the wall by demolishing a portion of it on either side of the door. It was held that he was guilty of mischief.⁴ A person obstructing a right of water-course belonging to another commits an act of trespass and the loss caused to him by the persons entitled to the right when they destroy that obstruction in order to exercise their own right of water-course cannot be considered to be wrongful loss within the meaning of this section.⁵

Destruction of property of trespasser.—The owner of land has no right to destroy the property of a trespasser found upon the premises. The complainant obtained possession of certain land as tenant of the accused, D, and after the term of his lease had expired, he was left in possession by D who took no steps to evict him. But when the complainant attorned to one B as landlord, D, who was litigating with B, forcibly and wantonly destroyed the earthen pots and put out of order a water-wheel of the well from which the complainant watered the crop raised by him on the land in dispute. It was held that the damage caused by D amounted to mischief. Batty, J., said: "The applicant's pleader, I understand, is unable to contend that if a trespasser left his watch in the room of another person, that would justify that other person in smashing the watch or throwing it down a well".⁶ There was a dispute about the possession of a certain land between the accused and the complainant. The complainant dug a well with a view to cultivate the land. The accused forcibly entered on the land and damaged the well. It was held that the accused were guilty under s. 147 and this section.⁷ The accused, who had a right of way for his carts across the fields of the complainants, was prevented from exercising his right by the complainants erecting dams in their fields. The accused obtained an injunction restraining the complainants from interfering with the accused in the exercise of his right. The complainants failed to comply with the injunction. The accused, instead of enforcing the injunction in the usual way, himself proceeded to the complainants' fields and had the dams demolished. It was held that the accused was guilty of mischief, for the loss to the complainants was caused by unlawful means adopted by the accused in taking the law in his own hands and abetting the nuisance contrary to the provisions of s. 36 of the Indian Easements Act, 1882.⁸ A dominant owner, having a right of way over land of another, was held to have no right to remove an obstruction unless his right of way was impaired by it. If he did so, and if loss of property was caused thereby to another, he would be guilty under this section.⁹ Where certain persons gathered at a public

²⁵ *Hamilton v. Bone*, (1888) 16 Cox 437.

¹ *The Deputy Superintendent & Remembrancer of Legal Affairs v. Chulhan Ahir*, (1908) 16 C. W. N. 263, 13 Cr. L. J. 188.

² *Mahadeo*, (1916) 12 N. L. R. 188, 18 Cr. L. J. 286, [1916] AIR (N) 14.

³ *Athi Ayyar*, (1920) 14 L. W. 728, 23 Cr. L. J. 607, [1921] AIR (M) 332.

⁴ *Mahadeo Singh*, (1926) 27 Cr. L. J. 898, [1926] AIR (A) 704.

⁵ *Deocharan Singh v. Ram Sunder Sahu*, [1938] P. W. N. 642, 19 P. L. T. 703, 40 Cr. L. J. 89, [1938] AIR (P) 538.

⁶ *Dinkar Chintaman Patkar*, (1904) 7 Bom. L. R. 86, 87, 2 Cr. L. J. 55, 57.

⁷ *Abdul Hussain*, [1943] Kar. 7.

⁸ *Zipru Tanaji Patil*, (1927) 51 Bom. 417, 29 Bom. L. R. 484.

⁹ *Hari Bilash Shau v. Narayan Das Agarwala*, [1938] 1 Cal. 680.

street and demolished a portion of a building which they considered to be an encroachment on the street, it was held that the accused had no right to take the law in their hands in order to abate the nuisance and were consequently liable to be proceeded against for offences under ss. 147 and 427.¹⁰ The Court dissented from an earlier case in which the accused, who were members of the public and who, in bona fide exercise of the right of way, pulled down a wall obstructing a public way which was built by the complainant, were held not guilty of mischief.¹¹ There is no statutory provision in India justifying a private person or a member of the public in demolishing a building and causing loss to another person by way of abating a nuisance.¹² A private party, having a right of easement, is not entitled to take the law in his own hands in order to remove an obstruction unless it actually amounts to nuisance.¹³

Accident.—Where the accused who were employed in floating timber through a bridge, struck the arch of the bridge with some of the logs, it was held that this offence was not committed.¹⁴

No mischief if no wrongful loss or damage or invasion of civil right.—Where the accused cut down crops planted by the complainant on land to which he had no right whatever;¹⁵ where the accused was found catching fish in a public river, the right of fishing in which was let out by Government to another but no fencing was put up to shut up the fish in any manner;¹⁶ where the servant of a person pulled down a building which a civil Court had declared ought not to have been erected;¹⁷ where a person innocently removed a barricade placed by a Municipality on a piece of land in front of his house which impaired his ingress and egress to or from his house;¹⁸ where an agent of a landlord accompanied by a bailiff broke open the door of a room, in his chawl, in the possession of his tenant, in execution of a distress warrant issued against the tenant for non-payment of rent;¹⁹ where the owner of an animal buried its carcass to prevent the *mahars* (low caste people) of a village from taking off its skin;²⁰ where a person, in a bona fide belief that the construction of a wall on his land was a civil trespass, destroyed the construction;²¹ where members of a Municipal Committee permitted a tree within municipal limits to be cut for public purposes against the orders of the Municipal Committee as a body;²² where persons took cattle to a pound whereby their owners were subjected to a fine;²³ where the reversioner of a mortgagor sold some of the bricks of the mortgaged house, which had tumbled down;²⁴ and where a person dug out tombs of the forefathers of the complainant which stood on his own lands,²⁵ it was held in all these cases that this offence was not committed.

The fact that for years a deity was allowed to be brought once a year underneath a tree standing on the land of the accused for public worship, was not sufficient to divest the owner of the land and of the tree standing thereon of his ownership and not to amount to a dedication of the tree to the deity or the public, and the accused, who cut the tree, was, therefore, not guilty of mischief.¹ Where the accused, a servant of one R, acting solely in the interests of his master, removed or damaged some bamboos which belonged to the estate of his master which was under the management of the Court of Wards, it was held that the act of the accused did not amount to this offence inasmuch as by his act no wrongful loss was caused to anybody, not even to the Court of Wards. The Court said: "It is a well-known rule of law that a man may commit mischief by damaging his own property, provided he does so in order to cause wrongful loss to somebody else, or knowing it to be likely to cause wrongful loss to somebody else.

¹⁰ *Narasimhulu v. Nagur Sahib*, (1933) 57 Mad. 351.

¹¹ *Dharmalinga Mudaly*, (1914) 39 Mad. 57.

¹² *Narasimhulu v. Nagur Sahib*, (1933) 57 Mad. 351.

¹³ *Hari Bilash Shau v. Narayan Das Agarwala*, [1938] 1 Cal. 680.

¹⁴ (1870) 5 M. H. C. (Appx.) 40, 1 Weir 487.

¹⁵ *Nga Si*, (1908) 1 Cr. L. J. 668.

¹⁶ *Bhagiram Dome v. Agar Dome*, (1888) 15 Cal. 388; *Bakar Halsana v. Dinobandhu Biswas*, (1869) 3 Beng. L. R. (A. Cr. J.) 17,

12 W. R. (Cr.) 1.

¹⁷ *Rajcoomar Singh*, (1878) 3 Cal. 573.

¹⁸ *Abdul Aziz*, (1895) Cr. R. No. 10 of 1895,

Unrep. Cr. C. 745.

¹⁹ *Kaikhuro Cursetji*, (1898) Unrep. Cr. C. 949.

²⁰ *Gorinda Punja*, (1884) 8 Bom. 295.

²¹ *Shankar Lal*, (1887) 7 A. W. N. 101; *Rustam Ali*, (1882) 2 A. W. N. 209.

²² *Amir Chand*, (1877) P. R. No. 9 of 1878.

²³ *Ramjiawan*, (1881) 1 A. W. N. 158; *Dayal*, [1943] O. W. N. 202, (1943) 44 Cr. L. J. 640, [1943] AIR (O) 280.

²⁴ *Bhuban Mohan Banerjee v. Tansuk Roy Seraogi*, (1901) 6 C. W. N. 34.

²⁵ *Chotually*, (1902) 4 Bom. L. R. 463; but see contra, *Rumala Nagayya*, (1889) 1 Weir 496.

¹ *Venkatapurmanandam*, (1902) 1 Weir 496.

But it can hardly be said that a man who damages his own estate, although he has at present only a qualified interest damages the trustees in possession, whose only object is to preserve the estate for the benefit of the owner".² If a person wishing to eject a trespasser sets fire to his own house, he cannot be said to cause wrongful loss to any person or to the public, and, therefore, cannot be convicted of mischief.³

2. 'Causes the destruction of any property or any such change in any property'.—It is the essence of this offence that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility. Something should be done to the property contrary to its natural use and serviceableness. It may be mischief to throw the contents of a pot of food upon the fire, but it is not mischief, though it may be theft, to eat the food. Where some graziers grazed goats without the necessary permit no offence was held to have been committed.⁴ To cut a crop that is grown to be cut is not to destroy it, or affect it injuriously,⁵ but cutting an unripe crop would constitute mischief.⁶ Cutting and removal of bamboos which are grown to be cut⁷ or of a branch of a tree⁸ does not amount to mischief. Walking across a field of long grass is causing damage to the grass;⁹ making a breach in the wall of a canal is an act which causes such a change in the property as destroys or diminishes its value or affects it injuriously and therefore amounts to mischief.¹⁰ The section contemplates a physical injury from a physical cause. Certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and, after telling those who were seated to move to another place which they refused to do, threw down a shoe amongst the men who were seated. The persons who threw the shoe were convicted of mischief inasmuch as their action had polluted the food, and had, from a Hindu religious point of view, rendered it unfit to be eaten. It was held that they were not guilty of mischief.¹¹ Where the accused, a landlord, omitted to give electric light to the complainant, his tenant, by not switching on the light, it was held that this did not amount to mischief as it did not involve a change in the property.¹²

The accused threw large pieces of brick at the back of the complainant's house, complainant being at the time on the ground in front of the house and there being no one in the house. It was held that the accused was guilty of mischief because roofs and walls of dwelling-houses were not put up to be pelted at with brick-bats and their owners had a right to be protected from even hurts and marks being made in and on them without their consent.¹³

'Property' means some tangible corporeal property capable of being forcibly destroyed, but does not include an easement. The accused with intent to cause wrongful loss or damage to the complainant caused the destruction of certain stairs. The Magistrate found that the accused was the owner of the stairs but that the complainant had the right to use them, and convicted the accused. It was held, quashing the conviction, that even assuming such an easement existed it could not be considered 'property' within the meaning of this section.¹⁴ Similarly a right to collect toll at a public ferry was not held to be property.¹⁵ If the owner of land over which another or a body of others have a right either of passage or other use throws earth upon the land so that the use becomes either disadvantageous or impossible, it does not amount to mischief.¹⁶ Filling up a ditch dug by the complainant does not constitute mischief as, in the first place, it is doubtful if it can be said to cause wrongful loss to the complainant, and, in the second place, it does not affect any property injuriously so as to diminish its

² *Parameswar Singh*, (1910) 38 Cal. 180, 181.

³ *Ram Krishna Singh*, (1922) 3 P. L. T. 385, 28 Cr. L. J. 321, [1922] AIR (P) 197.

⁴ *Ragupathi Ayyar v. Narayana Goundan*, (1928) 52 Mad. 151.

⁵ *Pahawan Singh*, (1934) 10 Luck. 1.

⁶ *Mahomed Foyaz v. Khan Mohamed*, (1872) 18 W. R. (Cr.) 10. See *Miras Chowkidar*, (1803) 7 C. W. N. 713.

⁷ *Shakur Mahomed v. Chunder Mohun Sha*, (1874) 21 W. R. (Cr.) 38.

⁸ *Sardar Singh*, (1917) 19 Cr. L. J. 339,

[1918] AIR (P) 323, contra, *Muhammad Hasan*, (1927) 29 Cr. L. J. 275, [1927] AIR (A) 610.

⁹ *Gayford v. Chouler*, [1898] 1 Q. B. 316.

¹⁰ *Bansi*, (1912) 34 All. 210.

¹¹ *Moti Lal*, (1910) 24 All. 155.

¹² *Abdul Rahman*, (1927) 22 S. L. R. 393, 28 Cr. L. J. 960, [1928] AIR (S) 49.

¹³ *Ma Nyein Gale v. Nga Sein*, (1909) 5 L. B. R. 100, 10 Cr. L. J. 552, F.B.

¹⁴ *Keru*, (1888) Unrep. Cr. C. 387.

¹⁵ *Ali Ahmad v. Ibadat-Ullah Khan*, [1944] All. 189.

¹⁶ *Ramaraju*, [1980] M. W. N. 909.

value or utility.¹⁷ But where the accused dug a ditch in a cartway over which the complainant had a right to pass it was held that they were guilty of mischief.¹⁸

The mischief must be done to the property belonging to another person, but where a person's right is declared by a civil Court, he commits no mischief by damaging the property.¹⁹

Where the accused on receiving delivery of a registered article from a village branch postmaster was requested to sign an acknowledgment for the article received by him, but instead of returning the same duly signed he tore it up and threw it on the ground, it was held that the accused was guilty of mischief. The Court said: "...the act of tearing is an act of mischief, and...the postal receipt is the property of the post office, which has some value, however small. The tearing of such a receipt causes damage to the post office, that is wrongful loss to it, and...there can be no question that the accused is liable under s. 426...for his act".²⁰ The destruction of a document evidencing an agreement void for immorality constitutes this offence as it can be used as evidence for other collateral purposes.²¹

In a Collectorate partition a certain building which was in the possession of the complainant fell to the share of one A. Subsequently, there was a compromise between A and the complainant whereby the former agreed to give up the building to the latter in exchange for a plot of land. This compromise was filed before the Collector who gave effect to it in the Collectorate partition. Complainant continued in possession of the building. Accused, a servant of A, along with others, demolished the building and ploughed up the site asserting that the building belonged to his master A and that the compromise was ineffective as no deed of exchange had been drawn up in accordance therewith. It was held that the compromise having been given effect to by the Collector in the partition the title to the building had passed to the complainant, and that the accused was, therefore, guilty of mischief.²²

'Change' means physical change in composition or form. A change in value is not sufficient to constitute mischief.

3. 'Destroys or diminishes its value or utility, or affects it injuriously'.— It is highly essential that the property regarding which the offence is alleged to have been committed must have been destroyed or its value or utility must have been diminished. In the latter case it is not said to what extent the value or utility must have been diminished. But there must be some appreciable diminution; otherwise s. 95 will apply. It is not essential that the property interfered with should belong to the person injuriously affected. See Explanation 1. Illustrations (e) and (f) exemplify this Explanation.

D, as lessee of Government, held rights of fishery in a particular stretch of river. C, by diverting the water of that river, converted the bed of the river for a considerable distance into dry land, or land with a very shallow covering of water upon it, and by so doing he was enabled to destroy, and did destroy, very large quantities of fish, both mature and immature. It was held that when C deliberately changed the course and condition of the river in the manner described to the detriment of D, he was guilty of the offence of mischief.²³

A person who destroys property which at the time belongs to himself with the intention of causing, or knowing that it is likely to cause, wrongful loss or damage to anybody else, is guilty of this offence.²⁴ Illustrations (e) and (g) show that a man may commit mischief on his own property. See Explanation 2. In order, however, to his doing so, it is necessary that he intends to cause wrongful loss to some person, as in the cases stated in the illustrations. If a person destroys a duplicate specimen (his own property) of some rare coin, painting, or other object to enhance the value of the remaining one, such an act could not be done with the intention of thereby causing wrongful loss to any person.²⁵

¹⁷ *Ram Roop*, [1938] O. W. N. 1127, 3 Cr. L. J. 188, [1939] AIR (O) 88.

¹⁸ *Sri Ram*, [1947] O. W. N. 481.

¹⁹ *Jang Bahadur Singh*, (1925) 7 P. L. T. 79, 27 Cr. L. J. 392, [1926] AIR (P) 244; *Arman Shaik*, (1935) 37 Cr. L. J. 524, [1926] AIR (C) 157.

²⁰ *Sukha Singh*, (1905) P. R. No. 24 of 1905,

at p. 57, 2 Cr. L. J. 242, 243.

²¹ *Vyapuri*, (1882) 5 Mad. 401.

²² *Tanak Chaudhry*, (1923) 24 Cr. L. J. 542, [1923] AIR (P) 361.

²³ *Chanda*, (1905) 28 All. 204.

²⁴ *Dharma Das Ghose v. Nussuruddin*, (1886) 12 Cal. 660.

²⁵ *M. & M.* 892.

Bona fides.—"If a person deals injuriously with property in the *bona fide* belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence".¹ Where, therefore, a person cut trees on land which he claimed, but possession of which, after an execution sale, had been legally made over to another person without any objection or formal intervention on his part, it was held that he had committed mischief.² But where the accused cut the branches of a tree regarding which there was a dispute, it was held that he was not guilty.³ Where a raiyat surrendered his holding to the landlord who took possession of the land dispossessing an under-raiyat who had been brought on the land by the raiyat and uprooting the seeds sown by the under-raiyat, it was held that, under the Chota Nagpur Tenancy Act, after surrender the position of the under-raiyat was that of a trespasser and the action of the landlord being a *bona fide* claim of right, he was not liable for criminal trespass and mischief.⁴

Where, in the *bona fide* assertion of a right, a wall was pulled down, it was held that the act did not amount to mischief and the dispute between the parties was one for settlement by a civil Court.⁵ Where the complainant and the accused occupied adjoining houses, and there was undoubtedly a projection of poles and planks over the land of the accused from the complainant's portion, and there was no doubt that the projections were an invasion of the rights of the accused, and he tried to remove them and in doing so caused damage to the complainant's building, it was held that the accused must have acted *bona fide* in the exercise of what he considered to be his right and he was not guilty of any offence.⁶ Where, in the exercise of any *bona fide* claim of right to bury a deceased person, the members of a congregation broke open the gate of a graveyard which they believed was wrongfully closed against them by a priest, it was held that they had committed no offence.⁷ The accused who were servants of S were convicted by a Magistrate under this section and s. 143 for having cut a channel from a *jhil* which was in the possession of B and by so doing let water and fish from the *jhil*. The Magistrate had found that the land adjoining the *jhil* across which the channel had been cut had been in the possession of S. On appeal, it was contended that the accused had a perfect right to make the cutting in their master's land. It was held that though they had that right, it did not follow that they had a right to extend the cutting beyond and through the bank of the *jhil*, which, with the *jhil* itself and the land underneath the water, were in the possession of B, and the conviction could not be set aside on that ground.⁸ A game-keeper was prosecuted for unlawfully and maliciously killing a dog which was at the time near an aviary in which pheasants, the

¹ Per Turner, J., in *Budh Singh*, (1879) 2 All. 101, 108; *Keru*, (1888) Unrep. Cr. C. 387; *Nandu*, (1889) Unrep. Cr. C. 465; *Natha Singh*, (1903) P. R. No. 6 of 1903; *Madhu Sudan Das Gupta v. Sasti Prosad Nandy*, (1903) 7 C. W. N. 859; *Bakar Halsana v. Dinobandhu Biswas*, (1869) 3 Beng. L. R. (A. Cr. J.) 17, 12 W. R. (Cr.) 1; *Shakur Mahomed v. Chunder Mohun Sha*, (174) 21 W. R. (Cr.) 38; (1881) 1 Weir 488; *Daniel Grove*, (1882) 1 Weir 488; *Viagula Fernandez Vaz*, (1891) 1 Weir 489; *Jagannathan*, (1893) 1 Weir 490; *James*, (1837) 8 C. & P. 181; *Matthews*, (1877) 14 Cox 5; *Manikka Veera*, (1910) 11 Cr. L. J. 623, *Kondi Chetti*, (1910) 11 Cr. L. J. 566; *Pitamb Singh*, (1920) 21 Cr. L. J. 828, [1928] AIR (A) 215 (2); *Talebar Chowdhary*, (1917) 18 Cr. L. J. 750, [1917] AIR (P) 366; *Gainu Panday*, (1921) 2 P. L. T. 394, 23 Cr. L. J. 504; *Tatiparthi v. Sanam Kanakya*, [1929] M. W. N. 711, 31 Cr. L. J. 225, [1929] AIR (M) 833; *Sebastian Lobo v. Mingel D'Souza*, [1932] M. W. N. 645, 37 L. W. 149, 33 Cr. L. J. 655, [1932] AIR (M) 676.

² *Sonai Sardar v. Bukhtar Sardar*, (1876) 25 W. R. (Cr.) 46. See also *Dharma Das Ghose v. Nusseruddin*, (1886) 12 Cal. 660.

³ *Sardar Singh*, (1917) 19 Cr. L. J. 339; [1918] AIR (P) 323; *Sham Lal Lohar*, (1918) 19 Cr. L. J. 729; *Sarat Chandra Sen v. Yakub Taluqdar*, (1923) 28 C. W. N. 736, 26 Cr. L. J. 194, [1924] AIR (C) 805.

⁴ *Har Prasad Singh v. Hulsan Chamar*, (1928) 9 P. L. T. 728, 29 Cr. L. J. 642.

⁵ *Jagannathan*, (1893) 1 Weir 490; *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 26 Cr. L. J. 254, [1924] AIR (B) 486; *Suryanarayana Murthi*, [1940] 1 M. L. J. 571, [1939] M. W. N. 1254, (1938) 41 Cr. L. J. 807, [1940] AIR (M) 747.

⁶ *Jambulingam Pillai v. Ponnuswami Pillai*, [1939] 1 M. L. J. 321, 49 L. W. 332, [1939] M. W. N. 815, 40 Cr. L. J. 656, [1939] AIR (M) 400.

⁷ *Viagula Fernandez Vaz*, (1891) 1 Weir 489.

⁸ *Shoshi Bhushan Bose v. Gobind Chandra Roy*, (1903) 7 C. W. N. 663.

property of the appellant's master, were confined for breeding purposes. It was held that he was not liable if he acted under the bona fide belief that what he was doing was necessary for the protection of his master's property.⁹

Negligence is not mischief.—Where the accused set fire to a heap of rubbish in his own field, and a gust of wind came and carried the flame to an adjacent forest and burnt it, it was held on the analogy of cases of alleged mischief done by straying of cattle, that the facts did not at the outside show more than "mere neglect or carelessness" on the part of the accused to keep the fire from straying into the forest, and that the "neglect or carelessness" was not sufficient to constitute the offence of mischief.¹⁰ Where the accused whilst driving his bullock-cart pulled the bullock in the wrong direction and thereby dashed the pole of his yoke against the footboard of the complainant's carriage and caused damage, it was held that the accused was not guilty of mischief.¹¹

Master not liable for negligence of servant.—An owner who lived elsewhere could not, in the absence of express malice, be held criminally liable for the negligence of his contractor in digging the foundations of a house then being built without proper precautions.¹²

Cattle.—In the case of mischief done by straying of cattle, mere neglect or carelessness on the part of the owner of cattle to keep them from straying into fields of others is not sufficient.¹³ To warrant a conviction it must be proved that he actually and wilfully caused the cattle to enter, knowing that by so doing he was likely to cause damage,¹⁴ or at least that he was present and able to restrain the animal from causing damage and did not restrain it from so doing.¹⁵ The prosecution is bound to show that there was an intention to cause wrongful loss or damage.

But owners of cattle, who, knowing their animals to be not properly provided with fodder and accustomed to stray in search of food, intentionally omit to secure their cattle or neglect to take reasonable precautions for their care and custody, may be guilty of this offence. The omission or neglect, however, must be such as to have an active effect conducing to the result, as a link in a chain of facts from which an intention to bring about the result may be inferred.¹⁶ Where the accused grazed their cattle on waste lands on which the Government had by notification prohibited the public from grazing cattle, when provision was made for the public grazing their cattle elsewhere, this offence was held to have been committed.¹⁷ But when the grass was not meant to be sold for a profit, and the accused grazed his goats without the necessary permit, it was held that no offence was committed.¹⁸ In a subsequent case the same High Court held that in allowing one's cattle to graze on land belonging to the complainant, there is no destruction of property within the meaning of this section.¹⁹ Where in the absence of the accused, his cattle entered into the Government garden, it was held that he was not guilty of mischief. The act to be criminal should be done with dishonest intention.²⁰

PRACTICE.

Evidence.—Prove (1) that the accused caused the destruction of some property, or some change in such property or in the situation thereof.

⁹ *Miles v. Hutchings*, [1903] 2 K. B. 714.

¹⁰ Per Russell, Ag. C. J., and Heaton, J., (Aston, J., dissenting) in *Nandeyappagowda*, (1906) 8 Bom. L. R. 851, 854, 4 Cr. L. J. 446.

¹¹ *Thornotti Madathil Poker*, (1886) 1 Weir 405.

¹² *Srish Chandra Sircar*, (1918) 17 A. L. J. R. 343, 20 Cr. L. J. 299, [1919] AIR (A) 385.

¹³ *Narsu*, (1882) Unrep. Cr. C. 185; *Rangu*, (1883) Unrep. Cr. C. 189, Cr. R. April 19, 1883; *Hyderally*, (1884) Unrep. Cr. C. 199; (1871) 6 M. H. C. (Appx.) 36, 1 Weir 487.

¹⁴ *Aras Sircar*, (1868) 10 W. R. (Cr.) 29; *Major Forbes v. Girish Chandra Bhuttacharjee*, (1870) 6 Beng. L. R. (Appx.) 8, 14 W. R. (Cr.) 31; *Bai Baya*, (1883) 7 Bom. 126; *Shaik Raju*, (1884) 9 Bom. 173; *Mehdi Hasan*, (1907) 29 All.

565.

¹⁵ *Narsu*, (1888) Unrep. Cr. C. 357; *Vithu*, (1887) Unrep. Cr. C. 318, Cr. R. No. 5 of 1887.

¹⁶ *Thornotti Madathil Poker*, (1866) 1 Weir 405.

¹⁷ *Gurram Siddugadu*, (1886) 1 Weir 492. See *Nga Lun*, (1903) 2 L. B. R. 158.

¹⁸ *Ragupathi Ayyar v. Narayana Goundan*, (1928) 52 Mad. 151.

¹⁹ *Palaniandi Muthirian v. Ramaswami Reddi*, [1942] 2 M. L. J. 545, [1942] M. W. N. 756 (2), (1942) 55 L. W. 695, 44 Cr. L. J. 140, [1942] AIR (M) 724 (1).

²⁰ *Ghazi*, (1904) P. R. No. 28 of 1904, 1 Cr. L. J. 1097. See *Joti Babu*, (1906) 8 Bom. L. R. 549, 4 Cr. L. J. 93.

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

(3) That the accused did as in (1) intending or knowing that he was likely to cause loss or damage to the public or to any person.²¹

(4) That the causing of such damage or injury was wrongful.

Onus.—It is for the prosecution to prove that the accused caused damage with a wrongful intent—with a knowledge that he was not justified in doing it, and that the party under whose orders he was acting had no real title.²²

Where, in a case regarding mischief to land, the defence raises a bona fide plea of right to the land, the Magistrate should determine whether the accused acted with any such intent as made his act criminal, viz. any such intent as is mentioned in this section.²³

Procedure.—Not cognizable—Summons—Bailable—Compoundable when the only loss or damage caused is loss or damage to a private person—Triable by any Magistrate—Triable summarily.

Warning to Magistrate.—The authority vested in the criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the true meaning of s. 425, otherwise this provision of the law will be frequently resorted to as a trenchant mode of deciding disputed civil questions of rights.²⁴

Conviction for mischief as well as for theft.—It is not illegal to convict the accused of mischief as well as of theft. Where, therefore, the accused had cleared a piece of Government land, cutting down and appropriating the trees thereon without permission, it was held that it was not illegal to convict them of mischief and theft, as the mischief preceded the theft which could not have been committed according to Explanation 1 of s. 378 until the trees had been detached from the ground.²⁵ Where the accused stole a sheep and killed it, it was held by the Patna High Court that he could not be charged with and convicted of mischief as well as of theft.¹ The Madras High Court has held likewise.² But the Bombay High Court has held in a case in which the accused stole a calf and then killed it that he should be convicted and sentenced separately for each of the offences.³ The Rangoon High Court has followed the view of the Bombay High Court and has dissented from the view of the Madras and the Patna High Courts in a case in which the accused stole a bullock from a jungle, where it was put to graze by its master, a cartman, and then killed it for food. He was convicted of the offences of theft and mischief at one trial and was sentenced separately for each offence. It was held that the sentences were legal.⁴

Summary trial.—A person may be tried summarily for criminal trespass and mischief unless there is a bona fide claim of right depriving the Magistrate of jurisdiction.⁵

Punishment.—In laying down the punishment for different degrees of the offence of mischief, the gradation observed refers to the amount of loss sustained, the mode of distinction not admitted in estimating the degrees of criminality in other offences against property.⁶ The penal provisions relating to mischief have been framed on the same principle which pervades the Code of first providing a certain amount of punishment for all offences of a particular denomination and then proceeding to provide

²¹ *Denoo Bundhoo Biswas*, (1869) 12 W. R. (Cr.) 1, 3 Beng. L. R. (A. Cr. J.) 17; *Kashi Nath Ghose v. Dinobundhoo Mtyee*, (1871) 16 W. R. (Cr.) 62 [72]; *Pran Nath Shaha*, (1876) 25 W. R. (Cr.) 69; (1881) 1 Weir 488.

²² *Issur Chunder Mundle v. Rohim Sheikh*, (1876) 25 W. R. (Cr.) 65.

²³ *Mahadshet*, (1889) Unrep. Cr. C. 432.

²⁴ *Ram Golam Singh*, (1866) 6 W. R. (Cr.) 59.

²⁵ *Narayan Krishna*, (1866) 2 B. H. C. 392.

¹ *Hussain Buksh Mian*, (1924) 3 Pat. 804; *Rathi*, (1901) 14 C. P. L. R. (Cr.) 159.

² *Madar Saheb*, (1902) 1 Weir 497. In Burma and in Sind the same view has been

taken: *Nga Paik Hmwe*, (1894) 1 U. B. R. (1892-1896) 241; *Nga Aung So*, (1900) P. J. L. B. 633; *Jairo*, (1915) 9 S. L. R. 204, 17 Cr. L. J. 239, [1916] AIR (S) 77.

³ *Bhawan Surji*, (1935) 38 Bom. L. R. 164, 60 Bom. 627, approving *Krishna*, (1889) Cr. R. No. 1 of 1889, Unrep. Cr. C. 430, disapproving *Ramla Ratanji*, (1903) 5 Bom. L. R. 460, and *Genya*, (1877) Unrep. Cr. C. 129.

⁴ *Paw Din*, [1938] Ran. 63.

⁵ *Gamirullah Sarkar v. Abdul Sheikh*, (1884) 10 Cal. 408, disapproving *Shakur Mahomed v. Chunder Mohun Sha*, (1874) 21 W. R. (Cr.) 38.

⁶ 1st Rep., s. 608.

heavier punishment for aggravated offences of that kind.⁷ This section provides punishment for the offence of mischief generally. But if in any particular case there is any circumstance which brings it within any of the subsequent penal clauses whereby heavier punishment is provided, and if that circumstance can be proved, that subsequent clause is then the appropriate one for the punishment of the offence committed. And when one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act, unless there be in the mind of the offender a wholly separate intention.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Mischief causing damage to the amount of fifty rupees.

COMMENT.

This section provides for enhanced sentence where the loss or damage caused is upwards of fifty rupees. In estimating the amount of the loss or damage caused, the actual loss or damage only should be taken into consideration and not the damage which, in consequence of such loss, may be occasioned to the sufferer.⁸ But the damage done to several things may be added together, provided the things are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction.⁹

CASES.

Where some persons belonging to a certain village pulled up and removed fishing stakes lawfully fixed in the sea, within three miles of the shore, by the villagers of another village, and the removal of the stakes, though without any intention to appropriate them, occasioned "damage", it was held that they had committed mischief.¹⁰ Cattle belonging to the accused, who were Rabaris, having trespassed on the complainant's farm and done damage to the crops there, the accused were tried for the offence of mischief under this section and also for an offence under s. 26 of the Cattle Trespass Act. It appeared that on previous occasions too, cattle of each of the accused were impounded a number of times for similar acts. It was held that they were guilty of mischief.¹¹ Where a person not entitled to a piece of land or to raise any crops on it, raised crops on it and the accused drove his cattle into the land and destroyed the crops, it was held that as the person who raised the crops was not legally entitled to the land or to the crops there was no wrongful loss to him and no offence under this section was committed.¹²

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the loss or damage caused amounted to Rs. 50 or more.

There ought to be evidence to show that the defendant caused mischief.¹³

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when the only loss or damage caused is loss or damage to a private person—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed mischief, causing loss or damage to the amount of—, and thereby committed an offence punishable under s. 417 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

⁷ M. & M. 302.

⁸ M. & M. 393.

⁹ *Shepherd*, (1868) L. R. 1 C. C. R. 118.

¹⁰ *Kastya Rama*, (1871) 8 B. H. C. (Cr. C.) 63.

¹¹ *Punya Godad*, (1918) 21 Bom. L. R. 247, 20

Cr. L. J. 387, [1919] AIR (B) 59.

¹² *Kolathukara Goundan v. Kuppuswami Goundan*, [1948] 1 M. L. J. 830, 61 L. W. 331.

¹³ (1870) 5 M. H. C. (Appx.) 29, 1 Weir 497.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d) and 12 (2).

428. Whoever commits mischief by killing, poisoning, maiming¹ or rendering useless any animal² or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Mischief by killing or maiming animal of the value of ten rupees.

COMMENT.

This section is intended to prevent cruelty to animals and consequent loss to the owner.

1. 'Maiming'.—The term "maiming" refers to those injuries which cause the privation of the use of a limb, or a member of the body.¹⁴ 'Maiming' implies a permanent injury,¹⁵ affecting the use of limb, or other member of the body.¹⁶ Wounding is not necessarily maiming. Wounding is causing an injury to the person by which the skin is broken.¹⁷ To constitute a wound it is necessary that there should be a separation of the whole skin; and a separation of the cuticle or upper skin only is not sufficient.¹⁸ The external surface of the body must be divided.¹⁹ 'Maiming' must mean some permanent injury because it occurs in this section and s. 419 between 'killing' and 'rendering useless'. This last expression again differs from 'diminishing utility', the expression used in the definition of 'mischief'.²⁰ Meres, C. J., in a case²¹ said: "It is true that in its primitive meaning the verb to 'maim' involves the notion of mutilation of some part of the body useful for fighting. . . . I do not think the framers of the Code intended this restricted meaning only of this expression. It seems difficult to understand how many of the domestic animals could be 'maimed' within this meaning of the term. I think the expression would fairly include the amputation of any member, or the injury, of an animal by which its speed, or endurance, or use, was permanently diminished". Maiming then means some permanent injury to one of the members of the body. It involves the notion of the privation of the use of some limb or member involving a permanent injury, and not a mere disfigurement.²² Where the ribs of a pony were broken so as permanently to diminish its usefulness and value, it was held to be 'maimed'.²³ Similarly, where the ears of a horse,²⁴ or an ass,²⁵ were cut off, it was held that the accused was guilty of maiming. But where one-half of one ear of a mare was cut off whereby the animal's sense of hearing was not impaired, it was held that this did not amount to maiming within the meaning of this section.¹ Where the accused caused the death of a mare through injuries inflicted by his inserting the handle of a fork into her vagina and pushing it into her body, it was held that he was liable for killing, maiming or wounding the mare.²

It is not necessary to prove that any instrument was used to inflict the wound.³ Pouring acid into the eye of a mare, and thereby blinding her, was held to be maiming.⁴ But, if a person inflicts a wound on an animal whereby it is disabled for some days only, his offence falls under s. 426.⁵

2. 'Animal'.—See s. 47, *supra*. The animal destroyed must be the subject of property. The escape of an animal that is originally in the condition of *feroe naturae*, but is subsequently reduced into possession, does not terminate the owner's right to it, and any person shooting such an animal is guilty of mischief.⁶

¹⁴ *Fattehadin*, (1881) P. R. No. 33 of 1881.

¹⁵ *Jeans*, (1844) 1 C. & K. 539; *Narain Singh*, (1905) U. B. R. (P. C.) 25, 3 Cr. L. J. 107.

¹⁶ *Juman Sajan Otho*, [1946] Kar. 437, 440.

¹⁷ *Moriarty v. Brooks*, (1834) 6 C. & P. 684.

¹⁸ *M'Loughlin*, (1831) 8 C. & P. 635.

¹⁹ *Beckett*, (1836) 1 Mood. & Rob. 526.

²⁰ *Bahawal*, (1891) P. R. No. 7 of 1891.

²¹ *Nga San Yun*, (1885) S. J. L. B. 404.

²² *Anna Laxman*, (1916) 18 Bom. L. R. 289, 17 Cr. L. J. 253, [1916] AIR (B) 220.

²³ *Nga San Yun*, (1885) S. J. L. B. 404.

²⁴ *Marigowda v. Srinivasa Rangachar*, (1911) 35 Mad. 594.

²⁵ *Rangasami Goundan*, (1917) 18 Cr. L. J. 620, [1918] AIR (M) 638.

¹ *Anna Laxman*, (1916) 18 Bom. L. R. 289, 17 Cr. L. J. 253, [1916] AIR (B) 220.

² *Welch*, (1875) 1 Q. B. D. 23.

³ *Bullock*, (1868) L. R. 1 C. C. R. 115.

⁴ *Owen's Case*, (1828) 1 Mood. Cr. C. 205.

⁵ *Subrao Sukhal*, (1901) 3 Bom. L. T. 503.

⁶ *M. Subrayadu*, (1888) 1 Weir 498.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426 ; and further—

(5) That the property injured consisted of an animal or animals.

(6) That the value thereof at the time of injury was Rs. 10 or more.

(7) That the injury in question was caused by killing, poisoning, maiming, or rendering useless such animals.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, committed mischief by killing (*or poisoning, etc.*) an animal, to wit—, of the value of—, and thereby committed an offence punishable under s. 428 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d) and 12 (2).

429. Whoever commits mischief by killing, poisoning, maiming¹ or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox,² whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.

COMMENT.

This section is exactly similar to the preceding s. 428 except that it mentions particular animals.

This section provides enhanced punishment owing to the greater value of the animals mentioned therein. Intention is the gist of the offence. The accused threw a stone at a young buffalo and thereby caused its death, and it appeared that her intention was to drive it out of her backyard. It was held that the accused was not guilty of mischief.⁷

1. 'Maiming'.—See s. 428, *supra*. Beating to death a buffalo dedicated to a deity is an offence under this section. An animal branded and let loose on the occasion of the funeral or obsequies in a Hindu family may be *nullius in terris*, but an animal dedicated to a deity is not a *res nullius*.⁸

2. 'Horse, mule, buffalo, bull, cow or ox'.—The word 'horse' includes a mare⁹. According to the Madras High Court, a 'calf' does not come within the term 'bull, cow or ox';¹⁰ but the Calcutta High Court has held that the words 'bull' and 'cow' in this section include the young ones of those animals. The section specifies the more valuable of the domestic animals, without any regard to age; but in respect of other kinds of animals not so specified, the section will not apply unless the particular animal in question is shown to be of the value of fifty rupees or upwards.¹¹

Bulls set at large according to religious usage.—Such bulls are not the subject of ownership by any person, as the original owner surrenders all his rights as its proprietor and gives it its freedom to go whithersoever it chooses. They are, therefore, *nullius in terris*, and as such cannot be the subject of mischief.¹² But if there is not total abandonment of control and property, the animal would not cease to be the private property of the owner. Before finding that the animal ceased to be the private property of any one it is necessary to see whether the ceremony at which it was released was followed by an abandonment of all control and property over it.¹³ There

⁷ *Obammal*, (1901) 1 Weir 502.

⁸ *Abdul Qayum*, [1945] O. W. N. (H.C.) 287.

⁹ *Agne*, [1947] O. W. N. 494.

¹⁰ *Cholay*, (1864) Mad. 4th Ses. Unrep.

¹¹ *Hari Mandle v. Jafar*, (1895) 22 Cal. 457.

¹² *Romesh Chunder Sannyal v. Hiru Mondal*, (1890) 17 Cal. 852.

¹³ *Ghanta Veeranna v. Pusapati Narasiah*, (1888) 1 Weir 500; *Sulaiman Shah*, (1936) 18 P. L. T. 329, 38 Cr. L. J. 407, [1937] AIR (P) 406.

is also a material distinction in principle between the case of an animal, property in which is wholly renounced or abandoned and allowed in accordance with superstitious or religious usage to roam at large free from control, and an animal so abandoned and at large after dedication to a temple.¹⁴ The former Chief Court of the Punjab had held that a bull liberated according to ancient usage did not cease to be "property", and was moveable property within the meaning of the Code, and capable of being the subject of the offence of mischief.¹⁵

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the property injured consisted of an elephant, camel, horse, mule, buffalo, bull, cow, or ox; or that such property consisted of any animal of the value of Rs. 50 or more.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed mischief by killing (poisoning, maiming or rendering useless) (*specify the animal: where the animal is not of the kind mentioned in the section specify its value also*), and that you thereby committed an offence punishable under s. 429 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d) and 12 (2).

430. Whoever commits mischief by doing any act which causes,

Mischief by injury to works of irrigation or by wrongfully diverting water.

or which he knows to be likely to cause, a diminution of the supply of water¹ for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

This section deals with diminution of water supply. Section 278 applies if the water is foiled so as to be unfit for use.

For a conviction under this section there must be some infringement of right resting in some one by the act of the accused. It must be proved that the accused had no right to do what they did.¹⁶ This section only applies if mischief, within the meaning of s. 425, is committed.¹⁷

Scope.—The section applies equally to irrigation channels as to other sources of irrigation, such as tanks and ponds.¹⁸

1. 'Diminution of the supply of water'.—Under this section the physical requisites of the act are the doing of any act which causes, or to the doer's knowledge is likely to cause, a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right, and it matters not that he claims to set up such a right if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial tact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent. It is no part of the definition of the

¹⁴ *Nalla*, (1887) 11 Mad. 145.

¹⁵ *Bahadur Singh*, (1888) P. R. No. 84 of 1888.

¹⁶ *Ashtosh Ghosh*, (1929) 57 Cal. 897.

¹⁷ *Mohammad*, (1936) 38 P. L. R. 1085, 37

Cr. L. J. 430, [1936] AIR (L) 15.

¹⁸ *Syru Chinna Mangaiya*, (1886) 1 Weir 510; *Ismail Biswas*, (1929) 31 Cr. L. J. 751, [1930] AIR (C) 289.

offence that the act of the accused should be in common language a mere wanton act of waste.¹⁹ It is sufficient that the supply of water available for a particular person or class of persons should be diminished by the act of the accused.²⁰ The words "diminution of the supply of water for agricultural purposes" refer to actual utilization of the particular water by particular persons who are deprived of it by the mischief complained of and not to the use to which such water is put by the accused and, therefore, the fact that the water was used by the accused also for agricultural purposes does not take the case out of this section.²¹ The accused is liable even if his whole crop would have been destroyed but for his act of cutting a *bandh* belonging to the complainant.²² Where the accused cut a dam erected by the complainant, not to take a supply of water but to save their own crops, and it was not proved that the act of the accused caused a diminution of the supply of water for agricultural purposes or that the accused knew that it was likely to cause such diminution in future, it was held that the accused could not be convicted of this offence.²³

The placing, across a channel, of an embankment²⁴ or the cutting of an embankment,²⁵ may lead to a diminution of supply. If a supply channel is obstructed or filled up by a dam put up or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility and which, if it was done with intention to cause or with knowledge that it was likely to cause wrongful loss to any person, would constitute 'mischief'. If the act so done causes a diminution of supply of water an offence under this section is committed.¹ The mere deprivation of water supply to the complainant by a cut in a dam is not an offence under this section. It is the destroyed property that must have lost its utility or value to bring the offence under it. Where the accused have not caused destruction of any property by damaging a canal or any of its banks or openings in any manner but only continued to take water from the canal even after the end of their turn, no offence under this section is committed and the accused are only liable to be dealt with under the provisions of the Canal Act.²

Where the accused closed the supply of water to his own land, without the permission of Government officials, and no one else was deprived of water on that day, it was held that no offence under this section was committed.³

Bona fides.—It is only interference which cannot be justified by the assertion of a *bona fide* right that would constitute mischief.⁴ This section will not apply to proceedings taken by anybody in good faith in the exercise of his rights of property. Where, therefore, a zamindar stopped a water-channel running over his own land on the complainant's refusing to pay him the rent he demanded, it was held that he was not guilty under this section.⁵ Where the accused cut open a *bund* and diverted water to his fields in anticipation of usual permission to do so, it was held that he had committed no offence under this section.⁶ Where there was no doubt that the accused knew that by their act they were causing a diminution of the water supply and where they had not substantiated a right to take the water nor shown that the other side had no right, it was held that a *bona fide* claim to take the water could not be entertained.⁷

¹⁹ *Ramakrishna Chetti v. Palaniyandi Kudambar*, (1876) 1 Mad. 262 F.B.; *Ashulosh Ghosh*, (1929) 57 Cal. 897.

²⁰ *Narasimha Rao v. Ayyanna Rao*, [1939] 1 M. L. J. 445, 49 L. W. 298, [1939] M. W. N. 121, 41 Cr. L. J. 88, [1939] AIR (M) 794.

²¹ *Lukman*, (1926) 27 Cr. L. J. 1233, [1927] AIR (S) 39.

²² *Raghunath Thakur*, (1932) 13 P. L. T. 162; 33 Cr. L. J. 313, [1932] AIR (P) 224.

²³ *Nafar Chandra Bhattacharjee v. Helakuddin Mondal*, (1904) 8 C. W. N. 370, 1 Cr. L. J. 245; *Mohammad*, (1910) 11 Cr. L. J. 168.

²⁴ *Nalla Narayanasami*, (1884) 1 Weir 504.

²⁵ *Sheikh Arif*, (1908) 35 Cal. 437.

¹ *Deenabandu v. Viswaswamy*, [1923] M. W. N. 684, 24 Cr. L. J. 830, [1924] AIR (M) 176; *Narasimha Rao v. Ayyanna Rao*, [1939] 1 M. L. J. 445, 49 L. W. 298, [1939] M. W. N. 121, 41

Cr. L. J. 88, [1939] AIR (M) 794.

² *Mohammad Raja*, (1936) 38 Cr. L. J. 430, 38 P. L. R. 1035, [1937] AIR (L) 196.

³ *Chimandas Dhanomal*, [1943] Kar. 8.

⁴ *Kovada Sanyasi Naidu*, (1939) 41 Cr. L. J. 930, [1940] AIR (M) 306.

⁵ *Mohur Singh v. Laloo*, (1906) 3 A. L. J. R. 142n. See *Armugam Chetti*, (1888) 8 Mad. Jur. 528; *Athinarayanasaamy Pillai v. Subbier*, (1898) 1 Weir 505; *Deputy Legal Remembrancer Behar and Orissa v. Matukdhari Singh*, (1915) 20 C. W. N. 128, 17 Cr. L. J. 9; *Gulab Singh*, (1926) 27 Cr. L. J. 1354, [1927] AIR (A) 112.

⁶ *Kallappa Naicker v. Palani Ammal*, [1920] M. W. N. 131, (1919) 11 L. W. 148, 21 Cr. L. J. 137.

⁷ *Basdeo Singh*, (1924) 26 Cr. L. J. 258, [1924] AIR (P) 704.

CASES.

Diminution of supply of water.—Where it appeared that the complainant was the exclusive owner of a water-course, and that the accused had no sort of right to assert any claim to it, the causing of a diminution of the supply of water by the accused, even though in assertion of a right, was held to be only an additional wrong, and to constitute this offence.⁸ Where the accused closed a water-course by which water had been supplied to the complainant's land, he was held not to have committed this offence, as no damage was alleged to have been caused by the stoppage of water to any crop in the land.⁹ Where the accused bunded up a portion of the channel, running in his own land, and carrying water to the complainant's land to which he was not found to be entitled either by way of contract or by easement, it was held that no actual wrongful loss had been proved and that therefore the accused's action in bunding up the channel did not constitute any offence.¹⁰ On a partition between the complainants and the accused, who were members of a joint family, certain fields fell to the share of the former and other fields fell to the share of the latter. On the lands allotted to the accused there had existed a channel for a long number of years which was used for carrying water to the fields which had been allotted to the complainants. Some years after the partition the accused filled up the channel with the result that water could not be carried to the lands of the complainants for purposes of irrigation. It was held that the loss caused to the complainants by the channel being filled up was wrongful loss and the accused must be presumed to have had the knowledge that their act in filling up the channel was likely to cause such wrongful loss to the complainants and that consequently they were guilty of an offence under this section.¹¹ Where the accused took water for agricultural purposes to which he was not entitled, and thereby diminished the supply of others who were entitled, it was held that he was guilty under this section.¹² A landlord had agreed with the tenants of his flats, on payment of a separate charge, to pump water for them from a reservoir. He stopped the pumping. It was held that no offence under this section was committed as the act of the landlord was mere breach of contract.¹³

Diminution of water by cutting embankment.—The complainant put up an embankment on Government land without previous permission to store water for the use of his land. The accused cut the embankment and were charged with mischief but were acquitted on the ground that the complainant's act was illegal. It did not appear that the accused interfered to protect their own interests. It was held that the acquittal was wrong.¹⁴ The accused cut the embankment of an irrigation tank and kept the embankment open for more than twenty-four hours and pleaded in excuse of their act the authorization of the Public Works authorities given to them to take the water for twenty-four hours. It was held that, assuming the original act of cutting the embankment was lawful in consequence of the authorization given by the Public Works authorities to the accused to take the water for twenty-four hours, by keeping the breach open for six hours longer, they were guilty of an illegal omission which was under s. 32 of the Code equivalent to an illegal act, and that they were guilty under this section as their act was clearly likely to cause a diminution of water supply for agricultural purposes; and that it was not necessary to prove actual damage.¹⁵ But in a Punjab case it was held that a person by merely irrigating his land from a Government canal-cut for a period exceeding that allotted to him, did not commit any offence under this section.¹⁶

The accused entered into the lands of the complainant and cut three bunds which had been erected in a channel that ran through the land, with the result that water in that channel ran down another channel off the complainant's land, and utilized

⁸ *Jagannath Bhikaji Bhawe*, (1885) 10 Bom. 188.

⁹ *Kataya*, (1885) Unrep. Cr. C. 217; *Vattu Karan*, (1882) 1 Weir 507.

¹⁰ *Budda Reddi*, (1922) 44 M. L. J. 234, 16 L. W. 792, [1922] M. W. N. 839, 23 Cr. L. J. 655, [1923] AIR (M) 141.

¹¹ *Krishna Aiyar v. Ayappa Naick*, [1925] M. W. N. 45, 21 L. W. 611, 26 Cr. L. J. 1100, [1925] AIR (M) 577.

¹² *Aiyannagowd*, (1882) 1 Weir 507; *Sheikh*

Arij, (1908) 35 Cal. 437. See, to the same effect, *Chengama Naidu*, [1911] 2 M. W. N. 349, 12 Cr. L. J. 551; *Har Narain*, (1919) 41 All. 599; *Athimoolam Pillai v. Palaniandi Ambalam*, (1920) 13 L. W. 266, 22 Cr. L. J. 270, [1921] AIR (M) 536.

¹³ *Ram Das Pandey*, (1947) 51 C. W. N. 751.

¹⁴ *Rangana Goundan*, (1890) 1 Weir 510.

¹⁵ *Nallappa Udayan*, (1899) 1 Weir 505.

¹⁶ *Fateh Din*, (1909) P. R. No. 14 of 1909, 11 Cr. L. J. 65.

by the accused for sale to ryots holding the lands lower down. The complainant was entitled to the whole of the water in the channel in question. It was held that this section applied not only where the water was wantonly wasted but also where the accused himself utilized it, or sold it to others provided the person entitled was deprived of its use.¹⁷

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426 ; and further—

(5) That the mischief in question caused, or was likely to cause, diminution of the supply of water.

This is an essential element to be proved.¹⁸

(6) That such supply of water was for purposes of agriculture ; or for food or drink for human beings ; or for animals which are property ; or for cleanliness ; or for carrying on any manufacture.

(7) That such mischief was done with knowledge that it would, or was likely to cause, such diminution of the supply of water.¹⁹

The prosecution must prove that there has been unlawful and intentional interference on the part of the accused with the admitted or proved rights of the complainant.²⁰

It is not necessary to prove actual loss.²¹

Where there was nothing to show that the complainant had any legal right to the water intercepted by the accused, it was held that the complainant's loss was not wrongful and the offence of mischief was not established.²²

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

A Magistrate can make an inquiry by personal inspection of the disputed place.²³

Where there was a genuine dispute between the two parties in regard to a channel and one party was charged with mischief for closing the channel, it was held that the matter was not one for trial in a criminal Court and that the act of closing the channel was not an offence.²⁴

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, committed mischief by doing—which act caused (*or which you knew to be likely to cause*) a diminution of the supply of water for agricultural purposes (*or for food, etc.*) and thereby committed an offence punishable under s. 430 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

431. Whoever commits mischief by doing any act¹ which renders or which he knows to be likely to render any public road,² bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to public road, bridge, river or channel.

COMMENT.

To support a conviction under this section there must be evidence of intention to cause mischief, and of knowledge that injury is likely to result from the act of the

¹⁷ *Chidambaram Pillai v. Muhammad Khan Sahib*, (1918) 34 M. L. J. 206, 19 Cr. L. J. 356, [1918] AIR (M) 72; *Lukman*, (1926) 27 Cr. L. J. 1233, [1927] AIR (S) 39.

¹⁸ *Taj-ud-din*, (1908) 5 A. L. J. R. 159, 7 Cr. L. J. 296.

¹⁹ *Nga Myat Aung*, (1908) 1 Cr. L. J. 663; *Mewa Ram*, (1934) 35 Cr. L. J. 1250, [1934] AIR (A) 687.

²⁰ *Banwari Karmakar v. Gosto Behary Karmakar*, (1920) 32 C. L. J. 476, 22 Cr. L. J. 415, [1920] AIR (C) 835.

²¹ (1881) 1 Weir 503.

²² *Tun Aung*, (1907) 4 L. B. R. 149, 7 Cr. L. J. 448.

²³ *Muruga Pillai*, (1883) 1 Weir 508.

²⁴ *Athinarayanadasamy Pillai v. Subbier*, (1898) 1 Weir 505; *Ashutosh Ghosh*, (1920) 57 Cal. 897.

accused.²⁵ Such intention or knowledge is not necessary for offences under ss. 279, 280 and 283.

1. 'Act'.—See s. 33, *supra*.

2. 'Road'.—A path through a jungle is not a road.¹

CASES.

In a case where the accused was charged with committing mischief by doing an act which rendered a bridge impassable, it was proved (1) that two pieces of timber came floating down the river in flood and coming in contact with a bridge destroyed two of its pillars; (2) that the accused cut the smaller piece at a point on the bank of the river some eight miles above the bridge, and left it lying on the bank. It was held that the conviction could not be sustained, for on the facts found there was obviously no intention to cause mischief, and there was no sufficient evidence of knowledge that injury was likely to result from the act of the accused.² Where the accused dug a trench on waste land bordering upon a public road in order to protect his land from drainage water and thereby incidentally caused damage to the public road, it was held that this was not sufficient to constitute the offence of mischief.³ Mere placing of bricks on a road would not come within this section.⁴

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief in question consisted of an act rendering or likely to render impassable or less safe, a public road, bridge, navigable river or channel, natural or artificial, for the purpose of travelling or conveying property.

(6) That such mischief was done with a knowledge that it would, or was likely to, cause such injury.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

432. Whoever commits mischief by doing any act¹ which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by causing inundation or obstruction to public drainage attended with damage.

COMMENT.

This section provides for a more severe punishment where the mischief is committed by causing inundation to public drainage as it affects the health of the community.

1. 'Act'.—See s. 33, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief consisted of an inundation or obstruction to drainage.

(6) That such inundation or obstruction was, or was likely to be, attended with injury or damage.

(7) That such damage was public.

(8) That the mischief was done with a knowledge that it would, or was likely to, cause such injury.⁵

It is not sufficient to show probable consequential damage to other property.⁶ The accused were convicted by a Magistrate for erecting a dam across the bed of a

²⁵ *Malayan Kalan*, (1883) 1 Weir 510.

¹ *Nga Shwe Laukke*, (1899) P. J. L. B. 629.

² *Malayan Kalan*, (1883) 1 Weir 510.

³ *Kairthadi Anantha Bhattar*, (1888) 1 Weir 511.

⁴ *Jugal Narain Singh*, (1908) 12 C. W. N. cxxii (152).

⁵ *Pran Nath Shaha*, (1876) 25 W. R. (Cr.) 69.

⁶ (1868) 4 M. H. C. (Appx.) 15, 1 Weir 512.

river knowing it to be likely that the lands of the adjacent village would be in consequence inundated. The High Court in quashing the conviction held that as the act done was the erecting of a dam which did not cause 'the destruction' of any property the offence of mischief was not committed.⁷

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Mischief by destroying, moving or rendering less useful a light-house or sea-mark.

COMMENT.

This section is an extension of the principle laid down in s. 281. Sea-marks are very important in navigation and any tampering with them may lead to disastrous results.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief consisted of an act causing the destruction, or moving of, or rendering less useful a light-house, sea-mark, etc.

(6) That such light-house, sea-mark, etc., was at the time of mischief used as a guide for navigation.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

434. Whoever commits mischief by destroying or moving¹ any land-mark fixed by the authority of a public servant,² or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Mischief by destroying or moving, etc., a land-mark fixed by public authority.

COMMENT.

This section deals with the destruction or removal of land-marks. The preceding section deals with sea-marks. But as destruction of sea-marks is likely to lead to disastrous consequences the punishment provided in s. 433 is much higher than the punishment provided under this section.

1. 'Moving'.—Sec s. 378, Explanation 3, *supra*.

2. 'Fixed by the authority of a public servant'.—The Madras High Court has held that in construing the words 'authority of a public servant' the same considerations would apply to an offence under this section as to an offence under ss. 183 and 186.³ A Magistrate making an order under s. 145, Criminal Procedure Code, has no authority to cause the property which is the subject of a dispute likely to occasion a breach of the peace to be demarcated by boundary pillars, and, consequently, if he does so, a person destroying or removing such boundary pillars is not liable to conviction under this section.⁴ Where a surveyor empowered by a notification under the Survey

⁷ (1868) 4 M. H. C. (Appx.) 15, 1 Weir 512.

⁸ *Public Prosecutor v. Madhava Bhonjo Santos*, (1916) 31 M. L. J. 305, 311, [1916] 2 M

W. N. 183, 4 L. W. 377, 17 Cr. L. J. 481.

Rameshar, (1904) 27 All. 300.

and Boundaries Marks Act to survey certain lands, in good faith and under colour of his office, entered upon the lands of the accused and fixed demarcation stones on them and the accused obstructed the surveyor in measuring the lands and removed the demarcation stones, it was held that the accused were guilty under this section though it might be proved that the lands on which the surveyor carried on his operations were not actually included in the notification.¹⁰

Innocent removal.—Where a person innocently removed a barricade, placed by a Municipality on a piece of land in front of his house, which impaired his ingress and egress to, or from his house, it was held that he had committed no offence.¹¹

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426 ; and further—

(5) That the mischief consisted of an act causing the destruction, or moving of, or rendering less useful, a land-mark.

(6) That such land-mark was fixed by the authority of a public servant.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

435. Whoever commits mischief by fire or any explosive substance,¹ intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards or (where the property is agricultural produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.

COMMENT.

Where the mischief is committed by means of fire or any explosive substance and the evidence enables the Court to conclude that the offender intended or knew himself to be likely to cause wrongful loss or damage to the amount of 100 rupees, the conviction must be under this section. If the evidence falls short of this, but is sufficient to show that mischief to the amount of 50 rupees has been caused, whether by fire or by any means whatsoever, the offender may be convicted under s. 427. In the case of agricultural produce the value fixed under the section is Rs. 10, in the case of other property, it is Rs. 100.

1. 'Explosive substance'.—This expression, according to the Explosive Substances Act (VI of 1908), s. 2, includes any materials for making any explosive substance, also any apparatus, machine, implement, or material used, or intended to be used, or adopted for causing, or aiding in causing, any explosion in or with any explosive substance : also any part of any such apparatus, machine or implement.

Amendment.—The words “or (where the property is agricultural produce) ten rupees or upwards” were inserted by the Indian Penal Code (Amendment) Act (VIII of 1882), s. 10. The amendment was introduced to protect agricultural produce.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426 ; and further—

(5) That the mischief was caused by fire or some explosive substance.

(6) That the damage caused thereby to property amounted to Rs. 100 or more ; or if the property in question is agricultural produce, to Rs. 10 or more.

(7) That the accused intended or knew that he was likely thereby to cause such damage.

Mere negligence or carelessness would be of no avail. Where the accused set fire to a heap of rubbish in his field which was close to a protected forest and the wind

¹⁰ *Public Prosecutor v. Madhava Bhonjo Santos*, (1916) 31 M. L. J. 305, 311, [1916] 2 M. W. N. 183, 4 L. W. 377, 17 Cr. L. J. 481.

¹¹ *Abdul Aziz*, (1895) Cr. R. No. 10 of 1895, Unrep. Cr. C. 745.

carried the flames to a forest and destroyed a part of it, it was held that he was not guilty of mischief.¹²

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d) and 12 (2).

436. Whoever commits mischief by fire or any explosive substance,¹ intending to cause,² or knowing it to be likely that he will thereby cause, the destruction of any building³ which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes mischief by fire or explosive substance. Owing to the serious nature of the means employed the punishment is severe.

1. 'Explosive substance'.—See s. 435, *supra*.

2. 'Intending to cause'.—The offence is not intentionally committing mischief by fire, and thereby causing the destruction of building, etc., but committing mischief by fire, with the intention of causing the destruction of a building, etc. Intention is a most important element in such a charge.¹³

3. 'Building' is not necessarily a finished structure.¹⁴ An unfinished house, of which the walls were built and finished, the roof unfinished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering was held to be a building.¹⁵ It is absolutely necessary to prove that the building which the accused destroyed came within one of the three classes mentioned in the section. The words "ordinarily used" do not mean that other buildings are from time to time used for purposes such as those stated in the section but they mean that that particular building is itself used. Certain villagers were convicted under s. 304 and this section, for having made an attack on the Chamars (skinners) of the village, resulting in the destruction by fire of their *chaupal*, and the death of their child therein. It appeared that on being attacked the Chamars fled from the spot and left the child inside the *chaupal*. There was no evidence that the *chaupal* was ordinarily used as a human dwelling or for one of the other purposes specified in this section. Nor did the accused know that the child was inside when they set fire to it. It was held that under the circumstances no offence under s. 304 or this section had been established.¹⁶ Where the accused poured kerosene oil over the furniture in a room at a railway station and set fire to it, it was held that they were guilty under this section and their defence that the building was of solid masonry and, therefore, could not have been destroyed was not upheld.¹⁷

The Law Commissioners observe: "The grass or mat huts of the lowest classes are placed on a level with the substantial, secure, and valuable dwellings of the better classes. . . It is obviously proper that in the case of mischief by fire a distinction should be made between the huts. . . and substantial houses, but there is sufficient room for such a distinction between the maximum of fourteen years and the minimum of one year, and between rigorous and simple imprisonment. . . , and we think it best that the distinction should be left to the discretion of the Judge".¹⁸

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—
(5) That the property injured consisted of a building.

¹² *Nandeyappagowda*, (1906) 8 Bom. L. R. 851, 4 Cr. L. J. 446.

¹³ (1865) 3 W. R. (Cr. L.) 18.

¹⁴ *Manning*, (1871) L. R. 1 C. C. R. 338.

¹⁵ *William Edgell*, (1897) 11 Cox 132.

¹⁶ *Khanjan*, (1924) 25 Cr. L. J. 1190, [1924] AIR (A) 781.

¹⁷ *Ram Pratap*, (1948) 45 Cr. L. J. 728.

¹⁸ 1st Rep. ss. 614, 615, p. 322.

(6) That such building was ordinarily used as a place of worship, or as a human dwelling, or as a place for the custody of property.

Procedure—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

In a charge under this section the amount of mischief done is not altogether to be the measure of the penalty to be inflicted. A person who mischievously sets fire to a human dwelling may put in jeopardy the lives and the property, not only of those dwelling therein, but of others dwelling in adjoining houses, of persons assisting to put out the fire, and so on. Severe penalties of this section are, therefore, justified.¹⁹

Charge.—In a case of mischief by fire with intent to cause the destruction of a building, the charge should lay the intent as an intent to cause the destruction not of a house simply, but of a house used as a place of worship, or as a human dwelling, or as a place for custody of property.²⁰

Punishment.—Arson in an Indian village is a crime which cannot be too heavily punished as it causes incalculable damage to innocent persons who can ill-afford to lose the little property that they possess and in such a case a sentence of three to five years' rigorous imprisonment cannot be reduced.²¹

As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d), and 12 (2).

A sentence of whipping is not legal under this section.²²

437. Whoever commits mischief to any decked vessel¹ or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.

COMMENT.

This section operates in the case of decked vessels or any vessel of a burden of twenty tons, or upwards. Only vessels of large dimensions have decks. Fishing boats, ferry-boats, canoes, etc., will not come under it. Thus, small crafts of all kinds are excluded. The intention of the Legislature is to punish mischief committed on vessels which are likely to carry passengers.

1. 'Vessel'.—See s. 48, *supra*. Where a sailor on board a ship entered a part of the vessel where spirits were kept, for the purpose of stealing rum, and, while tapping a cask of rum, a lighted match, held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a conflagration ensued, which destroyed the vessel, it was held that a conviction for the arson of the vessel could not be upheld.²³

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief was committed in respect of a decked vessel, or a vessel of a burden of twenty tons or upwards.

(6) That the accused when committing mischief intended, or knew that he was likely, to render unsafe that vessel.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

¹⁹ (1867) 8 W. R. (Cr. L.) 14.

²⁰ *Durbáro Polie*, (1867) 8 W. R. (Cr.) 30.

²¹ *Ghafoor Khan*, (1930) 6 Luck. 539.

²² *Jagannath*, (1927) 29 Cr. L. J. 666, [1928] AIR (O) 111.

²³ *Faulkner*, (1877) 13 Cox 550.

438. Whoever commits, or attempts¹ to commit, by fire or any explosive substance,² such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for the mischief described in section 437 committed by fire or explosive substance.

COMMENT.

This section provides for much more severe punishment than the last section when the mischief is committed by fire or explosive substance to a decked vessel or a vessel of a burden of twenty tons or upwards.

1. 'Attempts'.—See s. 511, *infra*.
2. 'Explosive substance'.—See s. 435, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

- (5) That the accused committed or attempted to commit mischief by fire, or any explosive substance.
- (6) That the mischief was committed in respect of a decked vessel, or a vessel of a burden of twenty tons or upwards.
- (7) That the accused, when committing or attempting to commit mischief, intended, or knew that he was likely, to destroy or render unsafe such vessel.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

439. Whoever intentionally runs any vessel¹ aground or ashore, intending to commit theft² of any property contained therein or to dishonestly misappropriate³ any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.

COMMENT.

This section punishes an act which is akin to piracy. Under this section it is sufficient if a vessel is run aground or ashore with the intention to commit theft of any property contained therein; whether actual theft is committed or not is immaterial. As to what amounts to piracy, see p. 34.

1. 'Vessel'.—See s. 48, *supra*.
2. 'Theft'.—See s. 378, *supra*.
3. 'Dishonestly misappropriate'.—See s. 403 and s. 24, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property in question was contained in a vessel.

- (2) That the accused ran such vessel aground or ashore.
- (3) That he did so intentionally.
- (4) That he intended thereby (a) to commit theft of the property so contained therein; or (b) to dishonestly misappropriate the same; or (c) that such theft or misappropriation thereof might be committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

440. Whoever commits mischief, having made preparation for causing to any person death,¹ or hurt,² or wrongful restraint,³ or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

The aggravating circumstance which is visited with severe punishment under this section is preparation for causing to any person death, hurt, or wrongful restraint if any opposition is offered while committing mischief.

1. 'Death'.—See s. 46, *supra*. 2. 'Hurt'.—See s. 319, *supra*.

3. 'Wrongful restraint'.—See s. 339, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426 ; and further—

(5) That when such mischief was committed, the accused had made preparation for causing death, hurt, or wrongful restraint, or fear thereof.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (1901), ss. 11 (3) (d) and 12 (2). As to Burma, see the Burma Laws Act, (1898), s. 4 (3) (b) and sch. II.

Of Criminal Trespass.

441. Whoever enters into or upon property in the possession of another¹ with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,²

or, having lawfully entered into or upon such property, unlawfully remains there³ with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

COMMENT.

The authors of the Code say : "We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

"These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed."²⁴

Scope.—"The unusually vague and elastic language used in s. 441, which, if not closely scrutinized and strictly interpreted, might lead to its application to sets of facts or circumstances, for which it was never intended by the Legislative authorities who framed it. For it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit of the section, and which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in a criminal Court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain

²⁴ Note N, p. 168.

that its scope must be confined within those bounds that common sense and sound reason dictate."²⁵

Ingredients.—The section has three essentials :—

1. Entry into or upon property in the possession of another.
2. If such entry is lawful then unlawfully remaining upon such property.
3. Such entry or unlawful remaining must be with intent
 - (i) to commit an offence; or
 - (ii) to intimidate, insult or annoy the person in possession of the property.

1. 'Whoever enters into or upon property in the possession of another'.—

Every unauthorised entry is not criminal trespass. A trespass is not criminal unless one or other of the intentions specified in the definition is proved. "There must be an unauthorised entry into or upon property,—unauthorised, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits."¹

A man may be guilty of criminal trespass on the land of another without ever personally setting foot on it, if for example, he causes others to build on it against the wishes and in spite of the protest of the owner.² The Rangoon High Court has dissented from this view and held that where a person acting in good faith and believing the land to be his gives to his tenant the right to possession of the land but does not order him to take it on his behalf, he cannot be convicted of criminal trespass.³

The use of criminal force is not necessary.⁴

'Whoever'.—Any person who enters in the manner indicated in the section commits this offence. The accused must have committed the trespass in person. Merely sending a servant to plough up land is not an entry by the master.⁵

'Property'.—In this section property generally means immovable corporeal property, and not incorporeal property. A right of fishery is not property of such a nature as that a man who unlawfully infringes that right can be said to enter upon property in the possession of another, within the meaning of this section.⁶ Similarly, a person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit criminal trespass.⁷ But the word 'property' is wide enough to cover moveable property into or upon which it is possible for a person to enter or upon entering remain, with the intention described in the section. The word would, therefore, cover a boat, and a person may be found guilty of criminal trespass in respect of a ferry boat.⁸

'Possession'.—The possession must be actual possession of some person other than the alleged trespasser.⁹ If one person forcibly enters upon property in the possession of another, and there does an act with intent to annoy the person so in possession, is guilty of criminal trespass without reference to the question in whom the title to the land may ultimately be found.¹⁰ A landlord who forcibly enters on land in the possession of a tenant after the expiry of the lease and dispossesses him is guilty of an offence of criminal trespass, even where the lease gives him the right of re-entry on its termination.¹¹ The question of title is not to be raised on a plea of possession. But "a mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate

²⁵ Per Straight, J., in *Gobind Prasad*, (1879)

2 All. 465, 466; *Shistidhar Parui*, (1872)

9 Beng. L. R. (Appx.) 19, 18 W. R. (Cr.) 25; *Chooramoni Sant*, (1870) 14 W. R. (Cr.) 25.

¹ Per Straight, J., in *Gobind Prasad*, (1879) 2 All. 465, 466.

² *Ghasi*, (1917) 39 All. 722.

³ *Maung Nwe v. Maung Po Hla*, [1937] Ran. 246.

⁴ *Pottivadu v. Vecrayya*, (1902) 12 M. L. J. 447.

⁵ *Shwe Kun*, (1906) 8 L. B. R. 278, 5 Cr. L. J. 415; *Mg. Shwe Kyi*, (1922) 1 B. L. J. 276.

⁶ *Charu Nayiah*, (1877) 2 Cal. 354.

⁷ *Muthra v. Jawahir*, (1877) 1 All. 527.

⁸ *Dhananjay Dhara v. Provat Chandra Biswas*, (1934) 38 C. W. N. 665, 35 Cr. L. J. 949, [1934] AIR (C) 480.

⁹ *Faujdar*, (1878) P. R. No. 28 of 1878; *Kunji Lal*, (1913) 12 A. L. J. R. 151, 14 Cr. L. J. 633, [1914] AIR (A) 220; *Parmeshwar Lal Mitter*, (1921) 7 P. L. T. 347, 23 Cr. L. J. 440; *Abdul Hussain*, [1943] Kar. 7.

¹⁰ *Ram Dyal Mundle*, (1867) 7 W. R. (Cr.) 28.

¹¹ *Dwarka Singh v. Ram Kishun Singh*, (1917) 18 Cr. L. J. 402, [1917] AIR (P) 542.

himself in his former possession.¹² Possession is not lost because trespassers come without license and plough the land. It would put the rightful owner of land in an almost impossible position if after getting possession of the land through a civil Court a single act of trespass is deemed sufficient to take away his possession and to deprive him of recourse to the criminal Courts. Consequently the rightful owner can file a complaint for the second act of trespass even though at the time he was deprived of the possession by the trespassers.¹³ The offence may be committed in respect of property in a person's possession even though such possession may not have originated in right.¹⁴ Possession given even for a few minutes in execution of a decree constitutes possession contemplated by this section.¹⁵

A proprietor in possession of land through his license or tenant can be said to be in possession of the property and if a person trespasses on the land with intent to cause annoyance to the proprietor, he is guilty of the offence under this section.¹⁶

It would seem that a person entitled to a right of way or other incorporeal right is not a person in possession of property within the definition of this offence, and there can be no criminal trespass 'into or upon' such property.

Joint possession.—A joint owner of land who enters upon the land with the intention or knowledge of doing a wrongful act commits criminal trespass.¹⁷ A prosecution for criminal trespass on the part of one co-owner against another co-owner will not lie unless there has been an ouster from possession or some destruction or waste of the common property.¹⁸ Where one co-sharer built upon a piece of common land against the will of the other co-sharer, whose consent had been previously asked and refused, it was held that this circumstance alone was not sufficient to render the co-sharer so building guilty of criminal trespass.¹⁹ One member of a joint family commits no trespass by entering into the house which forms the joint property, but he is guilty of that offence when he enters into the room ordinarily occupied by another member of the family.²⁰ A joint owner of property is entitled to have joint possession restored to him in a civil Court; but he is not justified in taking the law into his own hands to recover possession. If he does so he is liable for criminal trespass.²¹ The entry of a stranger into a family dwelling-house, with the permission and license of one of the members, is not criminal trespass.²²

Where a business is in the actual possession of one partner as manager and that partner dies, the firm or the remaining partners collectively must be considered to be in possession thereafter for purposes of this section.²³

Entry to commit offence, etc.—The entry into or upon the property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. Where the accused entered upon another's property to cut down trees;²⁴ where the accused cultivated village waste-land, which he had been ordered not to cultivate;²⁵ and where the accused enclosed, and cultivated a portion of a burial-ground,¹ this offence was held to have been committed.

Entry not to commit offence or to intimidate, insult, or annoy.—Where the accused secretly entered into an exhibition building without ticket but without any of the intents specified in the section;² where the accused went into cavalry lines, without the permission of the commanding officer, with a cavalryman of the regiment with intent to commit adultery;³ where a person drove his cart across an open green,

¹² Per Lord Denman, C. J., in *Browne v. Dawson*, (1840) 12 Ad. & E. 624, 629.

¹³ *Amru*, (1915) 37 Cr. L. J. 720.

¹⁴ *Surwan Singh*, (1869) 11 W. R. (Cr.) 11.

¹⁵ *Sitaram v. Tilokchand*, (1932) 28 N. L. R. 98, 34 Cr. L. J. 145, [1933] AIR (N) 86.

¹⁶ *Bansidhar*, [1941] O. W. N. 1300, (1941) 43 Cr. L. J. 162, [1942] AIR (O) 104.

¹⁷ *Ram Prasad*, (1911) 33 All. 773.

¹⁸ *K. M. Hamin Khan*, (1881) 3 Mad. 178.

¹⁹ *Ram Sarup*, (1914) 36 All. 474.

²⁰ *Frankisto Chunder v. Bissonath Chunder*, (1871) 15 W. R. (Cr.) 6.

²¹ *Gopakrao Venkatesh*, (1908) 10 Bom. L. R. 285, 7 Cr. L. J. 309.

²² *Prankrishna Chandra*, (1870) 6 Beng. L. R.

(Appx.) 80.

²³ *Gopala Iyer*, [1935] M. W. N. 48.

²⁴ *Jeenut Bebee*, (1864) 1 W. R. (Cr.) 46.

²⁵ (1870) 5 M. H. C. (Appx.) 17, 1 Weir 513. See *Nagoji Ramachandra*, (1898) 1 Weir 143.

¹ (1871) 6 M. H. C. (Appx.) 25, 26, 1 Weir 513, 514. But see (1871) 6 M. H. C. (Appx.) 26, 1 Weir 514, in which a person who included in his own land a portion of a public foot-path was held to have not committed this offence. See also *Fakirgavda*, (1888) Cr. R. No. 49 of 1888, Unrep. Cr. C. 393.

² *Mehervanji Bejanji*, (1869) 6 B. H. C. (Cr. C.) 6.

³ *Kushee*, (1887) Cr. R. No. 18 of 1887, Unrep. Cr. C. 328.

in contravention of an order issued by Municipal Commissioners, who had no power to issue the order;⁴ where an excommunicated Hindu wife entered the house of her husband to claim maintenance;⁵ where a person effected an entry into a Local Fund market with intent to evade payment of market dues;⁶ where A, having shot a deer near B's land, followed it into D's land for the purpose of killing it, although he was warned off the land beforehand;⁷ where a man for several years cultivated land under a lease from the Forest Department, and during his occupation built a dwelling-house and made other improvements, but refused to relinquish the land after notice of ejectment was served upon him until he was paid compensation;⁸ where an owner entered into his own lands permissively used or occupied by, but not in the possession of, another;⁹ where a person fished in a tank to which the public generally had access;¹⁰ where a person entered into premises purchased by him at a Sheriff's sale for the purpose of acquiring possession;¹¹ where a zamindar, under the pretext that one of his tenants had left the village and abandoned his holding, took possession of the tenant's holding wrongfully;¹² and where the accused drove a cart over Government waste land in respect of which the Municipality had put up notices prohibiting cart traffic,¹³ this offence was held not to have been committed.

The accused granted a lease of pepper on certain hills described to be the property of his *tarwad*. The lease granted comprised within the boundaries mentioned therein not only land belonging to the *tarwad* of the accused but also other land stated to be the property of Government. The lessee conveyed his rights to others, and, under colour of the lease, the sub-lessees bona fide entered upon the land and took the pepper. The accused was convicted of abetment of criminal trespass and of theft. It was held that the execution of the document could not be said to aid either the entry or the taking, and that, in the absence of evidence that the accused either suggested the entry or the taking, he was not guilty.¹⁴ Where a servant of a proprietor, who had voluntarily surrendered his estate to the Court of Wards, cut or removed bamboos, etc., growing thereon for the benefit of his master, it was held that no offence had been committed.¹⁵ A school was built by public subscription and put in charge of a teacher. He closed the school for want of pupils, and went away having locked the building. The accused who were some of the managers of the school took possession of the building and started certain classes in it. They were convicted of criminal trespass. It was held that the conviction was improper as the building was not in the possession of the teacher and the accused had no intention of annoying him.¹⁶

2. 'With intent to commit an offence or to intimidate, insult or annoy any person in possession of such property'.—The word "intent" is not to be taken as identical with "wish" or "desire". The intention constitutes the entry criminal. Merely to trespass is not ordinarily such an offence; but when the trespass is in order to the commission of an offence, or when it is to intimidate, to insult, or to annoy, it is punished. Thus, the essence of the offence is the intent in committing the trespass.¹⁷ It is essential for the prosecution to prove the intention laid down in the section. The intention must always be gathered from the circumstances of the case, and one matter which has to be considered is the consequences which naturally flow from the act, because a man is usually presumed to intend the consequences of his own act. That, however, is only one element from which the Court has to discover the intention of the party who trespasses.¹⁸ "It must be proved that some criminal intent was present in the mind of the accused, and it does not at all follow that, because an act is unlawful and is one that the civil law will restrain, or for which it will compensate the injured

⁴ (1870) 5 M. H. C. (Appx.) 38.

⁵ *Marimuttu*, (1881) 4 Mad. 243, (1881) 1 Weir 523.

⁶ *Varthappa Nayakan*, (1882) 5 Mad. 382.

⁷ *Chunder Narain v. Farquharson*, (1879) 4 Cal. 837.

⁸ *Faujdar*, (1878) P. R. No. 28 of 1878.

⁹ *Daniel Groves*, (1882) 1 Weir 521.

¹⁰ (1879) 1 Weir 520.

¹¹ *Charoo Chunder Mutty Lal*, (1899) 4 C. W. N. 47.

¹² *Jangi Singh*, (1903) 26 All. 194; *Barid*, (1904) 27 All. 298.

¹³ *Nga U Thit*, (1909) U. B. R. (P. C.) 25, 11

Cr. L. J. 57.

¹⁴ *Parapravan Bavothi Hadgi v. Henry Rhodes Morgan*, (1890) 1 Weir 48.

¹⁵ *Parmeshwar Singh*, (1910) 38 Cal. 180.

¹⁶ *Narain Das*, (1918) 17 A. L. J. R. 384, 20 Cr. L. J. 463.

¹⁷ See *Mathura Rai*, (1928) 50 All. 637; *Duraismami*, [1935] M. W. N. 1290; *Ganauri Mia*, (1935) 16 P. L. T. 847, 37 Cr. L. J. 513, [1936] AIR (P) 248; *Khurshedji*, (1926) 21 S. L. R. 263, 28 Cr. L. J. 349, [1927] AIR (S) 159.

¹⁸ *D'Cunha*, (1935) 37 Bom. L. R. 880, 59 Bom. 738.

party in damages, it is necessarily criminal".¹⁹ A mere knowledge that he will annoy the owner is not sufficient. It must be shown that the intention of the accused was to intimidate, insult or annoy any person in possession.²⁰

An intent to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such offence. It exists before the attempt is begun. A mere intent is not by itself an offence. Therefore, where it is used as essential to bring a particular act within the category of criminal offences, and proof has been given that such an act accompanied by such an intent has been committed, the offence is complete, even though the further act intended may not have been committed or even attempted. Where an offender enters the premises of his neighbour on his way to the private apartments occupied by that neighbour's wife with intent to commit adultery, the offence of criminal trespass is complete long before the stage of an attempt to commit the adultery is reached.²¹

Criminal trespass depends on the intention of the offender and not upon the nature of the act and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of an embankment belonging to his neighbour which he ordinarily would not be justified in doing, he is guilty of any criminal offence.²² It is one thing to entertain a certain intention, and another to have the knowledge that one's act may possibly lead to a certain result. The section is so worded as to show that the act must be done with intent and does not, as other sections do (e.g. s. 425), embrace the case of an act done with knowledge of the likelihood of a given consequence. Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent.²³ There is a distinction between the phrases "with intent" and "with knowledge"; it must be proved by the prosecution that the accused had the intention to intimidate, insult or annoy when he made the entry, and it is not enough that the prosecution should ask the Court to infer that the entry is bound to cause intimidation, insult or annoyance. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within this section. A conviction could not follow merely because one could pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance.²⁴ Accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the accused with his friends, the co-accused, went into the complainant's house and in spite of the latter's protests, searched the house, but nothing was found. It was held that the accused were not guilty of criminal trespass because trespass was an offence only if it was committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance was insufficient to sustain a conviction under s. 448.²⁵ Where the accused started building a hut on a piece of land which was not obviously included within railway land, and the accused apparently acted under a bona fide claim of title and there was nothing to establish an intention to intimidate, insult or annoy, but later on it was demonstrated to him that the land was railway land, and he still continued to build in spite of repeated remonstrances and warnings, it was held that he was rightly convicted of the offence of criminal trespass.¹

'Offence.'—As to offence, see s. 40, *supra*. Every unlawful act is not necessarily an offence, and mere entry, without right upon another's land does, not render the accompanying trespass a criminal trespass.² If the entry is to commit an offence,

¹⁹ Per Rattigan, J., in *Alladitta*, (1882) P. R. No. 29 of 1882, p. 37; *Ganpat*, (1888) Cr. R. No. 43 of 1888, Unrep. Cr. C. 390; *Rehana*, (1923) 5 Lah. 20; *Mayang Po Thei*, (1937) 38 Cr. L. J. 776.

²⁰ *Nagi Reddy v. Sanjiva Reddy*, [1942] 1 M. L. J. 585, [1942] M. W. N. 371, (1941) 55 L. W. 367, 43 Cr. L. J. 755, [1942] AIR (M) 533 (2).

²¹ *Dhantua Lodhi*, (1915) 19 Cr. L. J. 881, [1917] AIR (N) 90.

²² *Madan Mandal*, (1918) 41 Cal. 662.

²³ *Rayapadayachi*, (1896) 19 Mad. 240, 241, approving *Sivaratri Guravaiya*, (1885) 1 Weir

536, disapproving *Veda Gurukkal*, (1882) 1 Weir 535. See, to the same effect, *Vencataramanuja Reddi*, (1909) 10 Cr. L. J. 384; *Po Kin*, (1902) 1 L. B. R. 355; *Tharu*, (1911) 5 S. L. R. 29, 12 Cr. L. J. 148.

²⁴ *Moti Lal*, (1925) 47 All. 855; *Mahadeo*, [1934] A. L. J. R. 1061, 36 Cr. L. J. 328, [1934] AIR (A) 1025.

²⁵ *Vullappa v. Bheema Row*, (1917) 41 Mad. 156, F.B.

¹ *Baldawa*, (1933) 56 All. 33.

² *Ibid.*

criminal trespass is committed.³ In a Madras case it is laid down that it is sufficient if the evidence leaves no reasonable doubt that the accused intended to commit some offence. It is not necessary for the Magistrate to find what specific offence he wanted to commit.⁴

The offence mentioned in this section cannot be the offence of criminal trespass itself but must be some other offence either under the Penal Code or under any special enactment. Where a cow belonging to the accused was found grazing in the wheat crops of a certain person who had it impounded in the cattle-pound and the accused proceeded to the cattle-pound, opened the lock, entered and drove off his cow, it was held that as the accused entered with intent to commit an act, which was made an offence by the Cattle Trespass Act, he was guilty of criminal trespass.⁵ Where the accused sat in front of a railway train to prevent its progress as a protest against a railway company for overcrowding, it was held that he had committed an offence under s. 128 of the Indian Railways Act and his act amounted to criminal trespass.⁶

It is not necessary that the offence should be directed against the person in possession. It is sufficient that the property entered upon should be in the possession of another.⁷ The section, as worded, means that if a person enters upon property with intent to commit an offence on that property, or any other property, or with respect to a person who is, or is not in possession of the property entered upon, he is guilty under it.⁸ Where the accused at night passed stealthily through the courtyard of one house with the intention of committing adultery in another adjoining house, it was held that he was guilty of criminal trespass under the first part and not the second part of this section.⁹

An unlawful act is not necessarily an offence (s. 40), and an intention to commit such act does not render the accompanying trespass criminal.¹⁰ Thus, unlawful infringement of a right of exclusive fishing in a part of a public river is not an offence which can be brought within the definition of criminal trespass.¹¹

If a person suspects that a trader, of whom he is a customer, is having false measures, he is entitled to get in and see whether the trader has correct measures or not and if he entered the shop to seize the measures his entry will not amount to criminal trespass, for it cannot be said that when he entered the shop he did so with intent to commit any offence.¹²

'To intimidate, insult or annoy any person in possession of such property'.—Trespass is an offence only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction.¹³

'Intimidate'.—The word "intimidate" must be understood in its ordinary sense "to overawe, to put in fear, by a show of force or threats or violence". Where the accused persons came on the land of the complainant to oust him forcibly and by intimidation, that is to say, they entered upon the land with intent to intimidate the complainant and thereby to compel him to give up possession, it was held that they had committed criminal trespass.¹⁴ The accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends, the other four accused in the case, went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search, the house. But nothing was found. The complainant naturally felt insulted and annoyed at the high-handed conduct of the accused and lodged a complaint against the accused. It was held that the accused were not guilty of criminal trespass.¹⁵

³ *Jeenut Bebee*, (1864) 1 W. R. (Cr.) 46.

⁴ See *Samban*, (1881) 1 Weir 533, followed in *Kurnam Seshayya*, [1911] 2 M. W. N. 71, 21 M. L. J. 781, 12 Cr. L. J. 453.

⁵ *Bhola*, (1927) 8 Lah. 331.

⁶ *Ram Chander Mutsaddi*, (1930) 6 Luck. 485.

⁷ *Chinkwana*, (1901) 1 U. B. R. (1897-1901) 352, 353.

⁸ *Mohammad Yar*, (1938) 19 Lah. 462, 469, F.B.

⁹ *Ibid.*

¹⁰ *Alladitta*, (1882) P. R. No. 20 of 1882.

¹¹ *Charu Nayiah*, (1877) 2 Cal. 354.

¹² *Singara Babu*, [1944] 2 M. L. J. 455, (1944) 57 L. W. 394.

¹³ *Vullappa v. Bheema Row*, (1917) 41 Mad. 156, F.B., *Sellamuthu Seroigaran v. Pallamuthu Karuppan*, (1911) 35 Mad. 186, overruled.

¹⁴ *T. H. Bird*, (1933) 18 Pat. 268.

¹⁵ *Vullappa v. Bheema Row*, (1917) 41 Mad. 156, F.B.,

During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) and, without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting. It was held that their actions amounted to criminal trespass as their object in taking swords with them was "to intimidate".¹⁶

The accused was ejected from a plot of land and formal delivery of possession took place, but even after that he continued in possession and sowed a crop therein although the land was leased by the landlord to another person. After the crop had been cut and the land was lying fallow the lessee entered into possession but was forcibly ousted by the accused. It was held that the accused acquired no fresh right by forcibly cultivating the plot after his ejection and the new lessee was in rightful possession when he was ousted by the accused. The primary intention in such a case was to intimidate and the secondary object was to enforce possession, and the accused by entering on property in the possession of another with intent to intimidate could not defend his act by reliance on his ultimate intention of enforcing his supposed right of possession and he was guilty of criminal trespass.¹⁷

Where the object of the accused in standing on a *chabutra*, which the Chairman of the Municipal Board wanted to demolish, was to prevent the Congress flag from being removed, it was held that their conduct in remaining near the flag could not be said to have been actuated with an intent to insult, intimidate or annoy the Chairman of the Municipal Board and they were not guilty of criminal trespass.¹⁸ Where the accused held a condolence meeting in a park in contravention of a notice served by the Chairman of the Municipal Board, it was held that the intention to hold such a meeting could not possibly amount to an intention to commit an offence, nor could the primary intention be said to be to intimidate, insult or annoy the Chairman of the Municipal Board and the action of the accused in holding the meeting did not amount to criminal trespass. They could only be said to have committed civil trespass for which they could be sued in a civil Court.¹⁹

'Annoy'.—"The word 'annoy'... must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual".²⁰ "'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible... inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."²¹ "Mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring the case within the definition [of trespass] but... the word 'intent' cannot be read as if it were identical with 'wish' or 'desire'. There may be no wish to annoy but if annoyance is the natural consequence of the act, and if it is known to the person who does the act that such is the natural consequence then there is an intent to annoy. Most acts in the common course of natural events and human conduct lead to a series of results, and if these results are foreseen by the person doing the acts they cannot be said to be caused unintentionally. The ultimate object may be something different but the person intends all the intermediate results which he knows will happen in the natural course of events even though he may regret that they should happen. When it is uncertain whether a particular result will follow... there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result".²² The mere fact that

¹⁶ *Golap Pandey v. Boddam*, (1889) 16 Cal. 715.

¹⁷ *Bans Gopal*, (1938) 14 Luck. 360.

¹⁸ *Ram Bahi*, (1936) 13 Luck. 89.

¹⁹ *Babu Sundar Lal Gupta*, (1936) 13 Luck. 92.

²⁰ Per Straight, J., in *Gobind Prasad*, (1879) 2 All 465, 467.

²¹ Per Bowen, L. J., in *Tod-Heatly v. Benham*, (1888) 40 Ch. D. 80, 98.

²² Per Fulton, J., in *Luxman Raghunath*, (1902) 4 Bom. L. R. 280, 282, 26 Bom. 558, 560. This case is not reconcilable with *Chunder Narain v. Farquharson*, (1879) 4 Cal. 887, *Rayapadayachi*, (1896) 19 Mad. 240, and has been dissented from in *Fullappa v. Bheema Row*,

a person in possession is annoyed is not enough. It must be proved that the intention of the trespasser was to annoy.²³

Where an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof, in that case the Court may find that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. If there is an invitation (to enter a house) combined with an intention (on the part of the accused) to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order and an intention to annoy the author of the order may be inferred from it. A person was found inside the house of another at night and he pleaded in defence, first, that he had entered the house at the request of one of the inmates and, secondly, that he had no intention of annoying or insulting the complainant. It was found that he had taken the precaution of keeping his presence in the house entirely secret from the owner thereof, and it was not found that he was forbidden to enter the house by the owner. It was held that the conviction of the accused without inquiry into the truth or otherwise of the defence set up was bad in law.²⁴ Where it was proved that a person entered a house with intent to have illicit intercourse with a widow, it was held that he was not guilty of any offence.²⁵ Because though he might have known that, if discovered he was likely to cause annoyance to the owner of the house, he could not be said to have intended either actually or constructively to cause such annoyance. But where the accused could not prove to the satisfaction of the Court that he had an intimacy with a widow living in the house, it was held that he was guilty of lurking house-trespass.¹ Where the accused entered into a house to carry on an intrigue with a girl on receiving information that her father was absent, but was caught by her uncle before he could get away, it was held that it could not be said that the accused either intended or expected that his conduct would cause annoyance by being made public.² Where the accused entered at night the complainant's house with intent to carry on an intrigue with his unmarried goown-up daughter, it was held that it could not be said that he intended to cause annoyance to the complainant and was therefore not guilty of criminal trespass.³ A house was occupied only by the owner and his concubine who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived who, however, arrested him. It was held that the accused was not guilty of an offence under this section.⁴ Where accused broke open a lock and entered into a room which was not in his possession, but was in the possession of the complainant, behind the back of the latter, it was held that the intention to commit an offence, or to intimidate, insult or annoy was clearly inherent in the act of the accused.⁵

Where the accused entered on the land of another to stop him from ploughing in order to make him render an account;⁶ where the complainant leased a portion of his lands to certain tenants for the purpose of making bricks and the accused entered on such land with an intention to annoy the complainant;⁷ where the accused acting on behalf of or under the colour of the right of their master to whom possession had

(1917) 41 Mad. 156, F.B.; but it has been referred to with approval in *Chhote Lal*, (1917) 40 All. 221. It may be observed that intent and knowledge are distinguishable in the Indian Penal Code. In definitions of some of the offences both the words occur. In others only intent enters as an ingredient. The doctrine of presuming intention from knowledge cannot be safely applied to the Indian Penal Code. See *Ram Sukh*, (1933) 10 O. W. N. 1075, 34 Cr. L. J. 1055, [1933] AIR (O) 436; *Maia Dayal v. Salig Ram*, (1933) 10 O. W. N. 1078, 35 Cr. L. J. 124, [1933] AIR (O) 469.

²³ *Upendra Nath Paul v. Bankim Chatterjee*, (1947) 48 Cr. L. J. 785.

²⁴ *Chhote Lal*, (1917) 40 All. 221; *Asa Ram*, (1923) 25 Cr. L. J. 751.

²⁵ *Gaya Bhar*, (1916) 38 All. 517.

¹ *Mulla*, (1915) 37 All. 395. See *Kangla*, (1900) 23 All. 82; *Brij Basi*, (1896) 19 All. 74; *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391; *Ram Saran*, (1905) P. R. No. 12 of 1906, 4 Cr. L. J. 293, F.B.; *Chatter Singh Demat*, (1919) 8 U. B. R. (1917-1920) 194, 21 Cr. L. J. 435, [1920] AIR (UB) 50.

² *Suleman*, (1926) 27 P. L. R. 385, 27 Cr. L. J. 1015, [1927] AIR (S) 92; *Ram Saran*, (1905) P. R. No. 12 of 1906, 4 Cr. L. J. 293, F.B.

³ *Abdul Majid*, (1938) 40 P. L. R. 806, 39 Cr. L. J. 756, [1938] AIR (L) 534, F.B.

⁴ *Rupa*, (1919) 22 O. C. 121, 20 Cr. L. J. 610, [1919] AIR (O) 402.

⁵ *Jamnadas*, [1944] All. 754.

⁶ *Weir* (3rd Edn.) 204; *Bhow*, (1877) Unrep. Cr. C. 122.

⁷ *Muniandia Pillai*, (1882) 1 Weir 517.

been awarded by a civil Court, entered upon land in the physical possession of tenants or others *prima facie* entitled to retain possession until ousted by due course of law;⁸ where a person, after having been ejected by due process of law from certain agricultural land, wilfully persisted in trespassing upon such land;⁹ where the complainant, the purchaser of the rights of a mortgagee in possession and his predecessor-in-title, had been peacefully in possession of certain agricultural land for some years, and a relation of the mortgagor forcibly ousted the complainant on the plea that he was under the Hindu law entitled to share in the land and the mortgagor had no title to make a mortgage thereof with possession¹⁰ it was held that this offence was committed.

The accused was convicted under s. 509 for causing the roof of a house belonging to him, which the complainant occupied as his tenant, to be removed while the complainant's wife, a *purdanashin* woman, was in it, without giving any notice beforehand, and thereby causing her to be exposed to public view. It was held that the removal of the roof in the circumstances amounted to criminal trespass as it was clear that the accused intended to annoy the complainant, and house-trespass (s. 448) was thus established.¹¹ In a full bench case the former Chief Court of the Punjab held that where a person claiming a title to property, whether his title be good or bad, entered without any legal justification upon property in the established possession of another, he must be inferred to have had an intent to annoy the person in possession even though he had no primary desire to annoy and his only object was to obtain possession for himself.¹² The Patna High Court has held otherwise,¹³ but its decision seems not to be sound.

A headman was holding a regular trial in his private dwelling, and the accused attended to watch the proceedings on behalf of his nephew, who was under trial. The accused was ordered to withdraw by the headman, but he remained there to witness the proceedings. He was subsequently pushed out and then prosecuted for committing house-trespass. It was held that he had not said or done anything from which an intent to intimidate, insult, or annoy, might be inferred, and he was therefore not guilty.¹⁴

'Any person in possession'.—The Allahabad High Court has held that the possession contemplated and intended by this section must be "actual in the sense and meaning of s. 530, Criminal Procedure Code."¹⁵ The person to be annoyed must be on the premises, otherwise there could be no criminal trespass.¹⁶ Of two rival claimants, A and B, to some immovable property, including a certain shop, A was in possession of the shop through a tenant. The tenant, however, vacated the shop, whereupon B occupied it and locked it up. It was held that A could not, at the time of the occurrence, be said to be in possession of the shop within the meaning of this section and that the intention of B was not necessarily that required to constitute the offence of criminal trespass within the meaning of this section.¹⁷

The Calcutta High Court has also held that an intention to intimidate, insult or annoy any person in possession of a house does not mean to insult or annoy any person in constructive but in actual possession of the premises.¹⁸ The section contemplates actual possession, not mere juridical possession. Where there is a person in actual physical possession of property, he is the only person whose feelings have to be considered under this section.¹⁹

The Bombay High Court has held likewise.²⁰

⁸ *Srinivasaiyengar*, (1884) Weir (3rd Edn.) 320.

⁹ *Tika Ram*, (1901) 22 A. W. N. 6.

¹⁰ *Nandan*, (1902) 22 A. W. N. 42.

¹¹ *Dheramal*, (1901) 1 U. B. R. (1897-1901) 350.

¹² *Ram Saran*, (1905) P. R. No. 12 of 1906, 4 Cr. L. J. 293, F. B. Per Clark, C. J., and Reid, J. Rattigan, J., dissented from this view and held that it was not enough for the prosecution to prove or for the Court to find that the accused knew that his entry would probably annoy the person in possession, but it is absolutely essential to affirmatively establish and find that the accused acted with an intention to annoy; mere knowledge that annoyance is likely to result is not sufficient. Followed in *Premam*, (1929) 11 Lah. 288.

¹³ *Ramzan Mistry*, (1929) 11 P. L. T. 80, 80 Cr. L. J. 684, [1929] AIR (P) 111.

¹⁴ *Nga Po Ya*, (1922) 25 Cr. L. J. 673, [1923] AIR (R) 145. See *Audayappa Mudaliar*, (1923) 18 L. W. 181, [1923] M. W. N. 451, 24 Cr. L. J. 824, [1924] AIR (M) 40.

¹⁵ *Gobind Prasad*, (1879) 2 All. 465, 468; *Jangi Singh*, (1903) 26 All. 194; *Bazid*, (1904) 27 All. 298.

¹⁶ *Moti Lal*, (1925) 47 All. 855, 858.

¹⁷ *Ibid.*

¹⁸ *Ishur Chunder Kurmoker v. Seetul Das Mitter*, (1872) 17 W. R. (Cr.) 47.

¹⁹ *Tok Gyi*, (1916) 8 L. B. R. 425, 17 Cr. L. J. 378, [1917] AIR (LB) 155; *Bismillah*, (1928) 3 Luck. 661. *Bhagwan Din*, (1918) 16 A. L. J. R. 501, 19 Cr. L. J. 704, [1918] AIR (A) 365, leaves the point open.

²⁰ *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 26 Cr. L. J. 254, [1924] AIR (B) 486.

The Madras High Court has held that the offence may be committed against a person in constructive as well as against a person in actual possession of immovable property.²¹ Criminal trespass may be committed even when the person in possession of the property is absent, provided the entering into or upon the property is done with intent to do any of the acts mentioned in the section. Where a person entered upon a field, that had been leased, during the absence of the lessee and ploughed it, and only the lessor came to the spot on hearing of it to prevent the commission of such act, it was held that that was not enough to exonerate that person from intention to annoy the lessee and that such a person could properly be convicted under this section.²² A woman entered into the compound of an Assistant Superintendent of Police in his absence for the purpose of meeting her paramour. It was held that as her entry was not made with the object of intimidating, insulting or annoying the absent Superintendent of Police or any other person she was not guilty of criminal trespass.²³

The Chief Court of Oudh has held that owners of houses are not always and at all times in possession of their houses or of their shops and it would be absurd to hold that because the complainant was temporarily absent from his house at the time when forcible entry was effected into it, therefore, the accused were not guilty of the offence of criminal trespass.²⁴ Putting a lock on the outer door of an empty house does constitute in the eye of the law either actual or physical possession over the house.

The words "any person in possession" do not mean only "a complainant in possession" there being no authority for taking the offence of mischief and trespass out of the general rule which allows any person to complain of a criminal act.²⁵

An owner has no right to re-enter land which he has let to a tenant, and may be convicted of an offence for so doing under s. 447 unless it can be shown that the tenancy has been determined in accordance with law.¹ Where the complainant was a tenant of the accused and was living in his house, but he left it when the house fell down and the accused took possession of the vacant site, it was held that the accused had committed no offence.²

C, a rate-payer, who had filed a petition against an assessment which in his absence had been dismissed, entered a room, where a Committee of the Municipal Commissioners were seated hearing and deciding petitions in assessment matters, ostensibly with the object of presenting a petition for the revision of his assessment. The Chairman ordered him to leave the room, and on his refusal to do so, he was turned out. Outside the room in the verandah he addressed the crowd complaining that no justice was to be obtained from the Committee. It was held that he had committed no offence.³

3. 'Having lawfully entered into or upon such property, unlawfully remains there'.—The second part of the section applies where the entry is lawful, but subsequently the person who has entered insists on unlawfully remaining, either directly or constructively against the will of the person in possession with intent thereby to commit an offence or to intimidate, insult, or annoy any person in possession of the property.⁴

A person who unlawfully continues in occupation of property upon which he has unlawfully entered is as liable to punishment as a person who remains unlawfully on property which he has entered lawfully provided he is actuated by one of the intentions

²¹ *Sheikh Hyder Sahib v. Sabjan Sahib*, [1931] M. W. N. 328, 34 L. W. 527, 33 Cr. L. J. 145, *Gobind Prasad*, (1879) 2 All. 465, dissented from; *Maung Kado*, (1895) 1 U. B. R. (1892-1896) 264. See *Jambulinga Chetti*, (1924) 47 M. L. J. 437, [1924] M. W. N. 546, 26 Cr. L. J. 219, [1924] AIR (M) 862.

²² *Venkatesu v. Kesamma*, (1930) 54 Mad. 515; *Narayan v. Madar Khan*, [1944] 2 M. L. J. 380.

²³ *Chinna Thoyi*, (1895) 1 Weir 518; *Narain Das*, (1918) 17 A. L. J. R. 834, 20 Cr. L. J. 463, [1919] AIR (A) 300.

²⁴ *Baldeo Prasad*, (1934) 11 O. W. N. 738, 85 Cr. L. J. 964, [1934] AIR (O) 281.

²⁵ *Keshavlal Jekrishna*, (1896) 21 Bom. 536;

¹ *Maung San Myin*, (1922) 25 Cr. L. J. 699, 2 B. L. J. 87, [1923] AIR (R) 245.

Prayag Singh v. Morgan, (1920) 33 C. L. J. 118, 22 Cr. L. J. 494, (sub. nom.) *Rayaz Singh*, (1920) 25 C. W. N. 425, [1921] AIR (C) 627; *Daga Bhika*, (1928) 30 Bom. L. R. 631, 29 Cr. L. J. 977, [1928] AIR (B) 221.

² *Sondu v. Rama*, (1932) 34 P. L. R. 953, 85 Cr. L. J. 77, [1933] AIR (L) 734.

³ *Chandi Pershad v. Evan*, (1894) 22 Cal. 123, commented on in *Prayag Singh v. Morgan*, (1920) 33 C. L. J. 118, 22 Cr. L. J. 494, (sub. nom.) *Rayaz Singh*, (1920) 25 C. W. N. 425, [1921] AIR (C) 627; *Nga Po Tok*, (1918) 8 U. B. R. (1917-20) 111, 20 Cr. L. J. 115; contra, *Nga Tok Kyi*, (1916) 8 L. B. R. 425, 17 Cr. L. J. 878.

⁴ *Gobind Prasad*, (1879) 2 All. 465, 466.

mentioned in this section; and he is liable to be convicted in respect of such unlawful continuance even though he has already been convicted in respect of the original unlawful entry inasmuch as each time the true owner goes upon the property or makes a claim under circumstances sufficient in law to constitute re-entry, and the trespasser opposes him with the intention required by this section, a new offence is committed and a new liability arises.⁵ The former Judicial Commissioner's Court at Nagpur had differed from this view and had held that continuance in possession after unlawful entry did not constitute a fresh offence unless there had been re-entry by the true owner. There was no such re-entry if the true owner had merely gone near the property.⁶ Approving this case, the Nagpur High Court has held that the offence of criminal trespass is complete as soon as there is unlawful entry. It is a continuing offence only when the entry is lawful and the subsequent possession becomes unlawful. Where the original entry is unlawful, the possession must be presumed to have commenced with the unlawful entry. There is, therefore, no fresh act of criminal trespass on a subsequent date.⁷

The accused placed bricks on complainant's land with his permission but subsequently refused to remove them. For this he was convicted of criminal trespass. It was held that the possession being lawful in its inception the subsequent refusal did not amount to criminal trespass and the matter was one for decision by a civil Court.⁸

Bona fide claim.—"If a person enters on land in the possession of another in the exercise of a bona fide claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence... But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a bona fide claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence".⁹ The existence of a bona fide claim of right is not irrefutable evidence of the absence of a criminal intent.¹⁰ But where the accused acts on a belief of his own right, he cannot be held guilty of criminal trespass.¹¹ It should distinctly be found whether the entry of the accused upon the land was in the exercise of a bona fide claim of right or with one of the intents requisite to constitute a trespass criminal within the meaning of this section. If the accused entertained the belief in good faith that he was entitled to the possession of the land, his entry and continuance on it would constitute a trespass on the land for which he would, if he failed to prove his title, be answerable in a civil suit, but would not be liable to a criminal charge. If, on the other hand, the circumstances are such that he could not have entertained such a belief in good faith, it would be a fair inference that he intended the annoyance which his action must have caused to the complainant, and the conviction would be proper.¹²

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal tres-

⁵ *Bandhu Singh*, (1927) 6 Pat. 794.

⁶ *Saibaj v. Gaffoor*, (1931) 28 N. L. R. 57, 33 Cr. L. J. 861, [1932] AIR (N) 112.

⁷ *Anantram*, [1939] N. L. J. 564, (1939) 41 Cr. L. J. 315.

⁸ *Nand Singh*, (1925) 26 P. L. R. 247, [1925] AIR (O) 540.

⁹ Per Turner, J., in *Budh Singh*, (1879) 2 All. 101, 103; *Seith Roshun Lal*, (1870) 2 N. W. P. 82; *Shistidhar Parui*, (1872) 9 Beng. L. R. (Appx.) 19, 18 W. R. (Cr.) 25; *Po Ke*, (1904) 2 L. B. R. 319; *Maung Kado*, (1895) 1 U. B. R. (1892-1896) 264; *Ramchandra v. Ratho*, (1908) 5 N. L. R. 69, 9 Cr. L. J. 561; *Abdul Latif*, (1911) 5 S. L. R. 135, 13 Cr. L. J. 27; *Jagan Dubey*, (1918) 19 Cr. L. J. 629, [1918] AIR (P) 639; *Debi Dayal*, (1924) 25 Cr. L. J. 1047, [1925] AIR (P) 167; *Habib Musalman*, (1927) 28 Cr. L. J. 952, [1928] AIR (N) 79; *Sri*

Narain, [1936] A. L. J. R. 203, 37 Cr. L. J. 244, [1936] AIR (A) 146.

¹⁰ *Arunachala Achari*, (1881) 1 Weir 520. See *Jhumuk Noniah v. Shadashib Roy*, (1881) 7 Cal. 26; *Chakoo Mandal*, (1906) 11 C. W. N. 467, 5 Cr. L. J. 278.

¹¹ *Jurakhan Singh*, (1907) 7 C. L. J. 238, 7 Cr. L. J. 312; *Reajaddin Molla*, (1914) 18 C. W. N. 1245, 15 Cr. L. J. 725, [1915] AIR (C) 236; *Akshay Singh v. Romeshwar Bagdi*, (1916) 43 Cal. 1143; *Bhagwan Din*, (1918) 16 A. L. J. R. 501, 19 Cr. L. J. 704, [1918] AIR (A) 365; *U Kyaw Zan*, (1936) 38 Cr. L. J. 759, [1937] AIR (R) 122.

¹² *Devarasctli Gangaiya*, (1884) 1 Weir 516; *Po Ke*, (1904) 2 L. B. R. 319; *Maung Shwe Ku*, (1923) 24 Cr. L. J. 929, [1923] AIR (R) 157; *Ghulam Ahmad*, (1938) 40 P. L. R. 757, 40 Cr. L. J. 180, [1938] AIR (L) 848.

pass unless the intent to commit an offence or to intimidate, insult or annoy is conclusively proved.¹³ But where A was in peaceful possession of land which he claimed to hold in mortgage from B, and C entered on the land and ploughed it, ousting A, on the ground that he had bought the land from B, it was held that A was not liable to be ousted from the land save in due course of law, and C rendered himself liable to a conviction of criminal trespass.¹⁴ Similarly, a forcible entry upon land, which had been sold in execution of a money-decree and of which actual possession had been given to the purchaser under s. 318 of the Civil Procedure Code, 1882, without resistance or opposition, and over which the purchaser had thereafter exercised acts of possession, by sub-tenants claiming under a lease of an antecedent date from the judgment-debtor, was held to be criminal trespass.¹⁵ Thus, superior title in the accused will not by itself convert the complainant into a mere trespasser, so as to justify him in ejecting the complainant, if the latter be in possession otherwise than as a mere trespasser.¹⁶

The law is that the lawful owner of land of which another is in possession without right may enter on it, provided he is entitled by law to enter and can do so peaceably. But he may not effect such entry "with a strong hand or multitude of people". He may use a reasonable amount of force. But, whether peaceably or with a reasonable amount of force, he must somehow enter. In order to sustain a conviction under s. 447 you must have something more effective than a mere claim to the property; certainly something more effective than the very indefinite sort of attempt or gesture by sending men to the property.¹⁷ Where a person armed with weapons went on a land of which he was the owner when no one else was there at the time and refused to vacate it, when called upon to do so by a person who had no right to the land, it was held that the owner did not remain on the land unlawfully and was not therefore guilty of the offence of criminal trespass within the meaning of this section.¹⁸

In order to effect delivery of possession of an inhabited house, it is necessary to eject the former occupier. It cannot be effected by beating a drum and putting up a notice. If the former occupier forcibly enters into the house under such circumstances he could not be held guilty of criminal trespass.¹⁹

442. Whoever commits criminal trespass by entering into¹ or remaining in any building,² tent or vessel³ used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

COMMENT.

Circumstances which aggravate the offence of criminal trespass are of two sorts. "Criminal trespasses may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed."²⁰

The authors of the Code say: "There is no sort of property which it is so desirable to guard against unlawful intrusion as the habitations in which men reside, and the buildings in which they keep their goods. The offence of trespassing on these places we designate as house-trespass, and we treat it as an aggravated form of criminal trespass."²¹

¹³ *Gobind Prasad*, (1879) 2 All. 465; *Shah Muhammad v. Ganesh Dass*, (1904) P. R. No. 13 of 1905, 2 Cr. L. J. 83; *Nanak Chand*, (1883) 3 A. W. N. 188; *Kewal v. Tufail Ahmad*, (1924) 26 Cr. L. J. 1125, [1925] AIR (A) 592.

¹⁴ *Mya Zan*, (1902) 1 L. B. R. 358.

¹⁵ *Kailash Ghose v. Jugal Lohar*, (1905) 1 C. L. J. 104, 2 Cr. L. J. 161; *Gill*, (1904) 5 P. L. R. 484.

¹⁶ *The Public Prosecutor v. Ponnurami Pillai*, (1899) 1 Weir 522; *Rabi Lochan v. Purna Chandra Dey*, (1906) 11 C. W. N. 171, 5 Cr. L. J. 14; *Chhakoo Mandal*, (1906) 11 C. W. N.

467, 5 Cr. L. J. 268.

¹⁷ *Per Broomfield, J.*, in *Lawman Mahadev Banker*, (1938) Criminal Reference No. 46 of 1938, decided by Broomfield and Norman, JJ., on July 5, 1938 (Bom. Unrep.).

¹⁸ *Adalat*, (1945) 24 Pat. 519.

¹⁹ *Ram Janam Singh v. Mohan Lal Ahir*, (1935) 16 P. L. T. 361, 36 Cr. L. J. 860, [1935] AIR (P) 355.

²⁰ Note N, p. 168.

²¹ Note N, p. 168.

1. 'Entering into'.—The introduction of any part of the trespasser's body is entering sufficient to constitute house-trespass.²² Going on to the roof of a house is not entering into a building.²³ The accused, who held a decree against a judgment-debtor, went with a bailiff to execute a warrant of arrest against the judgment-debtor. Finding the door of the judgment-debtor shut they entered into his compound by passing through the complainant's house without the latter's consent and notwithstanding his protest. It was held that the accused's act amounted to criminal trespass, for when they trespassed on the complainant's house notwithstanding his protest, they must, as reasonable men, have known that they would annoy him.²⁴

2. 'Building'.—What is a 'building' must always be a question of degree, and circumstances: its "ordinary and usual meaning is, a block of brick or stone-work, covered in by a roof."²⁵ The mere surrounding of an open space of ground by a wall or fence of any kind cannot be deemed to convert the open space itself into a building, and trespass thereon does not amount to house-trespass.¹ A courtyard partly surrounded on the front by a mud wall with no roof over it nor any door or gateway is not a building or house within the purview of this section.² The mere rigging up of an awning over a shop does not constitute the shop a 'building'.³ According to the Code any construction that is used as a human dwelling will be included in the term 'building'.

The building should be the property of another person. If an owner in charge of a house professes to be an accomplice and invites another to his house to commit an offence, a conviction for house-trespass is bad in law.⁴

The following are held to be buildings :—An entrance hall surrounded by a wall in which there were two doorways but no doors, and used for the custody of property,⁵ a courtyard, consisting of a walled enclosure with four chambers, opening into it, and an outer door or gate leading into a side street,⁶ a walled enclosure from which other rooms of a house open and having no roof,⁷ a cattle yard originally walled on four sides, but one wall of which having fallen into disrepair, had a gap stopped with a thorn bush,⁸ an outer verandah of a Burmese dwelling-house,⁹ and a thatch-hut built for the purpose of residence.¹⁰

The following are held to be not buildings :—A courtyard of an uninhabited house,¹¹ a walled courtyard which is not provided with a door,¹² a compound,¹³ a cattle-fold or pen with a thorn-hedge round it,¹⁴ and a *wehra* used for custody or property.¹⁵

3. 'Vessel'.—See s. 48, *supra*.

CASES.

Lawful entry followed by assault.—The accused entered a house, remained there, and committed an assault. It was held that although the original entry might not have been unlawful, the remaining in the house was unlawful, and that as the

²² *Vide* Explanation.

²³ *Nanhun*, (1933) 34 P. L. R. 906, 34 Cr. L. 1181, [1933] AIR (L) 433 (1).

²⁴ *Lukshman Raghunath*, (1902) 4 Bom. L. R. 280, 26 Bom. 553; *Lakshmi Das*, (1919) 4 L. L. J. 582.

²⁵ *Per Esher, M. R.*, in *Moir v. Williams*, [1892] 1 Q. B. 264, see Stroud's Judicial Dictionary, 2 Edn., Vol. 1, p. 225.

¹ *Palani Goundan*, (1896) 1 Weir 523.

² *Sundar*, (1919) 20 P. L. R. 109, 20 Cr. L. J. 240.

³ *Sankar Dayal*, [1938] O. W. N. 960, 39 Cr. L. J. 987.

⁴ *P. Kamaraju*, (1888) 1 Weir 534.

⁵ *Dad*, (1878) P. R. No. 10 of 1879; *Niamat*, (1925) 26 Cr. L. J. 753, [1925] AIR (L) 117.

⁶ *Shera*, (1879) P. R. No. 35 of 1879; *Wali Mahomed*, (1928) 22 S. L. R. 466, 29 Cr. L. J. 875, [1929] AIR (S) 17; *Bhag*, (1929) 31 Cr. L. J. 368.

⁷ *Ismail*, (1925) 6 Lah. 463.

⁸ *Dullea*, (1874) 6 N. W. P. 307; *Ghulam Jelani*, (1889) P. R. No. 16 of 1889.

⁹ *Sit Hon*, (1916) 8 L. B. R. 463, 18 Cr. L. J. 81, [1917] AIR (LB) 76.

¹⁰ *Salig Ram*, (1916) 17 Cr. L. J. 536, [1916] AIR (O) 109.

¹¹ *Surja*, (1882) 2 A. W. N. 224.

¹² *Buta*, (1923) 25 Cr. L. J. 457, [1924] AIR (L) 623; *Mul Chand*, (1924) 26 Cr. L. J. 383, [1925] AIR (L) 279.

¹³ *Rama*, (1889) Unrep. Cr. C. 484; *Po Thet*, (1907) 4 L. B. R. 24, 6 Cr. L. J. 134.

¹⁴ *Sucha Singh*, (1887) P. R. No. 57 of 1887; *Kohmi*, (1914) P. R. No. 24 of 1914, 16 Cr. L. J. 1, [1914] AIR (L) 584; *Munshi*, (1928) 26 A. L. J. R. 855, 29 Cr. L. J. 766, [1928] AIR (A) 607.

¹⁵ *Niamat*, (1924) 26 Cr. L. J. 753, [1925] AIR (L) 117.

accused unlawfully remained in the house and then committed an offence, he must be held, while unlawfully remaining, to have remained with an intent necessary to constitute the offence.¹⁶

Attempt.—The removal of a trap-door with the intention of committing house-trespass amounts to an attempt to commit house-trespass.¹⁷ Entry on a verandah coupled with an attempt to push open a door amounts to an attempt to commit criminal trespass.¹⁸

Entry not to commit offence not house-trespass.—Where a person entered into a *havalat* (lock-up) with intent to convey or attempt to convey food to an under-trial prisoner, such act on his part was held not to amount to house-trespass as conveyance of food into a *havalat* was not an offence punishable under s. 45, Prisons Act, XXVI of 1870.¹⁹ Similarly, an entry into a cattle pen to prosecute an intrigue with an unmarried woman of over sixteen years of age was held to be no offence under s. 448.²⁰ The accused entered into the house of the complainant, in his absence, with intent to have sexual intercourse with his mother, a widow, and was found out by him while remaining in the house. It was held that the accused could not be said to have had the intent to annoy or insult the complainant because an act of which a man was never intended to hear could not be said to be done with intent to insult him.²¹ A house was occupied only by the owner and his concubine, who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived who, however, arrested him. It was held that the accused was not guilty of house-trespass.²² Where in execution of a decree certain property was attached and taken out of the house in which it was, it was held that the decree-holder was not guilty of house-trespass.²³ Where a person suspected that a trader of whom he was a customer was having false measures, and he entered into his shop to see whether he had correct measures or not, it was held that he was not guilty of criminal trespass.²⁴

Where, during the absence of the complainant, the accused took possession of the house in the complainant's occupation and established there a boy alleged to be the adopted son of the complainant's father, it was held that the accused could not be convicted of this offence.²⁵ A girl disappeared from the house of her parents shortly before she was to be married. It was found after some time that she was living with the complainant, and some of her relations went to the complainant's house in his absence and removed the girl. There was no proof that the girl had been lawfully married to the complainant. It was held that the accused were not guilty of house-trespass as there was no proof of any intent to commit an offence or to intimidate, insult or annoy any person in possession of the house.¹ It is submitted that this decision is of doubtful authority because the forcible removal of a mistress from a person's house must necessarily cause him annoyance.

Bona fide dispute.—The complainant and the accused were neighbours. Their houses were divided by a wall, which the complainant claimed as his own, but which, according to the accused, was a party-wall. The accused gave a notice prohibiting the complainant from raising the height of the wall. The very next day the complainant raised the height. Whilst the complainant was absent the accused went into his house and demolished the new addition to the wall. The accused were thereupon prosecuted for the offence of house-trespass and mischief under ss. 451 and 426. It was held that inasmuch as there was a bona fide claim or right by the accused to the wall in dispute and as the accused had entered the complainant's house and pulled down the addition in his absence, the offences charged were not made out against the accused.²

¹⁶ *C. Bashika Chari*, (1888) 1 Weir 528.

¹⁷ *Narshi*, (1888) Unrep. Cr. C. 188.

¹⁸ *Nga Pan Hlaing*, (1914) 16 Cr. L. J. 2, [1915] AIR (LB) 102.

¹⁹ *Lalat*, (1879) 2 All. 801, Spankie, J., *contra*. See *Nawab Ali*, (1885) 5 A. W. N. 50.

²⁰ *Ramsan*, (1905) F. R. No. 28 of 1905, 2 Cr. L. J. 420.

²¹ *Pamba Rangadu*, (1896) 1 Weir 587; *Ambika Charan Sarkar*, (1906) 4 C. L. J. 169, 4 Cr. L. J. 144.

²² *Rupa*, (1919) 22 O. C. 121, 20 Cr. L. J. 610, [1919] AIR (O) 402.

²³ *Bhikam Singh*, (1917) 15 A. L. J. R. 808, 19 Cr. L. J. 46, [1918] AIR (A) 374; *Abdul Sattar v. Sm. Moti Bibi*, (1930) 34 C. W. N. 588, 31 Cr. L. J. 1223, [1930] AIR (C) 720.

²⁴ *Singara Babu*, (1944) 57 L. W. 394, [1944] 2 M. L. J. 455, [1944] M. W. N. 498, 45 Cr. L. J. 805, [1944] AIR (M) 445.

²⁵ *Soita Biswal v. Dochhi Stri*, (1907) 12 C. W. N. 269, 7 Cr. L. J. 108.

¹ *Rehana*, (1928) 5 Lah. 20.

² *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 26 Cr. L. J. 254, [1924] AIR (B) 486.

Officer exceeding powers.—A police-officer is not justified by the mere fact that a person is of a suspicious character in entering his house at midnight to see whether he is in the house. Such an act is clearly a house-trespass, as it is calculated to annoy the members of the family of the suspected person and also to insult the latter person.³ To constitute an offence of house-trespass it is not enough that there should be an entry into a house without complying with all the formalities required by law. It further requires an intention either to commit an offence or to intimidate, insult or annoy the person in possession. Therefore, where a Sub-Inspector of Police searched a house for cocaine and omitted to record his reasons as required by s. 53 of the Excise Act for not first obtaining a search-warrant from a Magistrate, it was held that he could not be convicted under s. 448.⁴

443. Whoever commits house-trespass having taken precautions to conceal such house-trespass¹ from some person who has a right to exclude or eject the trespasser from the building, tent or vessel² which is the subject of the trespass, is said to commit "lurking house-trespass".

COMMENT.

The authors of the Code say: "House-trespass, again, may be aggravated by being committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass we designate as lurking house-trespass; the latter we designate as house-breaking. Again, house-trespass, in every form, may be aggravated by the time at which it is committed. Trespass of this sort has, for obvious reasons, always been considered as a more serious offence when committed by night than when committed by day. Thus we have four aggravated forms of that sort of criminal trespass which we designate as house-trespass, lurking house-trespass, house-breaking, lurking house-trespass by night, and house-breaking by night.

"These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order to (commit) a murder. It may also often happen that a criminal trespass which is venial, as respects the mode, may be of the greatest enormity as respects the end; and that a criminal trespass committed in the most reprehensible mode, may be committed for an end of no great atrocity. Thus A may commit house-breaking by night for the purpose of playing some idle trick on the inmates of a dwelling. B may commit simple criminal trespass by merely entering another's field for the purpose of murder or gang-robbery. Here A commits trespass in the worst way. B commits trespass with the worst object. In our provisions, we have endeavoured to combine the aggravating circumstances in such a way that each may have its due effect in settling the punishment."⁵

1. 'Having taken precautions to conceal such house-trespass'.—In order to constitute lurking house-trespass the offender must take some active means to conceal his presence.⁶ The mere fact that a house-trespass is committed by night does not make the offence one of lurking house-trespass. A man entered the courtyard of a building through a gate which had no door attached to it, and he was caught in the courtyard, his intention apparently being to commit theft of cattle. It was held that he was guilty under s. 451 and not s. 457 as he had taken no steps to conceal the fact of his presence.⁷ Entry upon the roof of a building may be criminal trespass. But it cannot sustain a conviction for lurking house-trespass,⁸ or for house-breaking.⁹

2. 'Vessel'.—See s. 48, *supra*.

³ *Dorasami Pillai*, (1903) 1 Weir 529.

⁴ *Syed Ali Abbas v. Subba Singh*, (1925) 2 O. W. N. 468, 26 Cr. L. J. 1205, [1925] AIR (O) 505.

⁵ Note N, p. 168.

⁶ *Budha*, (1916) P. R. No. 21 of 1916, 17 Cr. L. J. 304, [1916] AIR (L) 425; *Chhadami*,

[1940] All. 175.

⁷ *Budha*, (1916) P. R. No. 21 of 1916, 17 Cr. L. J. 304, [1916] AIR (L) 425.

⁸ *Alla Bakhsh*, (1886) P. R. No. 9 of 1887; *Mullua*, (1900) 20 A. W. N. 151.

⁹ *Fazla*, (1890) P. R. No. 9 of 1890.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."

COMMENT.

Under this section the time of the entry aggravates the offence.

445. A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence,¹ or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say:—

First.—If he enters or quits through a passage made by himself or by any abettor of the house-trespass, in order to the committing of the house-trespass.

*Secondly.*²—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened,³ in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

*Sixthly.*⁴—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section;

ILLUSTRATIONS.

(a) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.

(b) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(c) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(g) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(h) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

COMMENT.

House-breaking as defined in this section is an aggravated form of criminal trespass. One form of criminal trespass is the act of entering upon property, in the possession of another, with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. If the property is used as a human dwelling, the offence of criminal trespass becomes the offence of house-trespass. If this offence of house-trespass is further aggravated by an entry or departure of a forcible nature, then the entry passes from an offence merely of criminal trespass to the more serious offence of house-breaking as defined in this section. The offence of house-breaking may be further aggravated by causing grievous hurt to any person whilst committing the house-breaking (*vide s. 459*.)

The section prescribes six ways in which the offence of house-breaking may be committed. Clauses 1 to 3 deal with entry which is effected by means of a passage which is not ordinary. Clauses 3 to 6 deal with entry which is effected by force.

English law.—According to English law to constitute house-breaking there must be always an actual breaking of some part of the house, in effecting which more or less of actual force is employed, or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy. Under the Code the mere entry through a window not intended for human entrance will amount to house-breaking (*vide ill. (c)*). According to English law, if a thief enters through an aperture in a cellar window to admit light, it is not house-breaking.¹⁰

1. 'For the purpose of committing an offence'.—It is not necessary to specify any particular offence.¹¹ Intention of committing any offence is sufficient.

2. **Clause 2.**—This clause deals with those cases where a new passage has been created by a thief. When a hole is made by burglars in the wall of a house but their way is blocked by the presence of beams on the other side of the wall the offence committed is one of attempt to commit house-breaking and not actual house-breaking and illustration (a) to this section does not apply.¹²

3. **Clause 3.**—'Has opened'.—A door or window is not open if it is shut, though unfastened. Pulling down the sash of a window is a breaking.¹³ Raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking.¹⁴ Where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it; forcing it open by pushing against it is sufficient to constitute a breaking.¹⁵ The breaking open of a cattle shed in which agricultural implements are kept amounts to house-breaking.¹⁶

The following acts are held to be breaking under the English law and will amount to house-breaking under the Code:—Entry effected by taking out a glass from a door;¹⁷ or breaking a pane of glass;¹⁸ lifting up a heavy flap of a cellar to come out;¹⁹ obtaining admission by getting down a chimney;²⁰ removing the fastening of a window by the hand introduced through a broken pane of the window, and thereby opening the window and entering.²¹

¹⁰ *Lewis*, (1827) 2 C. & P. 628.

¹¹ See *Jharu Sheikh*, (1912) 16 C. W. N. 696, 13 Cr. L. J. 224.

¹² *Ghulam*, (1923) 4 Lah. 899.

¹³ *Haine's Case*, (1821) Russ. & Ry. 451.

¹⁴ *Hyams*, (1836) 7 C. & P. 441.

¹⁵ *Hall's Case*, (1818) Russ. & Ry. 355.

¹⁶ *Pullabhotla Chinniah*, (1917) 18 Cr. L. J.

469, [1918] AIR (M) 709.

¹⁷ *Smith's Case*, (1820) Russ. & Ry. 417.

¹⁸ *Joseph Perkes*, (1824) 1 C. & P. 300; *Tucker*, (1844) 1 Cox 73.

¹⁹ *Russell's Case*, (1838) 1 Mood. Cr. C. 377.

²⁰ *Brice's Case*, (1821) Russ. & Ry. 450.

²¹ *Robinson's Case*, (1831) 1 Mood. Cr. C. 327.

The accused suggested to a servant of the prosecutrix a plan for the commission of a robbery by the accused at the shop of the prosecutrix. The servant, pretending to agree to the accused's suggestion, lent the keys of the shop to the accused, who made duplicate keys, with one of which, on a day arranged with the servant, the accused unlocked a padlock attached to the outer door and entered the shop, where he was arrested. The prosecutrix had been informed by the servant of the accused's plan and knew that he intended to enter the shop on the day in question. The accused was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein. It was held that the conviction was right, notwithstanding that the prosecutrix knew that the accused had been supplied with the means of breaking and entering by her servant.²²

4. **Clause 6.**—The word 'fastened' implies something more than being closed such as chaining the shutters or tying them with a rope or bolting them or locking the door. An entry of an accused into a house by merely pushing in shutters of the door does not constitute the offence of house-breaking, as it does not come under any of the six clauses, but constitutes an offence of house-trespass under s. 457 with intent to commit an offence.²³

446. Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night."
House-breaking by night.

COMMENT.

Section 445 contains an elaborate definition of house-breaking. The addition in this section of the element of time turns the offence into 'house-breaking by night', the equivalent of the crime of 'burglary' in English law. The analysis of this offence naturally suggests a division of its ingredients into—(1) the breaking; (2) the entry; (3) the place; (4) the time; and (5) the intent.

English law.—Whosoever shall enter the dwelling house of another with intent to commit any felony therein, or being in such dwelling house shall commit any felony therein, and shall in either case break out of the said dwelling house in the night, shall be deemed guilty of burglary.²⁴

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.
Punishment for criminal trespass.

PRACTICE.

Evidence.—Prove (1) that the complainant has possession of the property in question.²⁵ In a prosecution for criminal trespass it is necessary to determine in whose possession the property was at the date of the alleged trespass.¹ Whether a party is in possession of immovable property or not is a question of fact to be ascertained by taking evidence in the usual way. The mere fact that a decree has been given against one party by a civil Court does not determine the question of possession, as that party may still be in possession of the property in dispute until effect is given to the decree in due course of law.² But a criminal is not entitled to disregard the decree of a civil Court declaring rights to the identical property in dispute in the criminal case.³

(2) That the accused entered into or upon the property; or after having lawfully entered unlawfully remained there.

(3) That he so entered or remained there with the intention (a) to commit

²² *Chandler*, [1913] 1 K. B. 125.

²³ *Ledga*, (1921) 23 Cr. L. J. 278, [1922] AIR (N) 26.

²⁴ 24 & 25 Vic., c. 96, s. 51.

²⁵ *Kalinath Nag Chowdhry*, (1887) 9 W. R. (Cr.) 1; *Parmeshwar Lall Mitter*, (1921) 3 P. L. T. 347, 23 Cr. L. J. 440, [1922] AIR (P) 296.

¹ *Mantripragada Venkatarama Rao*, (1917) 18 Cr. L. J. 761, [1918] AIR (M) 574 (1).

² *Mi Tok v. Mi Shan Ma*, (1894) 1 U. B. R. (1892-1896) 262.

³ *Varadaraja Chettiar v. Swami Maistry*, [1948] M. W. N. 62.

an offence; or (b) to intimidate, insult, or annoy the person in possession.⁴

The Magistrate must find what the intent with which the accused committed the trespass was. He is not to leave it to inference what the intent with which he committed the trespass was.⁵

"Though the prosecution must prove the existence of some one or more of the intentions mentioned in section 441 . . . , the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in that section, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances."⁶

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

A Magistrate ought not to decline to go into a case of criminal trespass because the complainant does not make out his title to the land.⁷ A person who enters upon property in the possession of another may be guilty of criminal trespass, without reference to the question in whom the title to the land may ultimately be found.⁸ The accused, after having been convicted of criminal trespass committed by entering on certain land, were again prosecuted for a further trespass by remaining on the land in spite of the previous conviction. It was held that the accused were not liable to be again convicted.⁹

Where a person commits criminal trespass in respect of property in the possession of a tenant, his landlord can file a complaint.¹⁰

Burma Circular.—The time and labour devoted by Magistrates to cases under section 447 of the Indian Penal Code is frequently out of proportion to their importance. In the majority of cases brought under this section the object of the complainant is to obtain in a cheap and speedy manner a remedy which ought to be sought by means of a civil suit. Magistrates are not authorised to dismiss complaints, or to discharge or acquit the accused, merely on this ground, because the facts which entitle a person to bring a civil suit may also constitute the offence of criminal trespass, but they should not allow prosecutions where the wrong is purely of a civil nature. In many cases where servants acting under their employer's orders enter upon land in the possession of another the ruling in *Shwe Kun v. King-Emperor*¹¹ is applicable. Such servants are not guilty of criminal trespass if they enter on the land in good faith in obedience to their employer's orders and without any intention of annoying the person in possession. A full and complete examination of the complainant and a careful consideration of the above and similar matters will enable Magistrates to dismiss summarily many more complaints of criminal trespass than they do, or in any event will enable them to discharge the accused after a brief hearing. Compensation under section 545, Criminal Procedure Code, should never be granted to a complainant when it appears that his object in instituting the prosecution was merely to assert a title to the land.¹²

448. Whoever commits house-trespass shall be punished with imprisonment for house-trespass. may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Section 442 defines the offence of 'house-trespass'; this section provides punishment for it.

⁴ *Vujeer*, (1868) Unrep. Cr. C. 10; *Sristeedhur Parooe v. Indrobhoosun Chuckerbutty*, (1872) 18 W. R. (Cr.) 25, 9 Beng. L. R. (Appx.) 19; *Shib Nath Banerjee*, (1875) 24 W. R. (Cr.) 58; *Punjab Singh*, (1881) 6 Cal. 579.

⁵ *Durgaiya*, (1882) 1 Weir 524. See *Devarasetti Gangaiya*, (1884) 1 Weir 516; *Wariama*, (1885) P. R. No. 11 of 1885. See *Meajan v. Sharafatullah Khan*, (1912) 16 C. W. N. 1007, 18 Cr. L. J. 783; *Chinna Krishna Reddi v. Marri Poliah*, [1912] M. W. N. 395, 13 Cr. L. J. 477.

⁶ Per Banerjee and Sale, JJ., in *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391, 406.

⁷ *Surwan Singh*, (1869) 11 W. R. (Cr.) 11.

⁸ *Ram Dyal Mundle*, (1867) 7 W. R. (Cr.) 28.

⁹ *Ma Hla Ya*, (1908) 4 L. B. R. 276, 8 Cr. L. J. 474.

¹⁰ *Fakir Chand v. Fakir*, (1922) 23 Cr. L. J. 699.

¹¹ (1906) 3 L. B. R. 278, 5 Cr. L. J. 415. Explained in *Maung Nwe v. Maung Po Hla*, [1937] Ran. 246.

¹² B. C. M., c. 455, p. 198.

PRACTICE.

Evidence.—Prove (1) that the accused committed criminal trespass.¹³

(2) That such criminal trespass was committed by entering into, or remaining in, a building, tent, or vessel.

(3) That such building, tent, or vessel, was used as a human dwelling or as a place for worship, or as a place for the custody of property.

To support a conviction under this section, some one or other of the intents mentioned in s. 441 must be expressly found and must not be left to inference.¹⁴

Procedure.—Cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

In proceedings under s. 145, Criminal Procedure Code, the Magistrate must confirm the party who is in actual possession and he is not competent to dispossess such a party by appointing a receiver. Persons who continue to remain on the property after the appointment of a receiver appointed in such circumstances cannot legally be convicted under this section.¹⁵

Restoration of possession.—Where possession of a house is taken by means of criminal trespass with a show of force, the Court can direct the restoration of the house to the complainant under s. 522, Criminal Procedure Code.¹⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed house-trespass by entering into [*or remaining in*] the building [*or tent, or vessel*] of AB used as a human dwelling [*or as a place of worship, or for the custody of property*] with intent (*specify the motive for entering into or remaining in*), and that you thereby committed an offence punishable under s. 448 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (d) and 12 (2).

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

House-trespass in order to commit offence punishable with death.

COMMENT.

This section provides punishment for house-trespass committed with intent to commit an offence punishable with death.

It is not made necessary under this section that the offender should do any further act than house-trespass towards the commission of the 'offence punishable with death'. But to justify a conviction there should be a clear proof of the design to commit a murder or other like offence. In the absence of proof of some further act done, in addition to the criminal trespass, in the prosecution of the murderous intention, it can rarely happen that the evidence will suffice for a conviction under this section.¹⁷

See page 86, where a list of offences punishable with death is given.

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.¹⁸

(2) That the same was committed in order to commit an offence punishable with death.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follow —

¹³ Vide s. 441, sup.

¹⁴ Durgaiya, (1882) 1 Weir 524.

¹⁵ Mewa Lal, (1927) 8 P. L. J. 147.

¹⁶ Rameshwar Singh, (1925) 4 Pat. 438.

¹⁷ M. & M. 404.

¹⁸ Vide, s. 442, sup.

That you, on or about the—day of—, at—, committed house-trespass by entering into [or remaining in] the building of AB, used as a human dwelling in order to the commission of an offence punishable with death, to wit—, and that you thereby committed an offence punishable under s. 449 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

House-trespass in order to commit offence punishable with transportation for life.

COMMENT.

This section is similar to the last section. It deals with house-trespass committed with intent to commit an offence punishable with transportation for life.

As to offences punishable with transportation for life, see page 86.

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.¹⁹

(2) That the same was committed in order to commit an offence punishable with transportation for life.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 449, *supra*.

Punishment.—As to the Frontier District, see s. 448, *supra*.

451. Whoever commits house-trespass in order to the committing of any offence¹ punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

House-trespass in order to commit offence punishable with imprisonment.

COMMENT.

This section is similar to ss. 449 and 450. It provides punishment for house-trespass committed with intent to commit an offence punishable with imprisonment. In order to constitute an offence under this section the prosecution must first establish that an offence of simple house-trespass has been committed and then satisfy the Court, in the particular case before it, that the house-trespass was committed with the object of committing a further offence punishable with imprisonment.²⁰

It is not necessary that the Court should be in a position to say which specific offence the accused intended to commit. It is sufficient if the evidence leaves no room for reasonable doubt that the accused intended to commit an offence.²¹

1. 'Offence'.—For the purposes of this section, an offence punishable under the Code is an 'offence' even though it is not punishable with imprisonment for more than six months. It is only an offence which is punishable under a special or a local law that must be punishable with imprisonment of six months or more before it can be considered to be an offence within the meaning of this section.²²

CASES.

Where the accused was convicted of house-breaking, his object being to have

¹⁹ *Vide*, s. 442, *supra*.

²⁰ *Mansur Hussain*, (1919) 41 All. 587, 589.

²¹ *Samban*, (1881) 1 Weir 583.

²² *Harkishan Lal*, (1981) 82 Cr. L. J. 732.

sexual intercourse with the complainant's wife, it was held that the conviction was valid.²³ Similarly, where the accused was caught at night in the courtyard of the complainant's premises under circumstances which showed that he had come there to commit theft of cattle, it was held that he was guilty under this section.²⁴

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.²⁵

(2) That the same was committed in order to commit theft, or an offence punishable with imprisonment.

When the prospective offence is that of adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman, the intent to commit adultery with whom is charged against the accused.¹ Where it has been shown that the husband was absent in the legitimate pursuit of his occupation, it may safely be presumed that such husband neither consented to nor connived at any adultery or immorality on the part of his wife. It seems obvious that he would be wholly ignorant of what was going on in his house and that, therefore, he could neither consent to nor connive at the same.²

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class, if theft was committed. If any other offence punishable with imprisonment was committed, then cognizable, warrant, bailable, compoundable when permission is given by the Court before which the prosecution is pending, and triable by any Magistrate—Triable summarily.

House trespass for adultery.—A Magistrate is right in refusing to convict when the husband declines to complain.³ But the omission of the husband to prosecute for adultery does not absolve the accused from criminal liability under s. 457.⁴

Charge.—The charge must charge the accused with committing house-trespass with intent to commit some specific offence punishable with imprisonment.⁵ It should run thus :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, committed house-trespass by entering into (*or remaining in*) the building of AB, used as a human dwelling (*or for the custody of property*), in order to commit the offence of—(*or theft*), and that you thereby committed an offence punishable under s. 451 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*. Under this section it is not necessary to impose a sentence of fine along with a sentence of imprisonment.⁶

452. Whoever commits house-trespass, having made preparation

House-trespass after preparation for hurt, assault or wrongful restraint.

for causing hurt¹ to any person or for assaulting² any person, or for wrongfully restraining³ any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

²³ (1875) 8 M. H. C. (Appx.) 6, 1 Weir 532; *Khanon Ram*, (1920) 22 Cr. L. J. 266, [1920] AIR (L) 62; *Anant Ram*, (1920) 22 Cr. L. J. 118, [1920] AIR (L) 464.

²⁴ *Budha*, (1916) P. R. No 21 of 1916, 17 Cr. L. J. 304, [1916] AIR (L) 425.

²⁵ *Vide* s. 442, *supra*.

¹ *Brij Basi*, (1896) 16 All. 74.

² *Khanon Ram*, *supra*; *Kala Ram*, (1924)

26 Cr. L. J. 1343.

³ (1869) 5 M. H. C. (Appx.) 5, 1 Weir 532.

⁴ *Bandhu*, (1894) Cr. R. No. 11 of 1894, Unrep. Cr. C. 689.

⁵ *Mehar Dowalia*, (1871) 16 W. R. (Cr.) 53 [63].

⁶ Cr. Ref. No. 73 of 1929, decided by Patkar and Wild, JJ., on September 12, 1929 (Unrep. Bom.).

COMMENT.

Section 451 prescribes penalty for house-trespass committed with intent to commit an offence punishable with imprisonment. In this way it envelops the provisions of this section. But the object of the Legislature in enacting this section is to provide severer punishment where house-trespass is committed in order to cause hurt to, or to assault, or to wrongfully restrain, any person.

1. 'Hurt'.—See s. 319, *supra*. Where the accused entered the complainant's house for the purpose of beating his (accused's) wife, who had taken refuge in it, it was held that the beating not being justifiable, that is, lawful, the entry amounted to criminal trespass, and a conviction under this section was good.⁷

2. 'Assault'.—See s. 351, *supra*.

3. 'Wrongful restraint'.—See s. 339, *supra*. Where a man went with a forged warrant of arrest into a house, and took away one of the inmates against his will under the authority of such warrant, he was held guilty of house-trespass, by putting such person in fear of wrongful restraint under this section.⁸

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.⁹

(2) That the same was committed after making preparation for causing hurt to, or for assaulting, or for wrongfully restraining, some person; or for putting some person in fear of hurt, assault, or wrongful restraint.

The fact that the accused trespassed into the shop for the purpose of assaulting the complainant, is not sufficient to support a conviction under this section, though it is for a conviction under s. 448.¹⁰

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, committed house-trespass by entering into [or remaining in] the building of AB, used as a human dwelling, having made preparation for causing hurt, etc., to AB; and that you thereby committed an offence punishable under s. 452 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Punishment for lurking house-trespass or house-breaking.

COMMENT.

This section provides penalty for the offences defined in ss. 443 and 444.

In all "house-breaking" there must be "house-trespass" and in all "house-trespass" there must be "criminal trespass". Unless, therefore, the intent necessary to prove the offence of criminal trespass is present, the offence of house-breaking or house-trespass cannot be committed.

'Offence', in this section, means a thing punishable under the Code or any special or local law (s. 40).

English law.—According to English law to constitute house-breaking there must be an actual or constructive breaking of some part of the house.

⁷ *Katakam Narasingadu*, (1882) Weir (3rd. Edn.) 329.

⁸ *Nund Mohun Sirkar*, (1869) 12 W. R. (Cr.) 33.

⁹ *Vide* s. 442, *sup*.

¹⁰ *Fakir Chandra De*, (1921) 38 C. L. J. 161, 25 Cr. L. J. 168, [1921] AIR (C) 556.

“The word ‘break’ means

(a) the breaking of any part, internal or external, of the building itself, or the opening by any means whatever (including lifting, in the case of things kept in their places by their own weight) of any door, window, shutter, cellar flap, or other thing intended to cover openings to the house, or to give passage from one part of it to another, and getting down the chimney ;

(b) obtaining an entrance into the house by any threat or artifice used for that purpose, or by collusion with any person in the house.

The word ‘enter’ means the entrance into the house of any part of the offender’s body, or of any instrument held in his hand for the purpose of intimidating any person in the house or of removing any goods, but does not include the entrance of part of an instrument used to break the house open”.¹¹

P R A C T I C E .

Evidence.—For lurking house-trespass prove (1) that the accused committed house-trespass.¹²

(2) That the accused took precaution to conceal the same.

That such concealment was from some person who had a right to exclude or eject the accused from the building, tent, or vessel which was the subject of the trespass.

For house-breaking, prove (1) that the accused committed house-trespass.¹³

(2) That he effected his entrance into the house or any part of it in any of the six ways mentioned in s. 445 ; or if he was in the house or any part of it for the purpose of committing an offence, he quitted it in any of those six ways.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.¹⁴

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the —day of—, at—, committed lurking house-trespass [*or house-breaking*] by entering into a building belonging to AB and used as a human dwelling, and that you thereby committed an offence punishable under s. 453 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

454. Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.

C O M M E N T .

The offence under this section is an aggravated form of the offence described in the last section : the aggravation being the commission of an offence punishable with imprisonment.

Intention is the *sine qua non* and the gist of the offence under this section. Where intention is not proved, no conviction under this section can take place.¹⁵

The latter portion of this section is framed to include the cases of house-trespassers, and house-breakers, who have not only intended to commit, but have actually committed, theft.¹⁶

The accused was seen leaving the house of one S and was seized on an outcry made by a female inmate of the house. He had on him jewels belonging to the female,

¹¹ Stephen’s Dig. of Cr. L., Art. 34].

¹² *Id.* s. 448, sup.

¹³ *Ibid.*

¹⁴ Act 1 of 1908.

¹⁵ *Brij Mohan Lal*, [1947] All. 152; *Gaya Bhar*, (1916) 38 All. 517.

¹⁶ *Zor Singh*, (1887) 10 All. 146.

which were ordinarily kept in an earthen receptacle in the house. The time was after-noon, before sunset. Upon these facts the District Magistrate convicted the accused of "lurking house-trespass by day for the purpose of committing theft" under this section. It was held that there was no evidence against the accused of house-breaking, nor of the essential element of lurking house-trespass, that the offence committed by the accused was theft in a dwelling-house, and that the conviction must be under s. 380.¹⁷ The accused was found inside the house of the complainant at about midnight. There was nothing to show that he had gone there to commit theft. It was likely that he had gone to the house to meet a female servant. It was held under the circumstances that the case did not come within the mischief of this section.¹⁸

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass or house-breaking.¹⁹

(2) That he did so in order to commit an offence punishable with imprisonment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.²⁰

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, committed lurking house-trespass, by entering into [*or remaining in*] a building belonging to AB, and used as a human dwelling, in order to the commission of an offence punishable with imprisonment, to wit—, and that you thereby committed an offence punishable under s. 454 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)]*.

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)]* on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (b) and sch. II.

455. Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person,

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term

which may extend to ten years, and shall also be liable to fine.

COMMENT.

The relationship between this section and s. 453 is the same as that between ss. 452 and 450.

This section is similar to s. 458. The only difference is that this section deals with trespass committed by day : whereas s. 458 deals with trespass committed during night.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass or house-breaking.²¹

(2) That he did so after making preparation for causing hurt, or assaulting or wrongfully restraining some person, or for putting some person in fear of hurt, assault, or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable y Court of Session, or Presidency Magistrate, or Magistrate of the first class.

¹⁷ *Khuda Bakhsh*, (1886) P. R. No. 10 of 886.

¹⁸ *Brij Mohan Lal*, [1947] All. 152.

¹⁹ *Vide* ss. 443, 445, 453, *supra*.

²⁰ Act I of 1903.

²¹ *Vide*, ss. 443, 445, 453, *supra*.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, committed lurking house-trespass (*or house-breaking*) by entering into (*or unlawfully remaining in*) the building in the possession of AB and used as a human dwelling (*or for the custody of property*) having made preparation for causing hurt to the said AB (*or for assaulting any person or for wrongfully restraining any person, or for putting any person in fear of hurt or assault or wrongful restraint*), and that you thereby committed an offence punishable under s. 455 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Punishment for
lurking house-tres-
pass or house-
breaking by night.

COMMENT.

Lurking house-trespass or house-breaking is punishable under s. 453 ; but when it is committed at night this section is applicable. Unless the intent necessary to prove the offence of criminal trespass is present, the offence under this section cannot be committed. Where the accused persons, execution creditors, broke open the complainant's door before sunrise with intent to distrain his property, for which they were convicted on a charge of lurking house-trespass by night or house-breaking by night, it was held that as they were guilty of the offence of criminal trespass, they could not be convicted under this section.²²

CASES.

Scaling a wall.—Effecting an entrance into a house at night by scaling a wall amounts to house-breaking by night.²³

Departure through doorway.—The accused entered into a house at night and effected his departure with a vessel under his arm from the house after knocking down a person who stood in the doorway. It was held that the conviction for house-breaking by night was good.²⁴

Entry for adultery.—Where a stranger, uninvited and without any right to be there, effected an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt was made to capture him, used great violence in his efforts to make good his escape, it was held that the Court should presume that the entry had been made with such an intent as was provided for by this section.²⁵ The accused unchained the outer door of the courtyard of M's house at night and was passing through it in order to reach the adjoining house occupied by a married woman, with whom he had intimacy, with the object of committing adultery with her when he was seen by M's wife who raised an alarm and he was arrested while in M's courtyard. It was held that the accused was guilty under this section as he had committed criminal trespass within the meaning of the first part of s. 441 as he entered into or upon property in the possession of another with intent to commit an offence.¹

Where the accused was found at night inside the complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room, it was held that the accused could not be convicted under this section as he had none of the intentions necessary to constitute the offence described in s. 451 and

²² *Jotharam Daway*, (1878) 2 Mad. 30.

²³ *Emdad Ally*, (1865) 2 W. R. (Cr.) 65.

²⁴ *Solai alias Kattayan*, (1892) 1 Weir 530.

²⁵ *Koiltash Chandra Chakrabarty*, (1889) 16 Cal. 657; *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391; *Premamundo Shaha v.*

Brindabun Chung, (1895) 22 Cal. 994; *Karali Prasad Guru*, (1916) 44 Cal. 358; *Ram Rang*, (1904) P. R. No. 18 of 1905, 2 Cr. L. J. 279; *Mohammad Nasiruddin*, (1925) 4 Pat. 459.

¹ *Mohammad Yar*, (1938) 19 Lab. 462, F.B.

could hardly have had the intention of committing the offence described in s. 509.² If a man enters the house of another person with the intention of committing clandestine adultery with a widow by invitation and actually commits adultery and the woman is in joint possession of the house not only does he not intend to insult or annoy any other person in the house, but he desires above all things that his presence should not be known to the other occupants and in such a case he cannot be held to be guilty under this section.³

Entry for theft.—The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli* (neck ornament). The evidence of the complainant clearly showed that the accused was not there with the consent or at the invitation or for the pleasure of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was under the circumstances innocent.⁴

PRACTICE.

Evidence.—For lurking house-trespass by night prove (1) that the accused committed lurking house-trespass.⁵

(2) That the same was committed after sunset and before sunrise.

For house-breaking at night prove (1) that the accused committed house-breaking.⁶

(3) That the same was committed after sunset and before sunrise.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

The splitting up of one aggravated offence into separate minor offences is prohibited, e.g. a conviction for lurking house-trespass and theft under this section and s. 380, instead of for lurking house-trespass in order to commit theft under s. 457.⁷

A conviction under this section may be made even though the accused is charged with the commission of an offence under s. 457.⁸

Charge.—A conviction under this section is not bad for want of the specification of the intention in the charge, but one under s. 457 cannot be sustained without such specification. In a charge under the former section, though a guilty intention must be proved, it is not necessary to prove which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in s. 441, though it may not be certain which it was.⁹ But if the accused pleads that his intention was an innocent one, it is for him to say what it was, as the burden of proving it is on him, the knowledge of that intent being specially within his knowledge.¹⁰ Where, however, it appears that the accused has been prejudiced by the omission to frame a charge and to specify the intent, the conviction must be set aside and re-trial ordered.¹¹

The charge should run as follows:—

I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass by night [*or house-breaking by night*] by entering into the building belonging to AB, and used as a human dwelling, after the hour of sunset and before

² *Lajje Kum*, (1898) P. R. No. 12 of 1898; *Milkh Ram*, (1919) 20 P. L. R. 97.

³ *Takbirullah Wahidullah*, (1941) 43 Cr. L. J. 96, [1941] AIR (P) 79.

⁴ *Ishri*, (1906) 29 All. 46; *Mulla*, (1915) 37 All. 395; *J.P. Henzie*, (1909) 3 S. L. R. 86, 10 Cr. L. J. 410. It is not necessary in such cases that the husband should bring a specific charge of adultery: *Mulla Teli*, (1904) 16 C. P. L. R. 182. See (1869) 5 M. H. C. Appx. 5, 1 Weir 532, which conflicts with (1868) 1 Weir 531, which lays down that entry into a house with the object of committing adultery will constitute this offence though the husband alone can prosecute. See *Bandhu*, (1894) Unrep. Cr. C.

689, Cr. R. No. 11 of 1894, which also lays down that the omission of the husband to prosecute for adultery does not absolve the accused from criminal liability.

⁵ *Vide* s. 443, sup.

⁶ *Vide* s. 445, sup.

⁷ *Ramcharan Katri*, (1866) Beng. L. R. Sup. Vol. 488, 6 W. R. (Cr.) 39, F.B.

⁸ *Karali Prasad Guru*, (1916) 20 C. W. N. 1075, 17 Cr. L. J. 424.

⁹ *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391.

¹⁰ *Ishri*, (1906) 29 All. 46.

¹¹ *Jadav Mahton*, (1920) 2 P. L. T. 140.

the hour of sunrise, and that you thereby committed an offence punishable under s. 456 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court, (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

457. Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

"In order to support a conviction under s. 457... it is necessary to prove that the lurking house-trespass by night or house-breaking by night was committed 'in order to the committing of any offence punishable with imprisonment': but the criminal intention which is thus made the essential element of the offence can, generally speaking, only be inferred from the circumstances of the case, and it is from those circumstances that the Court trying an offender must find whether the intention to commit some such offence as is contemplated by the section is made out, or not".¹²

The latter portion of this section is framed to include the cases of house trespassers, and house-breakers, by night, who have not only intended to commit, but have actually committed, theft.¹³

CASES.

Where the door of a shop was found broken open, it was held that the conviction should have been for house-breaking by night, and not simply lurking house-trespass by night.¹⁴ A, with a view to support a fraudulent claim of title to a house, broke into it at night during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house, and took forcible possession of it. It was held that A was guilty under this section as he intended to use criminal force to the servant in possession, and, therefore, intended to commit an offence.¹⁵ The accused, a previous convict, made his way into an open thorned enclosure in which goats and sheep were kept. He was disturbed and therefore ran away. It was held that on these facts the accused could not be convicted of lurking house-trespass under this section, but only of attempted theft under ss. 379 and 511.¹⁶ Where a temple was broken into and the idols were removed for celebrating a festival and the taking was not dishonest, a conviction under this section and s. 380 was held to be not sustainable.¹⁷

Where the accused entered during night the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, it was held that he was guilty under this section and that it was not necessary that the complainant should bring a specific charge of adultery.¹⁸

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night,¹⁹ or house-breaking by night.²⁰

¹² Per Rattigan, J., in *Sher Singh*, (1888) P. R. No. 14 of 1883, at p. 23; *Gaya Bhar*, (1916) 38 All. 517.

¹³ *Zor Singh*, (1887) 10 All. 146.

¹⁴ *Kenaram Bousee*, (1865) 4 W. R. (Cr.) 19.

¹⁵ *Sellamuthu Servaigaran v. Pallamuthu Karuppan*, (1911) 35 Mad. 186.

¹⁶ *Ghasita*, (1918) P. R. No. 13 of 1919, 20 Cr. L. J. 492.

¹⁷ *Perumal Konan*, [1940] M. W. N. 873, [1940] 52 L. W. 347, 42 Cr. L. J. 263, [1941] AIR (M) 71 (2).

¹⁸ *Kangla*, (1900) 23 All. 82. See *Chatter Singh Damai*, (1919) 8 U. B. R. 194, 21 Cr. L. J. 435, [1920] AIR (UB) 50.

¹⁹ *Vide* ss. 444, 456, *sup*; *Chhadami*, [1940] A. L. J. R. 77.

²⁰ *Vide* ss. 446, 456, *sup*.

(2) That the same was committed to commit theft, or an offence punishable with imprisonment.

Procedure.—Cognizable—Warrant—Not bailable—Not compounadable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

An attempt to commit an offence under this section is punishable under s. 511 and not under Chapter XII or XVII of the Code.²¹

A charge of house-trespass with intent to commit adultery can be entertained without a complaint by the husband or person having care of the woman.²² The Court has got to be satisfied that there was no consent or connivance by the husband.²³

Separate convictions for separate offences.—An accused person was convicted of house breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. It was held that the sentences were legal.²⁴ The Bombay High Court has held that where a person is accused of committing house breaking and theft he should be charged under this section alone as only one offence is committed.²⁵ The Patna High Court has held that an accused person convicted of house-breaking followed immediately by theft is liable to punishment under this section only.¹ But this view is not followed by the Chief Court of Oudh which has held that where a person commits house-breaking or lurking house-trespass by night and thereafter commits theft, he may be charged with and tried, at the same trial, for both the offences of lurking house-trespass and theft under this section and s. 380 and convicted under both the sections.² The Madras High Court has also held that under such circumstances separate sentences could be awarded.³ For further cases, see Comment on s. 71.

Where offences under this section and s. 380 are committed in one transaction, it is very desirable that formal convictions under both sections be recorded, in order that, if the accused subsequently commits another theft, technical difficulties may not arise.⁴ A person accused of an offence under this section can by virtue of s. 329 (e), Criminal Procedure Code, be legally charged and tried with persons accused of receiving or retaining the stolen property.⁵

Charge.—In drawing up a charge the offence intended with a view to which trespass was committed should be entered in the charge.

Where the accused was convicted of house-breaking by night and of house-trespass in respect of the same acts, it was held that the second head of the charge was superfluous, inasmuch as it involved the same intention substantially as the first, which intention ought not be applied to support two different charges.⁶

The charge should run thus :—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, committed lurking house-trespass by night [*or house-breaking by night*] by entering into the building belonging to AB, and used as a human dwelling, after the hour of sunset and before the hour of sunrise, in order to the commission of a certain offence punishable with imprisonment, to wit, the offence of—; and that you thereby committed an offence punishable under s. 457 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

Burglary is a serious crime and whenever it is detected the person concerned must be given a deterrent punishment. It is not proper to release the burglars on

²¹ *Harnam*, (1907) P. R. No. 17 of 1907, 6 Cr. L. J. 378.

²² *Subz Ali*, (1876) P. R. No. 2 of 1877; *Bandhu*, (1894) Cr. R. No. 11 of 1894, Unrep. Cr. C. 689.

²³ *Balaram Kundu*, (1924) 25 Cr. L. J. 1186, [1925] AIR (C) 160.

²⁴ *Nirichan*, (1888) 12 Mad. 36.

²⁵ *Mahavir Ajodhya*, (1899) 1 Bom. L. R. 69.

¹ *Makhru Dusadh*, (1926) 5 Pat. 464.

² *Sital*, (1941) 17 Luck. 513.

³ *Natesa Mudaliar*, [1945] Mad. 896.

⁴ *Nga Pan Bee*, (1908) 2 B. L. T. 19; see also *Sheobhajan Ahir*, (1920) 2 P. L. T. 125.

⁵ *Nawab*, (1936) 18 Lah. 62.

⁶ *Khandu*, (1886) Cr. R. No. 50 of 1886, Unrep. Cr. C. 302.

probation of good conduct. Such sentence means no punishment and emboldens persons to commit the crime because they rightly think that they can easily escape.⁷ Where a policeman committed burglary and was sentenced to five months' rigorous imprisonment, it was held that the sentence was not by any means excessive.⁸

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

Whipping.—In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal.⁹

458. Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt¹ to any person, or for assaulting² any person, or for wrongfully restraining³ any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.

COMMENT.

This section is analogous to ss. 452 and 455. It only applies to the house-breaker who actually has himself made preparation for causing hurt to any person, etc., and not to his companions as well who themselves have not made such preparation.¹⁰

1. 'Having made preparation for causing hurt'.—See s. 319, *supra*, as to the definition of 'hurt'.

2. 'Assault'.—See s. 351, *supra*.

3. 'Wrongfully restraining'.—See s. 339, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night,¹¹ or house-breaking by night.¹²

(2) That he did as above after having made preparation for causing hurt, or for assaulting, or for wrongfully restraining some person, or for putting some one in fear of hurt, assault or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 457, *supra*.

Punishment.—As to the Frontier District, see s. 448, *supra*.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt¹ to any person or attempts² to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

⁷ *Sardara*, (1932) 33 P. L. R. 215, 33 Cr. L. J. 500, [1932] AIR (L) 258.

⁸ *Sardara*, (1930) 31 Cr. L. J. 877, [1930] AIR (L) 667.

⁹ *Yella valad Parshia*, (1866) 3 B. H. C. (Cr. C.) 37.

¹⁰ *Ghulam*, (1923) 4 Lah. 399.

¹¹ *Vide* s. 444, *sup.*

¹² *Vide* s. 446, *sup.*

Scope.—This and the section following provide for a compound offence, the governing incident of which is that either a 'lurking house-trespass' or 'house-breaking' must have been completed in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. This section and s. 460 are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking.¹³ The accused one early morning were disturbed by a watchman while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted to make good their escape, one of the accused firing off a pistol and the other two attempting to prevent their apprehension by using their sticks. The first accused was convicted under this section and the two others under s. 460. The former Chief Court of the Punjab quashed the conviction under these sections and recorded them under ss. 452 and 511.¹⁴

This section is applicable not only to the particular burglar who is shown to have caused grievous hurt but to all who have taken part in the burglary.¹⁵

1. '**Grievous hurt**'.—The grievous hurt must be caused, or the attempt must be made, during the time that the house-breaking is being committed, and not after that offence is completed, and the offender has left the premises.¹⁶ The offence of house-breaking is complete when entry into the house is effected and any grievous hurt, subsequently caused by the persons breaking into a house, cannot be said to be grievous hurt caused while they were committing the house-breaking. This section will not, therefore, apply where the causing of grievous hurt succeeds the entry, or indication of such intention; that is to say, it will not apply to a trespass committed by remaining on.¹⁷ When a person commits lurking house-trespass and also inflicts grievous hurt in the courtyard, but it is not clear whether the courtyard is a part of the house into which trespass was committed, the offence established is one under s. 457 and not under this section.¹⁸ For the meaning of the term 'grievous hurt', see s. 320, *supra*.

2. '**Attempt**'.—See s. 511, *infra*.

Premeditation to cause hurt, etc., not essential.—If in the commission of the lurking house-trespass or house-breaking a personal injury of the kind here mentioned is caused or attempted to be caused, it is immaterial that it was without premeditation and sudden.¹⁹

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass,²⁰ or house-breaking.²¹

(2) That he caused grievous hurt, or attempted to cause death or grievous hurt, to some person.

(3) That he did as above whilst engaged in committing lurking house-trespass or house-breaking.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, while committing lurking house-trespass (*or house-breaking*) caused grievous hurt to AB (*or attempted to cause the death of AB or grievous hurt to AB*), and that you thereby committed an offence punishable under s. 459 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—As to the Frontier District, see s. 448, *supra*.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

¹³ *Ismail Khan*, (1886) 8 All. 649.

¹⁴ *Imamuddin*, (1876) P. R. No. 17 of 1876; *Jaffir*, (1881) P. R. No. 2 of 1882.

¹⁵ *Janu*, (1928) 30 P. L. R. 125, 30 Cr. L. J. 838.

¹⁶ *Ismail Khan*, (1886) 8 All. 649.

¹⁷ *Said Ahmad*, (1927) 49 All. 864.

¹⁸ *Enayet Ali*, (1933) 38 C. W. N. 446, 36 Cr. L. J. 619, [1934] AIR (C) 557.

¹⁹ *M. & M.* 407.

²⁰ *Vide* s. 443, *sup.*

²¹ *Vide* s. 445, *sup.*

460. If, at the time of the committing of lurking house-trespass by night or house-breaking by night,¹ any person jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them. guilty of such offence shall voluntarily² cause or attempt³ to cause death⁴ or grievous hurt⁵ to any person, every person jointly concerned in committing such lurking house-trespass by night⁶ or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section deals with the constructive liability of persons jointly concerned in committing lurking house-trespass or house-breaking by night in the course of which death or grievous hurt to any one is caused. It is immaterial who causes the death or grievous hurt. Every person jointly concerned in committing such house-trespass or house-breaking shall be punished in the manner provided in the section.²²

This section when read with ss. 445 and 441 demands that the offence of house-breaking shall have been completed to bring an offender within its terms. The accused must be "guilty of such offence", viz. house-breaking by night. The accused and another person attempted to break into a house by night for the purpose of committing theft, and were interrupted by the inmates, one of whom was killed by one of the accused. There was no evidence to show which of the accused caused the death. It was held that the accused could not be punished with transportation for life as the offence of house-breaking was attempted only and not committed.²³

1. 'At the time of the committing of . . . house-breaking by night'.—This expression "is to some extent vague, but . . . it must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time".²⁴ The accused broke into the house of one T at night with intent to commit theft, being armed with deadly weapons, left the house on an alarm being raised and in the courtyard stabbed R who tried to seize them, injuring him so that he died later on. They were pursued and captured. It was held that as the stabbing was done after the house-breaking was complete this section did not apply, but that the accused were guilty of offences under ss. 457, 458 and 326.²⁵ The accused was one of a party of four men who broke into the house of the complainant by night and, being discovered, were running away when a neighbour caught hold of the accused whereupon some of his companions inflicted injuries upon the neighbour of which he died on the spot. It was held that this section was not applicable as the offence of house-breaking by night had been completed when the neighbour arrived on the scene.¹ A number of persons armed with *lathis* entered a house at dead of night with the primary intention of abducting a woman. While abducting the woman some of them, whose identity was not established, attacked an inmate with *lathi* blows which resulted in his death and also caused grievous hurt to another. Having done this they went away, after scaling the wall of the courtyard of the house. It was held that an offence under this section was committed and a conviction for an offence under s. 302 or 304 (1) was not sustainable.²

A man who, in the commission of lurking house-trespass by night, voluntarily attempted to cause grievous hurt to the owner of the house who tried to capture him, was held punishable under this section and not under ss. 457 and 324.³

2. 'Voluntarily'.—See s. 39, *supra*. 3. 'Attempts'.—See s. 511, *infra*.

4. 'Death'.—See s. 46, *supra*. 5. 'Grievous hurt'.—See s. 320, *supra*.

²² *Chatur*, (1911) 8 A. L. J. R. 574, 12 Cr. L. J. 895.

²³ *Saifuddin*, (1874) P. R. No. 16 of 1874; *Jowala Singh*, (1880) P. R. No. 12 of 1880, explained in *Umar Din*, (1891) P. R. No. 12 of 1891.

²⁴ Per Plowden, J., in *Jaffir*, (1881) P. R.

No. 2 of 1882.

²⁵ *Sed Rasul*, (1916) P. R. No. 27 of 1916 18 Cr. L. J. 350, [1917] AIR (L) 319.

¹ *Muhammad*, (1921) 2 Lah. 342.

² *Mohammada*, (1936) 38 P. L. R. 1150, 38 Cr. L. J. 80, [1936] AIR (L) 911.

³ *Lukhun Doss*, (1865) 2 W. R. (Cr.) 62.

6. 'Every person jointly concerned in committing such lurking house-trespass by night'.—This section applies to those persons who have actually committed lurking house-trespass at night and not to those who may have accompanied their associates but did not commit the offence. It applies to actual doers, and not to others. The act of causing death or grievous hurt by any one of the intruders would certainly make others, who did not themselves cause the death or the grievous hurt, equally liable.⁴

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night;⁵ or house-breaking by night.⁶

(2) That he caused, or attempted to cause, death or grievous hurt.⁷

(3) That he did as above whilst engaged in committing lurking house-trespass by night or house-breaking by night.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, jointly with certain other person, to wit—, committed lurking house-trespass by night [*or house-breaking by night*] by entering into the building belonging to AB, and used as a human dwelling, and that one of the said persons, to wit—, at the time of committing such offence voluntarily caused [*or attempted to cause*] death [*or grievous hurt*] to—, and that you thereby committed an offence punishable under s. 460 of the Indian Penal Code and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Bombay Act LI of 1947 empowers enhanced punishment where an order of restriction or of settlement has been made (s. 19).

461. Whoever dishonestly,¹ or with intent to commit mischief,² breaks open or unfastens any closed receptacle³ which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonestly
breaking open
receptacle containing
property.

COMMENT.

This section and the following section provide for the same offence. As soon as the receptacle is broken open or unfastened the offence is complete.

1. 'Dishonestly'.—See s. 24, *supra*. 2. 'Mischief'.—See s. 425, *supra*.

3. 'Receptacle'.—This may include not only a room, a part of a room or closet, etc., but a box or closed package.⁸ T, being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under s. 457. It was held that he could not properly be convicted under that section, but should have been convicted under this section and s. 378.⁹

PRACTICE.

Evidence.—Prove (1) that the receptacle was closed or fastened.

(2) That it contained property, or that the accused believed that it contained property.

(3) That the accused broke open or unfastened it.

(4) That he did so dishonestly, or with intent to commit mischief.

⁴ *Faiz Bakhsh*, (1946) 48 P. L. R. 425, 48 Cr. L. J. 269.

⁵ *Vide* s. 444.

⁶ *Vide* s. 446.

⁷ See *Fatta*, (1919) 1 L. L. J. 253.

⁸ M. & M. 408.

⁹ *Tasuduk Hossein*, (1874) 6 N. W. P. 301.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the First or Second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, dishonestly [*or with intent to commit mischief*] broke open [*or unfastened*] a certain closed receptacle, to wit—, which contained [*or which you believed to contain*] certain property, to wit—; and that you thereby committed an offence punishable under s. 461 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

462. Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for same offence when committed by person entrusted with custody.

COMMENT.

This section deals with the same offence as is punishable under the preceding section. The punishment under it is higher as there is a breach of trust on the part of the person to whom the receptacle is entrusted.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 461; and

- (5) That the accused was entrusted with such receptacle.
- (6) That he was so entrusted with it, in a closed or unfastened state.
- (7) That he had no authority to open the same.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, being entrusted with a certain closed receptacle, to wit—, which contained [*or which you believed to contain*] certain property, to wit—, on or about the—day of—, at—, dishonestly [*or with intent to commit mischief*] broke open [*or unfastened*] the said receptacle, without having authority to open the same; and thereby committed an offence punishable under s. 462 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

463. Whoever makes any false document or part of a document,¹ with intent to cause damage or injury to the public or to any person,² or to support any claim or title,³ or to cause any person to part with property,⁴ or to enter into any express or implied contract,⁵ or with intent to commit fraud⁶ or that fraud may be committed, commits forgery.

Making a false
document.

464. A person is said to make a false document—

First.—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document,¹ with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed,² or at a time at which he knows that it was not made, signed, sealed or executed;³ or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

ILLUSTRATIONS.

(a) A has a letter of credit upon B for Rs. 10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(b) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B and thereby of obtaining from B the purchase money. A has committed forgery.

(c) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(d) A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

(e) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(f) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order" and signing the endorsement. B dishonestly erases the words "Pay to Z or his order," and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and, by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(k) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

ILLUSTRATIONS.

(a) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c) A picks up a bill of exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable, here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate to Z at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

*Explanation 2.*⁴—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

ILLUSTRATION.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The offence of forgery is defined in ss. 463 and 464 of the Code. Under s. 463 the making of a false document with any of the intents therein mentioned is forgery and s. 464 sets forth when a person is said to make a "false document" within the meaning of the Code.

The definition of forgery in the Code is not as simple and clear as it is in common law. Forgery in England is not defined by statute. It is defined in common law as the fraudulent making or alteration of a writing to the prejudice of another man's right.¹

Section 463. Scope.—Section 463 "contemplates two classes of intents, and it is clear...that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot be supposed that the definition of a false document, [s. 464] which is but a part of the definition of forgery, requires as a condition of criminality an intent different in its quality and its aims from that prescribed by s. 463".²

Ingredients.—The elements of forgery are :—

1. The making of a false document or part of it.
2. Such making should be with intent to
 - (a) cause damage or injury to (i) the public, or (ii) any person ; or
 - (b) support any claim or title ; or
 - (c) cause any person to part with property ; or
 - (d) enter into any express or implied contract ; or
 - (e) commit fraud or that fraud may be committed.

1. 'Whoever makes any false document or part of a document'.—To constitute the offence of forgery the simple making of a 'false document' is sufficient. What amounts to the making of a 'false document' is explained in s. 464. The person who makes a 'false document' commits forgery. A person who is not the writer of a forged document cannot be charged with committing the substantive offence of forgery. If he has caused such a 'false document' to be made he will be guilty of abetment.³ It is not necessary that the document should be published or made in the name of a really existing person.⁴ But "it is essential that the false document, when made, must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity, or in other words must be legally capable of effecting the fraud intended".⁵ A writing, which is not legal evidence of the matter expressed, may yet be a 'document' if the parties framing it believed it to be, and intended it to be, evidence of such matter.⁶ Thus, forging a deed will amount to this offence, although a statute requires the deed in a particular form, or to comply with certain requisities, and the forged deed is not in the form, or does not comply with those requisites.⁷

¹ Blackstone, Vol. IV, p. 245.

² *Abbas Ali*, (1897) 25 Cal. 512, 521, F.B., overruling *Haradhan's* case, (1892) 10 Cal. 380.

³ *Haidar Ali Pradhania*, (1912) 17 C.W. N. 354, 14 Cr. L. J. 129.

⁴ *Vide* Explanation 1.

⁵ 2 Bishop 508 ; *Jawala Ram*, (1895) P. R. No. 12 of 1895.

⁶ *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

⁷ *Lyon's* Case, (1868) Russ. & Ry. 255 ; *Mackintosh's* Case, (1800) 2 Leach 883.

The assertion of a false claim in a document does not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious. A, who was not the son, natural or adopted, of the deceased B, executed a deed of mortgage of certain properties of B in favour of C. In the body of the document A was described as the son of B, though no such description appeared in the signature. A was known to C for a long time, and A had no intention of causing it to be believed that the document was executed by any other person than himself. It was held that A was not guilty of making a 'false document'.⁸

"Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other".⁹ "Every forgery is a counterfeit".¹⁰ But every concoction of a document is not forgery. Supposing A says to B he has got a promissory note from B, and threatens to sue him if he does not pay the money due upon it. B finds that the document in possession of A purports to be a copy of a promissory note by B. If B had never given a promissory note, A cannot be convicted of forgery or of uttering a forged document, but of cheating he may be.

If the false document is incomplete in such a material way as no one will be deceived there will be no conviction for forgery. Where the accused drew a bill upon the treasurer of the navy payable to blank or order, and signed it in the name of a navy surgeon, it was held that forging an instrument payable to blank or order was not sufficient, there must be a payee.¹¹ The instrument should be complete. But if a forged document is not wholly void for want of certain form the maker of it will be guilty of forgery.¹²

2. 'Intent to cause damage or injury to the public or to any person'.—

When a false document is made, with 'intent to cause damage or injury to the public or to any person', it is not sufficient to prove that in making the document the accused knew that the document might injure, but it must be proved that it was his intention that it should injure another.¹³ It is immaterial whether damage, injury or fraud is actually caused or not. It is sufficient that there should be the intention of causing it.¹⁴ The phrase "intend to cause damage or injury" does not govern the other intents mentioned in the section. It is an intent complete in itself. The definition in s. 463 is itself subject to the definition in s. 464 in which the two essential elements are that the act should be done "dishonestly or fraudulently." In other words, whichever of the intents given in s. 463 may be applicable, the act itself must be done dishonestly or fraudulently to sustain a conviction for forgery. The use by the Legislature of words "dishonestly or fraudulently" in the alternative obviously means that they are not tautological but must be given different meanings. The intention to defraud is something other than the intention to cause wrongful gain or loss.¹⁵ If a person in order to make good a false defence and to cause justice to miscarry, fabricates a document, by putting false dates and spurious postmarks on an envelope, he does it with one of the intents referred to in s. 463.¹⁶

The element of injury or risk of injury to an individual or to the public is an essential ingredient in the definition of forgery. Where a Sub-Inspector of Police altered his case-diary as evidence in his favour after the institution of proceedings against him under ss. 380 and 348 of the Code, it was held that his act in altering the diary so as to show that he had not kept certain persons under surveillance did not amount to forgery, inasmuch as there was no risk of loss or injury to any individual and the element of 'fraud' as defined in s. 2 was absent.¹⁷ The mere signing a telegram in another's name, where it is not shown to have been done with intent to injure him and where it does not actually injure him, does not constitute the offence of forgery,

⁸ *Adaikalammai v. Raman*, (1908) 82 Mad. 90.

⁹ Per Bramwell, B., in *Smith*, (1858) 8 Cox. 32, 37.

¹⁰ Per Byles, J., in *ibid.*, p. 37.

¹¹ *Richard's Case*, (1811) Russ. & Ry. 193; *Randall's Case*, (1811) Russ. & Ry. 195; *Pate-man's Case*, (1821) Russ. & Ry. 455; *Butterwick*, (1839) 2 Mood. & Rob. 196.

¹² *Lyon's Case*, (1818) Russ. & Ry. 255.

¹³ *Feda Hossein*, (1881) 10 C. L. R. 184.

¹⁴ *Chunku*, [1930] A. L. J. R. 1451, 32 Cr. L. J. 559, [1931] AIR (A) 258; *Kalyanmal*, [1937] Nag. 45.

¹⁵ *Abdul Hamid*, (1943) 46 P. L. R. 255, 46 Cr. L. J. 341, [1944] AIR (L) 380.

¹⁶ *Ahmad Khan*, (1941) 43 Cr. L. J. 905, [1943] AIR (S) 46.

¹⁷ *Sanjiv Ratnappa*, (1932) 34 Bom. L. R. 1090, 56 Bom. 488.

even though the signature may have been made without the authority of such person.¹⁸ Where in a proceeding in a Court of justice the accused having an access to the record, inserted a document on the record and made interpolations in the list of documents, it was held that he was guilty of forgery under this clause as well as under the clause relating to commission of fraud because there was an intent on the part of the accused to commit a fraud on the Court and to cause damage to the other side.¹⁹

As to the meaning of the word 'injury', see s. 44; of 'public', s. 12; and of 'person', s. 11, *supra*.

The purpose with which a false document may have been prepared is a matter of inference. The inference that the intention was that the false document should be used in a judicial proceeding, even though such a proceeding is not in fact instituted is a reasonable one.²⁰

3. 'Support any claim or title'.—"There is no warrant for saying that in order to constitute forgery the document must be intended to support a false claim, or a false title. If in order to support a true claim or a genuine title a false document is created, it is a forgery...Whether a document is a false document or not does not depend upon the adjudication of the Court on the claim or title which is intended to be propped up by the false document."²¹ Even if a man has a legal claim or title to property, he is guilty of forgery if he counterfeits documents in order to support it.²² Any false document purporting to create, extend, transfer or otherwise to support a right or alleged right is included. See illustrations (f), (g), (h) and (i). An actual intention to convert an illegal or doubtful claim into an apparently legal one makes an action dishonest.²³

The term 'claim' is not limited in its application to a claim to property. It "may be a claim to anything, as, for instance, a claim to a woman as the claimant's wife, a claim to the custody of a child as being the claimant's child, or a claim to be admitted to attendance at a law class in a college, or to be admitted to a university or other examination, or a claim to the possession of immoveable or any other kind of property".²⁴

4. 'To cause any person to part with property'.—"It is not...necessary to constitute a forgery under s. 463 that the 'property' with which it is intended that the false document shall cause a person to part, should be in existence at the time when the false document was made. For example, if A gave an order to B to buy the material for making and to make a silver tea service for him, and C, before the tea service was made or the materials for making it had been bought, were to make a false letter purporting, but falsely, to be signed by A, authorising B to deliver to D the tea service when made, C would have committed forgery within the meaning of s. 463 by making that false document with intent to cause B to part with property, namely, the tea service, when made".²⁵ A written certificate has been held to be 'property' within the meaning of this section.¹

5. 'To enter into any express or implied contract'.—The false document under this clause must be to enable the person making it to enter into any express or implied contract. Creating of contractual rights by a false document is covered by this clause.

6. 'Intent to commit fraud'.—Dishonesty or fraud is a necessary ingredient of this offence.² "The offence [of forgery] is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in s. 463."³

¹⁸ *Kali Prasad Banerjee*, (1914) 16 Cr. L. J. 76, [1915] AIR (C) 786 (2).

¹⁹ *Mahesh Chandra Prasad*, (1948) 22 Pat. 292.

²⁰ *Ahmed Ali*, (1925) 42 C. L. J. 215, 26 Cr. L. J. 1574, [1926] AIR (C) 224.

²¹ Per Devadoss, J., in *Sivananda Mudali*, (1925) 27 Cr. L. J. 994, 995, [1926] AIR (M) 1072.

²² *Dhunun Kasee*, (1882) 9 Cal. 53.

²³ *Kalyanmal*, [1937] Nag. 45.

²⁴ Per Edge, C. J., in *Soshi Bhushan*, (1893)

15 All. 210, 217; *Kotamraju Venkatrayadu*, (1905) 28 Mad. 90, 98, F.B.; *Khandusingh*, (1896) 22 Bom. 768; *Chanon Singh*, (1928) 10 Lah. 545.

²⁵ Per Edge, C. J., in *Soshi Bhushan*, (1893) 15 All. 210, 218.

¹ *Ibid*.

² *Sudarsan Behra*, (1926) 8 P. L. T. 104, 27 Cr. L. J. 1263, [1927] AIR (P) 87.

³ Per Sir Arnold White, C. J., in *Kotamraju Venkatrayadu*, (1905) 28 Mad. 90, 95, F.B.

"By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the others is immaterial".⁴ It has been held in a Bombay case that the term 'fraud' is used in this section in its ordinary and popular acceptation.⁵ Stephen⁶ says: "... whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end... A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud". "It must be remembered that the loss contemplated by law is not confined to a deprivation of property and that the word would cover the infringement of any right possessed by a person".⁷ "Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is a fraud, and if a document is fabricated with such intent, it is a forgery".⁸ The majority of the Judges of the Madras High Court in a full bench case⁹ seem to be of opinion that an intention to secure a benefit or advantage to the party deceiving by means of the deceit constitutes an intention to defraud. Sir Arnold White, C. J., while observing that it was not necessary to decide this point, said "that either an intention to secure a benefit or advantage on the one hand, or cause loss or detriment on the other, by means of deceit, is an intent to defraud". He also observed: "Intending to defraud means, of course, something more than deceiving. A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But, as it seems to me, if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B". The object for which the deceit is practised has to be considered. The advantage intended to be secured or the harm intended to be caused need not have relation to property or be such as is implied in the term 'dishonestly' but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably. Where the accused altered a document without the authority of the executant after its execution, and it was proved that the alteration was made to prevent other people from setting up a claim to property which was admittedly in the possession of the accused, the object could not be said to be dishonest and the man was not guilty of forgery.¹⁰

The expression "intend to defraud" involves an intent to cause injury. It involves something more than mere deceiving.¹¹ It implies conduct coupled with intention to deceive and thereby to injure; in other words, "defraud" involves two conceptions, namely, deceit and injury to the person deceived; that is, infringement of some legal right possessed by him, but not necessarily deprivation of property.¹² The addition of a name to the list of attesting witnesses of an instrument which need not in law be attested¹³ or the forging of names of certain persons or notices which the accused, a process server, had to serve, with a view to save himself trouble or possibly

⁴ Per Le Blanc, J., in *Haycraft v. Crazy*, (1801) 2 East 92, 108, followed with approval in *Vithal Narayan*, (1886) 13 Bom. 515n., 517, which is followed in *Lalit Mohan Sarkar*, (1894) 22 Cal. 318.

⁵ *Balkrishna Waman*, (1913) 37 Bom. 666, 15 Bom. L. R. 708.

⁶ *History of Criminal Law*, Vol. II, p. 121. This extract is quoted with approval in several Indian cases.

⁷ *Robinson*, (1921) 22 Cr. L. J. 681, 682.

⁸ Per Bannerji, J., in *Muhammad Saeed Khan*, (1898) 21 All. 113, 115.

⁹ *Kotamraju Venkatrayadu*, (1905) 28 Mad. 90, 96, 97, F.B. The majority of the Court have expressed their non-concurrence with the case of *C. Srinivasan*, (1902) 25 Mad. 726.

¹⁰ *Manicka Asari*, [1915] M. W. N. 278, 16 Cr. L. J. 246.

¹¹ *Nga Tun Sein*, (1935) 30 Cr. L. J. 1025, [1935] AIR (R) 203.

¹² *Surendra Nath Ghose*, (1910) 38 Cal. 75; *Ahmed Ali*, (1925) 42 C. L. J. 215, 26 Cr. L. J. 1754, [1926] AIR (C) 224; *Ram Chand Gurdala*, (1926) 27 Cr. L. J. 1383.

¹³ *Surendra Nath Ghose*, *ibid*.

to hide the fact that he had neglected his duty,¹⁴ does not amount to making a false document.

From the intention that the false document should deceive others into a belief that it is genuine it may generally be inferred that there was an intention to damage or injure.¹⁵ An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim.¹⁶

Deprivation of property, actual or intended, does not constitute an essential element of an intention to defraud.¹⁷ It is immaterial that the deception does not succeed, or that if it had succeeded it could not have exposed the accused to an action for damages.¹⁸

Intent to defraud any particular person not necessary.—A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction; and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one meaning it to be taken as such, and knowing it to be forged.¹⁹ It is not required, in order to constitute in point of law an intent to defraud, that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequence of the act would necessarily or possibly be to defraud any person; but there must, at all events, be a possibility of some person being defrauded by the forgery.²⁰ It is not necessary that there should have been some person defrauded. "A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque either to try his credit, or to imitate his handwriting, there would be no *intent* to defraud, though there would be parties who might be defrauded; but where another person has no account at his bankers, but a man *supposes* that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded."²¹

Cases.—Intent to defraud.—If a person have the authority of another to write the name of that other to an acceptance, it is no forgery; neither is it if he had no such authority, provided that he had fair ground for considering that he had such authority, and did so consider, and wrote the acceptance, not meaning to defraud or injure any one.²² Even if there is no previous authority of the person whose name is put on a bill of exchange, still if that person has been informed of it at the time and he does not repudiate it, it does not amount to forgery.²³ But if A puts the name of B on a bill of exchange as acceptor without B's authority, expecting to be able to meet it when due, or expecting that B will overlook it, this is forgery.²⁴ Similarly, if a person having the blank acceptance of another, be authorised to write on a bill of exchange for a certain limited amount, and he writes on it a bill of exchange for a larger amount with intent to defraud either the acceptor or any other person, this is forgery.²⁵ A forged cheque on the W bank was presented for payment at the S Bank, where the supposed drawer never kept cash. It was held that this was sufficient evidence of an intent to defraud the partners of the S Bank, although there was no probability of their paying the cheque, even if it had been genuine.¹

In a case of forgery, the fact that the accused had given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, was held not to negative an intent to defraud.² If a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged

¹⁴ *Nga Tun Sein*, (1935) 36 Cr. L. J. 1025, [1935] AIR (R) 203.

¹⁵ *M. & M.* 416.

¹⁶ *Samuel Hopley*, (1915) 11 Cr. App. R. 248.

¹⁷ *Abbas Ali*, (1897) 25 Cal. 512, F.B.; *Kotam-
raju Venkatrayadu*, (1905) 28 Mad. 90, F.B.

¹⁸ *Mahesh Chandra Prasad*, (1943) 22 Pat. 292.

¹⁹ *Dhnum Kazee*, (1882) 9 Cal. 58.

²⁰ *Marcus*, (1846) 2 C. & K. 356; *Trenfield*, (1858) 1 F. & F. 43; *Mazagora's Case*, (1815)

Russ. & Ry. 291.

²¹ Per Maule, J., in *Nash's Case*, (1852) 2 Den. Cr. C. 493, 499, 21 L. J. (M. C.) N. S. 147.

²² *Parish*, (1837) 8 C. & P. 94.

²³ *Smith*, (1862) 3 F. & F. 504.

²⁴ *Forbes*, (1835) 7 C. & P. 224.

²⁵ *Hart*, (1836) 7 C. & P. 652, (1837) 1 Mood. 486.

¹ *Crowther*, (1832) 5 C. & P. 316.

² *James*, (1836) 7 C. & P. 558.

bill, and may suppose that the party whose name is forged will be no loser, and the fact that the bill has been since paid by the accused will make no difference, if the offence has once been complete at the time of the uttering.³ The accused was convicted on an indictment at common law for forging and uttering a diploma of the College of Surgeons. The jury found that the accused forged the document with the general intent to induce the belief that it was genuine and that he was a member of the College; and he showed it to certain persons with intent to induce such belief in them; but that he had no intent in forging or in uttering to commit any particular fraud or specific wrong to any individual. It was held that the conviction was wrong as it was not proved that the act was done with intent to defraud.⁴ Where the husband of a woman who had given him general permission to file papers in Court on her behalf, forged her signature in a plaint to save the suit from becoming barred by limitation and filed it in Court on the last day of limitation, it was held that the husband was not guilty of forgery as there was no intention to defraud anybody, though his act was an improper one.⁵ In this case the wife whose signature was fabricated had authorised her husband to do such acts on her behalf. Where the accused fraudulently brought into existence a registered sale deed, said to have been executed by the widow of B, intending to deceive and also to injure the reversioners of B, it was held that their convictions under s. 467, as also under s. 82, Registration Act, must be maintained.⁶ Where it was the duty of a school teacher to enter in the diary the work done by him each day in accordance with a circular issued by the School Board and he altered the dates in the diary, with a view to disguising the fact that on certain dates the diary had not been kept and thus escaping the penalty which was in the form of loss of pay, it was held that there was, if not actual dishonesty, such an intention on the part of the teacher to obtain an advantage to himself and a corresponding disadvantage to the School Board, as would constitute fraud and that he was guilty of an offence under this section.⁷

The accused executed a sale-deed in respect of his entire property in favour of his wife, but did not register it. He then executed a mortgage of the same property in favour of one F. Before the mortgage transaction was completed, F had made all necessary inquiry in the Registration Department as to any prior incumbrance. The accused then put in the sale-deed in favour of his wife for registration and soon after the mortgage-deed was also registered. When the matter came to light, F charged the accused with cheating. During the trial it was found that the mortgage-deed bore an endorsement of payment although there was no such endorsement on the date when it was filed in Court. It was held that the accused was guilty of fabricating false evidence as well as of forgery.⁸

Copy.—The offence of forgery may be committed by a person who fabricates a false document purporting to be a copy of another document for the purpose of the same being used in evidence. The accused, in a suit for possession of land, to support his pedigree, put in a deed of dower, and a deed of security purporting to be copies of the original documents filed in a previous suit, but it was found that both the copies contained two more names of witnesses than the original. It was held that the accused had committed forgery.⁹ Similarly, a person was convicted of using as genuine a document which he knew to be forged, though he, in the first instance, produced only a copy of a copy of it.¹⁰ It has been held that a copy of a false document is not a false document within the meaning of this section.¹¹ The making of a copy of a forgery does not constitute forgery unless the maker of the copy was authorised to make the copy.¹²

The accused was convicted of forgery on the ground that he sent an imperfect copy of his diary to the Superintendent of Police. The High Court reversed the conviction on the ground that the two lines not embodied in the copy sent were evidently interpolations in the original diary, subsequently struck through with the pen; and that no forgery could be established unless it was proved that those interpolations were extant in the diary and had not been struck through at the time the copy was made.¹³

³ *Geach*, (1840) 9 C. & P. 409.

⁴ *Hodgson's Case*, (1856) Dears. & Bell. 3.

⁵ *Apariti Charan Ray*, (1929) 31 Cr. L. J. 1126.

⁶ *Ganga Dibya*, (1942) 22 Pat. 95.

⁷ *Mg. Ko Gyi*, (1936) 37 Cr. L. J. 1059.

⁸ *Abdul Rashid Khan*, (1913) 12 A. L. J. R. 104, 15 Cr. L. J. 221.

⁹ *Essan Chunder Dutt v. Baboo Prannauth*

Chowdhry, (1863) W. R. (F. B.) 71, Marsh. 270.

¹⁰ *Nujum Ali*, (1886) 6 W. R. (Cr.) 41. See

Naro Gopal, (1868) 5 B. H. C. (Cr. C.) 56.

¹¹ *Gopalkrishna Heggade*, (1910) 20 M. L. J. 534, 11 Cr. L. J. 401.

¹² *Lachman Lal*, (1918) 4 P. L. J. 16, 20 Cr. L. J. 142.

¹³ *Shiddungowda*, (1868) Unrep. Cr. C. 12.

Section 464, clause 1.—The first clause says that a person makes a false document if he

(1) dishonestly or fraudulently makes, signs, seals or executes a document, or part of a document, or makes any mark denoting the execution of a document; or

(2) does as above with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed

(a) by or by the authority of a person by whom or by whose authority it was not so made, signed or executed, or

(b) at a time at which he knows that it was not made, signed, sealed or executed.

1. 'Dishonestly or fraudulently makes, signs, seals or executes a document, etc.'—There is an obvious difference between "dishonestly" and "fraudulently". "In order to do a thing dishonestly there must be the intention to cause wrongful loss or wrongful gain of property, but in order to do a thing fraudulently it is not necessary that there should be the intention to cause wrongful loss or wrongful gain of property. The Legislature advisedly uses the terms 'dishonestly' and 'fraudulently'...[they are] used to denote two different things...The intention to defraud need not necessarily be to obtain something to which a person is not legally or equitably entitled. It is sufficient if by means of the perpetration of the fraud somebody is defrauded...in order to do a thing fraudulently it is not necessary that the person doing it should intend, or the doing of it should have the necessary consequence of, causing wrongful loss to any person. It is sufficient if the doing of it is intended to defraud some one without ultimately acquiring unlawful gain or causing wrongful loss".¹⁴ A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise (s. 25). This "word is used in ss. 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part".¹⁵ "Those decisions...which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word 'fraudulently' as used in the Code".¹⁶ The Patna High Court has held that it is not necessary for a thing to be done 'dishonestly' that there should be an intention to cause both wrongful gain and wrongful loss. Except so far as loss or detriment is almost necessarily involved when an advantage is obtained, any intention of causing loss is a matter of remote inference.¹⁷

The making of a document untrue in certain particulars for the mere purpose of deceiving, does not amount to making a false document. It must be shown that it was made with such an intention as is implied in the term 'fraudulently' or in the term 'dishonestly'.¹⁸ A person cannot be convicted of fabricating a false document where his object in antedating a deed is simply to clear up matters and not fraudulent and no wrongful loss or wrongful gain is caused to any person thereby.¹⁹ Where a hand-note bearing a certain date bore the genuine thumb impression of the executant, but it was found in fact to have been executed subsequently, and there was absence of evidence that the antedating by the creditor was done with the object of making any wrongful gain to himself or causing wrongful loss to the executant, it was held that the necessary element of fraud or dishonesty was wanting in the case and that therefore the offence of forgery had not been committed.²⁰

¹⁴ Per Devadoss, J., in *Sivamanda Mudali*, (1925) 27 Cr. L. J. 994, 996, 999, [1926] AIR (M) 1072; *Abdul Hamid*, (1943) 46 P. L. R. 255, 46 Cr. L. J. 341, [1944] A. I. R. (L) 380.

¹⁵ *Abbas Ali*, (1896) 25 Cal. 512, 521, F.B., overruling *Haradhan*, (1892) 19 Cal. 380, which is followed in *Bala*, (1892) Unrep. Cr. C. 627.

¹⁶ Per Benson, J., in *Kotamraju Venkat-rayadu*, (1905) 28 Mad. 90, 113, F.B., contra,

Subrahmanya Ayyar, J., in *ibid.*, p. 103.

¹⁷ *Baijnath Bhagat*, (1940) 21 P. L. T. 206, [1940] P. W. N. 474, 41 Cr. L. J. 427, [1940] AIR (P) 486.

¹⁸ *Gudappa*, (1879) 1 Weir 542.

¹⁹ *Sudarsan Behra*, (1926) 8 P. L. T. 104, 27 Cr. L. J. 1263, [1927] AIR (P) 87.

²⁰ *Gobind Singh*, (1926) 5 Pat. 573.

"To execute false valuable securities in order to render inoperative genuine valuable securities, is an act which is, . . . an act done with a fraudulent intent. It does not . . . cease to be fraudulent merely because the genuine document may by a distinct act of fraud be withheld from the rightful owner. The true description of such a transaction is that fraud is committed in order to counteract fraud, a description which is of no avail to the person by whom the false documents are made".²¹

'Fraudulently': 'intent to commit fraud, etc'.— "Possibly a distinction may be drawn between doing a thing 'with intent . . . that fraud may be committed' (s. 463) and doing a thing 'fraudulently' (s. 464). Such a distinction seems to be recognised in s. 239 of the Code. But to my mind no distinction can be drawn between doing a thing 'with intent to commit a fraud' (s. 463) and doing a thing 'fraudulently' (s. 464). Although the words 'with intent to commit a fraud' are not expressly defined, I think they mean the same thing as 'fraudulently', that is to say, 'with intent to defraud'. It follows that if it is established that a person does a thing 'with intent to commit a fraud' he does it with one of the intents specified in s. 463, and he also does it 'fraudulently' within the meaning of s. 464. It also follows, as it seems to me, that the offence is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in s. 463".²²

The Patna High Court has held that the word 'fraudulently' is equivalent to 'intent to defraud'. In order to convict a person of an attempt to defraud, it is not necessary that any person should be in a situation to be defrauded. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by the act. Deprivation, actual or intended, is not a necessary ingredient of 'intent to defraud' referentially imported into s. 464 and s. 471.²³

'Makes'.—The simple making of a false document constitutes forgery.²⁴ "The 'making' of a document, or part of a document, does not mean 'writing' or 'printing' it, but signing or otherwise executing it; as in legal phrase we speak of 'making an indenture' or 'making a promissory note', by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. The fact that the word 'makes' is used in the section in conjunction with the words 'signs', 'seals', or 'executes' or 'makes any mark', 'denoting the execution, &c.' seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it".²⁵ Stokes¹ in reference to this case says: "Why then were 'makes' and 'made' used as well as 'signs', 'executes', 'signed', 'executed'?" In an English case it has also been held that the taking of a positive impression on glass by photography is a making although such impression is evanescent, and cannot be printed or engraved from until it has been converted into a negative.² The Bombay High Court has distinguished this case in a case in which the accused counterfeited marks on a tree, and it was held that this amounted to making a false document.³ The Lahore High Court taking the same view has held that the word 'makes' does not mean anything other than makes, that is to say, creates or brings into existence. Where a document purporting to be a will was never completed and remained ineffective for want of dates, it was held that it was "made" within the meaning of s. 464.⁴

Making a false document does not consist in writing without doing anything towards its execution.⁵

The meaning given to the word 'making' in English law is very wide.

²¹ Per Plowden, J., in *Fakir Muhammad*, (1884) P. R. No. 4 of 1885, at p. 9.

²² Per Arnold White, C. J., in *Kotamraju Venkatrayadu*, (1905) 28 Mad. 90, 95, F.B.

²³ *Baijnath Bhagat*, (1940) 21 P. L. T. 206, [1940] P. W. N. 474, 41 Cr. L. J. 427, [1940] AIR (P) 486.

²⁴ *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

²⁵ Per Garth, C.J., in *Riasat Ali*, (1881) 7 Cal. 352, 355.

¹ Anglo-Indian Codes, Vol. I, p. 260.

² *Rinaldi's Case*, (1863) L. & C. 380.

³ *Krishappa Khandappa*, (1925) 27 Bom. L. R. 599, 26 Cr. L. J. 1014, [1925] AIR (B) 827.

⁴ *Chatru Malik*, (1928) 10 Lah. 265.

⁵ *Lim Hoe*, (1894) 1 U. B. R. (1892-1896) 279.

In England it has been held that it is forgery to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.⁶ The antedating of a document is not forgery, unless it has or could have operated to the prejudice of anyone.⁷

'Signs, seals or executes'.—Signing or sealing a document completes its execution. Putting a seal to a genuine signature to a document which is invalid without a seal is a forgery.⁸ This offence may be complete though no use whatever has been made or attempted to be made of the document.⁹

Forgery at common law must be of some writing or document, and, therefore, the putting the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, is not a forgery at common law, but is cheating.¹⁰ Under the Code this will amount to forgery.

2. 'With the intention of causing it to be believed that such document. . . was made. . . by the authority of a person by whom or by whose authority he knows that it was not made. . . , etc.'—The making of a false document should be for one of the two purposes specified in this clause. The document should not have been made, etc., by the authority of the person by whom it is alleged to have been made or if it is made by his authority then it must not be at a time at which it is alleged that it was made, signed, etc.

3. 'At a time at which he knows that it was not made, signed, sealed or executed'—These words are to be read distributively and are not governed by the preceding words 'by or by the authority, etc.'¹¹ To execute, with fraudulent intent, a document purporting to have been executed on a date other than the one on which it was actually executed, is a forgery.¹² Antedating a document to save an appeal constitutes forgery.¹³ It is forgery to make a deed fraudulently with a false date when the date is a material part of the deed, although the deed is in fact made and executed by and between the person by and between whom it purports to be made and executed.¹⁴

Cases.—Clause 1.—False document must have been actually made.—Where a person gave orders for the printing of certain receipt forms similar to those used by a certain company, and corrected the proof of the same, it being his intention to use the receipt forms in order to commit a fraud, it was held that he could not be convicted of forgery until one of the printed forms had been converted by him into a false document, nor of an attempt to commit forgery until he had done some act towards making one of the forms a false document; until a form had been converted into a document, all that was done consisted in the mere preparation for the commission of an offence.¹⁵ But this case has not been followed by the Allahabad High Court in *MacCrea's case*,¹⁶ the charge in which was approved by the Privy Council.¹⁷

The mere fact that a document bearing a certain date was written on paper bearing an embossed stamp with a figure denoting a later date was held not sufficient to support a charge of forgery in the absence of evidence that the paper could not have been manufactured at the date the document bore.¹⁸

The accused went to the market and after making some purchases tendered a cheque to the shopkeeper who called a *poddar* who cashed it for a small commission. On being presented the cheque was dishonoured by the bank. The accused was tried in the High Court Sessions on charges of forgery and cheating and convicted. It appeared that the brother of the accused, G. R. Martindale, had an account with the bank and the signature on the cheque was only Martindale. The evidence was that he made an alteration in the date on the cheque in the presence of the shopkeeper and the *poddar* as though he were the drawer but made no representation about G. R. Martindale. It was held that inasmuch as the accused had no intention of inducing

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¹⁰ *Closs*, (1857) 7 Cox 494.

¹¹ *Ganesh Bhikaji*, (1895) Cr. R. No. 36 of 1895, Unrep. Cr. C. 772.

¹² *Rangaswami Chettyar v. Maung Po Ku*, (1927) 6 Ran. 49.

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in the minds of the shopkeeper and the *poddar* the belief that the cheque had been signed by his brother and had no such intention in regard to the bank, the cheque in question was not a false document and consequently the charge of forgery failed; that in the circumstances of the case there was dishonest concealment of facts on the part of the accused and he was guilty of cheating.¹⁹

Where the accused counterfeited letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of making a false document.²⁰

Entries.—The accused made certain entries in his ledger which consisted of rough loose sheets, showing that certain sums of money had been paid to the prosecutor, which, in fact, had not been paid. It was held that he was guilty of forgery.²¹

A beat constable who wrote in his note-book the signature of a headman whose village he had not visited was held thereby not to have committed this offence.²² The accused who supervised labourers employed in repairing a public road made entries of payment in muster-rolls in excess of the actual payments, it was held that he was not guilty of forgery.²³ Where the accused was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry as requested, he entered in a language not known to the complainant that the sum had been paid to the complainant, it was held that he had committed not forgery but an attempt to cheat.²⁴ The accused sold for Rs. 40 a bullock to the complainant who paid him one rupee as earnest money and promised to pay the balance at a certain time. An entry to this effect was made in the accused's account book and was thumb-marked by the complainant. Subsequently, a clause was added by the accused on the credit side of the account book without the sanction of the complainant which said that if the amount was not paid as agreed upon, the creditor would take one and a half times the principal, including interest. It was held that no false document had been made by the accused within the meaning of s. 464.²⁵

The accused transferred the whole of his property in favour of his wife but before registering the sale-deed mortgaged the property to F. The sale-deed was, however, registered after the mortgagee had made all necessary inquiry at the Registration Office. After the registration of the sale-deed the mortgage-deed was also registered. The accused was charged for cheating the mortgagee. It appeared during the trial that the mortgage-deed, filed by the complainant, bore on it an endorsement of the return of the consideration although there was no such endorsement on it when it was filed in Court. The accused was thereupon further charged for fabricating false evidence and forgery. It was held that the accused was guilty of fabricating false evidence and cheating, as he must be presumed to know the probable result of his action and it obviously could not have been absent from his mind when he forged the endorsement that he was thereby attempting to defraud the mortgagee of his money.¹

The accused made unauthorised entries in books showing certain donees of land as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors. The deeds of gifts made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not and *prima facie* the new entries made by the accused were correct. It was held that as it could not be said that the accused (who acted apparently bona fide) made the entries with intent to defraud, or dishonestly, he did not make a false document.²

Unauthorised signature.—A petition praying that a fishery lease might be transferred from A to B, and purporting to be signed by A and B, was presented to the Deputy Commissioner by A. B was not present but his son was, and admitted

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²³ *Ram Ghulam Singh*, [1929] A. L. J. R. 592, 30 Cr. L. J. 408, [1929] AIR (A) 396.

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In England it has been held that it is forgery to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.⁶ The antedating of a document is not forgery, unless it has or could have operated to the prejudice of anyone.⁷

'Signs, seals or executes'.—Signing or sealing a document completes its execution. Putting a seal to a genuine signature to a document which is invalid without a seal is a forgery.⁸ This offence may be complete though no use whatever has been made or attempted to be made of the document.⁹

Forgery at common law must be of some writing or document, and, therefore, the putting the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, is not a forgery at common law, but is cheating.¹⁰ Under the Code this will amount to forgery.

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having signed his father's name. He was subsequently prosecuted, although no attempt was made to show that he had acted fraudulently and without his father's authority, and was convicted of fabricating false evidence. It was held that the conviction was bad because the writing of B's name by his son did not constitute a false entry and there was no intention that it should appear in evidence in any proceeding.³ Accused, a clerk of one S, filed a plaint on behalf of S, and verified it in the words "*S. ba kalam khas*". S accepted the plaint, gave evidence in support of it and obtained a decree on its basis. During the suit accused admitted that the plaint had been verified by him, but that he had authority from S. S did not deny this. It was held that the accused was not guilty of forgery inasmuch as he did not make the signature of S on the plaint dishonestly or fraudulently.⁴ A, who was not the son, natural or adopted, of the deceased B, executed a deed of mortgage of certain properties of B in favour of C. In the body of the document A was described as the son of B, though no such description appeared in the signature. A was known to C for a long time, and A had no intention of causing it to be believed that the document was executed by any other person than himself. It was held that A was not guilty of making a false document within the meaning of s. 464. The assertion of a false claim in a document will not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious.⁵

False attestation.—If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all, he is guilty of forgery just as well as the scribe.⁶

Personation at examination.—A falsely represented himself to be B at a University examination, got a hall ticket in B's name, and headed and signed answer papers to questions with B's name. It was held that A had committed the offence of forgery and cheating by personation.⁷

Vakalatnamah.—The signing of a vakalatnamah in the name of co-decreeholders without their authority to do so, and delivering it to a Vakil with instructions to file a petition, stating that the debt had been satisfied, and praying that the case may be struck off the file, is held to be a forgery.⁸

Voting paper.—Where a person obtains a voting paper by putting a thumb impression in the name of another and passes it on in that name he commits forgery.⁹

Signing petition in another's name.—Where A signed B's name to a petition presented by C to a Mamlatadar, requesting his summary assistance under Bombay Regulation XVII of 1827, for recovery of rents from B's tenants, it was held that even if A had no authority from B to sign his name, and even if A wished to deceive the Mamlatdar into the belief that it was B himself who had signed the petition, still if there had been no intention to defraud anybody, or if no wrongful gain or wrongful loss could have been caused to A or B, A's act did not constitute forgery. Avoidance of litigation is no wrongful loss to Government.¹⁰

Fabricating letter or certificate for service.—The accused, who was a copyist in the Sub-divisional Office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and purporting to have been made by the Sub-divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicions as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the post-

³ *Po Shin*, (1906) 4 L. B. R. 45, 6 Cr. L. J. 283.

⁴ *Ram Sarup*, (1917) 19 Cr. L. J. 236, [1918] AIR (P) 640.

⁵ *Adaikalammai v. Raman*, (1908) 32 Mad. 90.

⁶ *Ambar Ali*, (1929) 31 Cr. L. J. 564, [1929]

AIR (C) 539.

⁷ *Appasami*, (1889) 12 Mad. 151; *Ashwani Kumar Gupta*, [1937] 1 Cal. 71.

⁸ *Gyanee Ram*, (1866) 6 W. R. (Cr.) 78.

⁹ *Ram Nath*, (1924) 47 All. 268.

¹⁰ *Bhavanishankar*, (1874) 11 B. H. C. 3.

master asking him to stop the despatch of the demi-official letter. It was held that the accused had committed forgery with regard to the first two documents but with regard to the third, it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of s. 464.¹¹ The accused applied to the Superintendent of Police at Poona for employment in the Police force. In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate. It was held that the accused was guilty of offences under ss. 463 and 471.¹² Where a private candidate for the Matriculation examination of the University of Madras, for the purpose of being admitted to the examination, forwarded to the Registrar of the University, as required by by-laws, a certificate that he was of good character and that he had completed his twentieth year which purported to be signed by the Head Master of a recognised school but was in fact not signed by him, but was signed by the candidate in his own writing, it was held that the certificate was a forged document within the meaning of ss. 467 and 464.¹³ A submitted to the proper authority an application for an appointment in the Land Records Department. This application contained false statements and to it was attached a forged certificate. It was held that A had attempted to obtain wrongful gain and that he had acted 'dishonestly'.¹⁴

English case.—The Corporation of the Trinity House were in the habit of examining persons voluntarily submitting to an examination, touching their nautical skill, and granting them certificates to act as masters. In order to enable persons to be examined and procure such certificates, it was necessary to produce to the examiners certificates of service, sobriety, and good conduct at sea, for not less than six years. The accused forged certificates for the purpose of inducing the examiners to pass him. It was held that he had committed forgery.¹⁵

Fabricating false kabin-nama.—Where a Mahomedan with the intention of making a claim to a woman's property alleged marriage with her and to support his claim executed a false kabin-nama in her favour, it was held that the document was not a false document.¹⁶

Fabricating receipt for debt written off as irrecoverable.—The accused, in order that he might obtain the annulment of an order adjudicating him an insolvent, and thereafter that he might be in a position to tender for municipal contracts, produced before the receiver in insolvency a document which purported to be a receipt from a creditor for payment of debt which the creditor had in fact written off as irrecoverable. It was held that in respect of the use of this receipt the accused was guilty under this section read with s. 471.¹⁷

Giving false name and address.—A person lawfully entitled to possess arms and ammunitions signed the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby deceived the gunsmith and the Government and defeated the object of the certificate. It was held that he was guilty of forgery. The act of the accused was not 'dishonest' but he acted 'fraudulently'.¹⁸

Fabricating order purporting to have issued from superior to subordinate officer.—One Piari, the wife of Amir, left her husband's house. Amir put in a petition at the police-station asking that a search might be made for the missing woman, and he also employed a pleader, one Ali Zohad, to assist him, in discovering the whereabouts of Piari. Ali Hassan, the son of Ali Zohad, and a clerk employed in the office of the District Superintendent of Police, forged two orders purporting to be orders of the District Superintendent of Police, the first intimating that the woman Piari was with one Sibni, the wife of Ghisu, weaver, and that the Sub-Inspector should be directed to hand her over to the petitioner (Amir), and the second directing the Sub-

¹¹ *Abdul Hamid*, (1886) 13 Cal. 349. A part of this decision is doubted in *Rash Behari Das*, (1908) 35 Cal. 450; *Abdul Razak*, (1894) P. R. No. 2 of 1895. See *Fazal Din*, (1906) P. R. No. 1 of 1907, where on similar facts the offence committed was held to be attempt to cheat.

¹² *Khandus Singh*, (1896) 22 Bom. 768; *Moah's Case*, (1858) Dears. & Bel. 550.

¹³ *Kotamraju Venkatrayadu*, (1905) 28 Mad.

90, F.B.; *Chanan Singh*, (1928) 10 Lah. 455.

¹⁴ *Nga Ba Thein*, (1922) 4 U. B. R. 174, 25 Cr. L. J. 129.

¹⁵ *Toshack*, (1849) 4 Cox 38.

¹⁶ *Gunjar Mohammad v. Shuruz Ali*, (1922) 23 Cr. L. J. 723.

¹⁷ *Abdul Ghafur*, (1920) 43 All. 225.

¹⁸ *Causley*, (1915) 48 Cal. 421.

Inspector of Kydganj to hand the woman over to the petitioner. It was held that in fabricating these two documents Ali Hassan had acted fraudulently and had committed forgery.¹⁹

Where a police constable's character and service roll in his custody was found to have been tampered with in this way, that a page, apparently containing unfavourable remarks to the constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of police, had been inserted in its place, the intent being to favour the chances of his promotion; it was held that this interpolation amounted to forgery, but that, inasmuch as it was not proved that the constable himself prepared and inserted the false page, he was guilty of abetment only.²⁰

But a person consenting to act under a *mookhteearnamah* (power-of-attorney) and attaching his name in token of such consent, does not become a maker of the *mookhteearnamah* or a forger if it turns out to be forged.²¹

Second clause.—This clause requires dishonest or fraudulent concellation or alteration of a document in any material part without lawful authority after it has been made or executed by a person who may be living or dead.

The alteration must be in a material part of the document. Thus the interpolation of the name of a person as an attesting witness to a document not required by law to be attested subsequent to its execution and registration is not an alteration of the document in a material part.²²

Where the date in a bond was altered, even though the alteration was not required to bring the claim within limitation;²³ where the dates in a certified copy of a decree were altered in order to bring it within time for execution and this was done on an erroneous impression that the decree was time-barred,²⁴ and where a document was deliberately tampered with to support a just claim in Court and to counteract a fraud perpetrated by the opposite party,²⁵ this offence was held to have been committed. But where the vendees of a plot of land altered the number by which the land was described in the deed of sale, because such number was not the right number, and used it as evidence in a suit; the alteration of the deed was held not to amount to forgery. The Court said: "The identity of the property which the deed of sale purported to convey could not possibly be affected by the alteration of the figures, and the substitution of one number for the other could not possibly defraud any one or have the effect of causing wrongful loss or wrongful gain to any person. If the object of the alteration were to make it appear that the property intended to be conveyed by the sale-deed was other than that which it actually did purport to convey, the case would of course have been different. . . The identity of the property which the sale-deed purported to convey being unaffected, the alteration cannot fall under the definition of making a false document".¹ Similarly, where the date of a document, which would otherwise not have been presented for registration within time, was altered for the purpose of getting it registered, the offence committed was not forgery but fabricating false evidence because there was nothing to show that the act was done dishonestly or fraudulently as the bond was genuine and the accused did not intend to support a false claim by a false bond.² A promissory note expressed no time for payment, and while it was in the possession of the payee, the words "on demand" were added without the assent of the maker. In an action by the payee against the maker it was held that as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument.³

A Mukhtear who appeared for the plaintiff in an ejectment suit before a Rent Court, in open Court but without the permission of the Court, or even of the officer of the Court in whose custody the record was, took the plaint in the case and altered it so as to represent the plaintiff as claiming ejectment of the defendant from one field more in addition to those mentioned originally in the plaint. It did not appear whether

¹⁹ *Ali Hasan*, (1906) 28 All. 358.

²⁰ *Muhammad Saeed Khan*, (1898) 21 All.

113; *Ramgopal Dhur*, (1868) 10 W. R. (Cr.) 7.

²¹ *Burjo Barick*, (1866) 5 W. R. (Cr.) 70.

²² *Surendra Nath Ghose*, (1910) 38 Cal. 75.

²³ *Ram Narain*, (1881) P. R. No. 14 of 1881.

²⁴ *Baijnath Bhagat*, (1940) 21 P. L. T. 206,

[1940] P. W. N. 474, 41 Cr. L. J. 427, [1940] AIR (P) 486.

²⁵ *Gobinda Mal*, (1895) P. R. No. 6 of 1895.

¹ *Fateh*, (1882) 5 All. 217, 220.

² *Mir Ekrair Ali*, (1880) 6 Cal. 482.

³ *Aldous v. Cornwell*, (1868) L. R. 3 Q. B. 573.

the plaintiff was or was not entitled to eject the defendant from that field, but inasmuch as the alteration was made openly and the prosecution had not established that it was made fraudulently or dishonestly, it was held that upon those facts the Mukhtear could not properly be convicted of forgery.⁴

Third clause.—This clause requires that a person must fraudulently or dishonestly cause any person to sign, seal, execute, or alter a document knowing that such person could not by reason of (a) unsoundness of mind, or (b) intoxication, or (c) deception know the contents of the documents or the nature of the alteration.

Where the accused obtained a genuine signature upon a false document, by inserting the document in a heap of papers placed for signature before the person signing it, it was held that the accused had not committed an offence under this section, on the ground that no deception was practised on the person signing it to prevent him from knowing the nature of the document.⁵ It must be shown that the accused practised deception, so as to prevent a person from knowing the nature of the document, before the accused can be found guilty. Where the accused, a *mohurrir*, in a Registry Office, was charged with making false endorsements of registry on the back of certain deeds which endorsements were signed by the Registrar, it was held that, before he could be convicted of forgery, it must be shown that the Registrar, in consequence of deception practised upon him by the accused, did not know the contents of the document he was signing.⁶

4. Explanation 1.—There may be a sufficient falsity in a man's merely signing his own name, if he do this in order that it may be mistaken for the signature of another person of the same name. If a bill of exchange payable to A or order, set into the hand of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorse it, he is guilty of forgery.⁷

It is a false document if the offender makes it falsely in the name of any other person, although that name happens also to be the offender's own name. A man who makes a promissory note in his own name without any false description or addition and with an honest intention, if he afterwards uses or attempts to use the note, pretending that it is signed by another person of the same name, does not by this false representation make the promissory note 'a false document'. It was a genuine document where he signed it and does not become false by his subsequent use of it for the purpose of cheating. In such cases as those mentioned in illustrations (d) and (e) a man signs or executes a document in his own name which is false in a material part, and is calculated to induce another to give credit to it as genuine and authentic when it is false and deceptive.⁸

5. Explanation 2.—"As to the charge of forgery it is wholly immaterial whether the name forged is that of a fictitious person who never existed or of a real person. It is as much a forgery in the one case as in the other provided the fictitious name is assumed for the purpose of fraud in the particular case under trial... There is, however, no doubt that an intention to defraud is an essential ingredient; but it is sufficient to show that there was an intention to defraud generally. Whether there was an intention to defraud or not is a question of fact to be determined with reference to the special circumstances of each case."⁹ A document will be a forgery even if it is a false document in the name of a fictitious or non-existent person. The definition of "person" in s. 11 is not exhaustive and must be taken to include artificial or juridical persons as well. An idol is a juridical person capable of owning property and therefore a "person" as defined in the Penal Code. The fact that the forged signature in a document is that of an idol would not make it any the less a forged document.¹⁰

As to how far personating the true man or assuming a fictitious character will affect this offence, the following principles, as laid down in *Dunn's case*,¹¹ are briefly summarised by East.¹² "First that if a person give a note or other security as his

⁴ *Bisheshar Dayal*, (1905) 25 A. W. N. 93, 2 Cr. L. J. 234.

⁵ *Nujeebutoollah*, (1868) 9 W. R. (Cr.) 20.

⁶ *Dwarkanath Ghose*, (1878) 20 W. R. (Cr.) 49.

⁷ *Mead v. Young*, (1790) 4 T. R. 28.

⁸ *M. & M.* 415.

⁹ Per Muttusami Ayyar and Parker, JJ., in

Pera Raju, (1889) 13 Mad. 27, 31; *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

¹⁰ *Vadivelu Arsuthiyar*, [1944] Mad. 685.

¹¹ (1765) 1 Leach 57, 59.

¹² *Pleas of the Crown*, Vol. II, p. 961.

own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery: for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But secondly, that if a note be given in the name of another person either really existing or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery. Thirdly, that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him; for then he could not know that such impostor was not really the person whose name he assumed, and therefore the other would be equally deceived." The first of these propositions was followed in a case where the accused, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the accused, had no account, and gave it to the prosecutor as his own cheque drawn in his own name.¹³ But if a person authorize another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person, in whose name it is drawn, represent it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exist, this is forgery.¹⁴ Signing a bill in an assumed name is a forgery, if the name was assumed to defraud the person to whom such bill is given, though such person would equally have taken the bill had the accused used his real name.¹⁵

Cases.—Document in name of fictitious person.—The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta: to have then requested the postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders redirected to him as above at Rajam: to have similarly requested the post-master at Rajam to pay the money orders to his clerk, Seshgiri Rau: to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the post-master at Rajam signing receipts as Seshgiri Rau: Robert S. Wilson and Seshgiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers: it was held that the above allegations supported charges of cheating and forgery.¹⁶ Where certain persons signed a bail bond with names which were not their own, it was held that the persons were not guilty of an offence under this section as they had before signing the bond informed the Magistrate that their names were the names they afterwards signed to the bail bond and that, therefore, they could not be held to have intended to cause the Magistrate to believe that the bail bond was signed by any person real or fictitious other than the accused.¹⁷

Document made to conceal previous dishonest, or fraudulent, or negligent act.—The Calcutta High Court has laid down that if the intention with which a false document is made is to conceal a fraudulent or dishonest act which has been previously committed, that intention cannot be other than an intention to commit fraud; and if the intention is to commit fraud, the making of a false document with that intention will come within the definition of forgery.¹⁸ It has also held that the making of false entries in a book or register by any person in order to conceal a previous fraudulent or dishonest act falls within the purview of s. 477A inasmuch as the intention is to defraud.¹⁹ In a subsequent case, however, the same Court held that the alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation was not an offence either under s. 465 or s. 477A, there having been no intention to commit fraud. The cases of *Lolit Mohan Sarkar* and *Rash Behari Das* were distinguished on the ground that

¹³ *Martin*, (1879) 5 Q. B. D. 84.

¹⁴ *Parker's Case*, (1796) 2 Leach 775, 2 East P. C. 963, 965.

¹⁵ *Francis's Case*, (1811) Russ. & Ry. 209; *Peacock's Case*, (1814) Russ. & Ry. 278; *Whiley's Case*, (1805) Russ. & Ry. 90; *Bontien's Case*, (1813) Russ. & Ry. 260.

¹⁶ *Pera Raju*, (1889) 13 Mad. 27.

¹⁷ *Venkaraju Venkatasami*, [1910] M. W. N.

232, 11 C. L. J. 440.

¹⁸ *Lolit Mohan Sarkar*, (1894) 22 Cal. 313, 321; *W. C. Das*, (1909) U. B. R. (P. C.) 29 11 Cr. L. J. 185.

¹⁹ *Rash Behari Das*, (1908) 35 Cal. 450, dissenting from *Jivanand*, (1882) 5 All. 221, *Girdhari Lal*, (1886) 8 All. 653, and *Abdul Hamid*, (1886) 13 Cal. 349, 351.

the entry in this case showed that the accused was liable and it was a statement of the true position of affairs, whereas in those cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs.²⁰

The Madras High Court is of the same opinion. It has held that a debtor who forges a release to screen himself from liability to pay the debt is guilty of forgery, because he intended by the forgery to cover a dishonest purpose.²¹ Where a process-server prepared and filed into Court a false *attakshi* with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under ss. 468 and 471.²²

The Bombay High Court has also held, adopting the Calcutta view, that a man who deliberately makes a false document with false signatures in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud. It is a fraud to take deliberate measures in order to prevent persons already defrauded from ascertaining the fraud practised on them and thus to secure the culprit who practised the fraud in the illicit gains which he secured by the fraud. In this case a village Kulkarni misappropriated certain sums which the *rayats* had paid to him for irrigation cesses. To prevent the *rayats* from complaining and to protect the fraud, he forged with the help of the accused certain *challans* showing that the sums had been paid over to the Government Treasury. The accused was paid Rs. 25 for the work. He was, on these facts, charged with the offence of forgery. The Sessions Judge acquitted him on the ground that the forgery was committed to conceal the fraud which had already been fully committed, whereas s. 468 required that forgery should be "with intent to commit fraud or that fraud may be committed". It was held, setting aside the order of acquittal, that the offence of forgery was complete although it was effected to conceal a fraudulent or dishonest act previously committed.²³

A falsification of a record made in order to conceal a previous act of negligence, not amounting to fraud, does not amount to forgery.²⁴

The Allahabad High Court has ruled that falsification of records made in order to conceal previous acts of fraud,²⁵ or negligence,¹ do not amount to forgery as no one would be defrauded or injured by them. Following these decisions it has decided that a clerk who, after committing criminal breach of trust, makes false entries in an account book, with the intention of concealing such offence, does not commit forgery.² Similarly, where a public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents, with the intention of screening himself from punishment, it was held that such fabricated documents, not having been made with the intent specified in s. 468, were not forgeries.³ With respect to a charge under s. 465 the accused's immediate and more probable intention, and not his remoter and less probable intention should be attributed to him. Where the intention is to conceal a fraud which has been previously committed, it is not the kind of intention which that section refers to.⁴ Where the accused in order to save himself from the consequences of misappropriations made by him, made false entries in the accounts, it was held that he could not be convicted of forgery.⁵ Latterly the Allahabad High Court has laid down that making a false document with a view to prevent persons already defrauded from ascertaining that misappropriations had been committed, and thus to enable the person who committed the misappropriations to retain the wrongful gain which he had secured, amounts to the commission of a fraud and brings the case under s. 477A. If the intention with which a false document is made is to conceal a fraudulent or dishonest act which had been previously committed, the intention cannot be other than an intention to defraud. The concealment of an already committed fraud is a fraud. A document that is made with the intention of concealing a dishonest act already committed is made

²⁰ *Jyotish Chandra Mukerjee*, (1909) 36 Cal. 955.

²¹ *Sabapati*, (1888) 11 Mad. 411.

²² *Kamatichinatha Pillai*, (1919) 42 Mad. 558.

²³ *Balkrishna Vaman*, (1913) 15 Bom. L. R. 708, 37 Bom. 666.

²⁴ *Shankar*, (1880) 4 Bom. 657.

²⁵ *Jageshur Pershad*, (1873) 6 N. W. P. 56.

¹ *Lal Gumul*, (1870) 2 N. W. P. 11.

² *Jivanand*, (1882) 5 All. 221.

³ *Mazhar Hussain*, (1888) 5 All. 585.

⁴ *Girdhari Lal*, (1886) 8 All. 658.

⁵ *Shuja-ud-din Ahmad*, (1922) 20 A. L. J. R. 662, 23 Cr. L. J. 610, [1922] AIR (A) 485.

"dishonestly" within the meaning of s. 24, read with s. 23 as it facilitates the retention of the wrongful gain already made.⁶

The Rangoon High Court has adopted the view of the Madras High Court. Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation, it was held that the offence came under the provisions of ss. 467 and 471.⁷

Joint act.—If several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.⁸ Each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone, in the absence of others.⁹ Thus, the makers of the paper and plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person.¹⁰

Abetment.—A person taking an active part in the preparation of a document, but no part in the forgery of the name of the executant, does not commit forgery, but simply abets the offence.¹¹ To prepare in conjunction with others a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document do not constitute forgery, or an attempt to commit it, but would amount to abetment.¹²

PRACTICE.

Evidence.—Prove (1) that the accused made, signed, sealed, or executed the document, or any part of it, or made a mark denoting execution.

(2) That he did as in (1) with the intention of causing it to be believed that such document was made, signed, sealed, or executed by, or by the authority of, another person; or (2) that it was executed at a particular time.

(3) That such other person did not so execute, or did not authorize such execution, or that such execution was not at that particular time.

(4) That the accused knew that it was not so executed, either by such person, or by the authority of such person, or at that time.¹³

(5) That he did as in (1) and (2) dishonestly or fraudulently, or with intent (a) to cause damage or injury, or (b) to support any claim or title, or (c) to cause a person to part with property, or (d) to cause any person to enter into any express or implied contract, or (e) to commit a fraud, or that a fraud might be committed.

Or prove (1) the making or executing of the document by some one.

(2) That the accused afterwards altered such document by cancellation or otherwise.

(3) That such alteration was in a material part of the document.

(4) That the accused had no lawful authority to make such alteration.

(5) That he did so dishonestly, or fraudulently, or with intent, etc., as in (5) above.

Or prove (1) that the accused caused a person to sign, seal, execute, or alter the document.

(2) That such person when doing as in (1) was ignorant of the contents of the document, or of the nature of the alteration.

(3) That such ignorance was due to (a) unsoundness of mind, or (b) intoxication, or (c) a deception practised upon him.

(4) That the accused knew of such ignorance, and the reason thereof.

(5) That he, when causing such person to sign, etc., acted dishonestly or fraudulently, or with intent, etc., as in (5) above.

Where it is alleged on behalf of the prosecution that a deed is forged, it is not sufficient for the prosecution to prove that it is improbable that the deed is genuine, but it must prove for a certainty that the deed is forged.¹⁴

⁶ *Ragho Ram*, (1933) 55 All. 783; *Shuja-ud-din Ahmad*, (1922) 20 A. L. J. R. 662, 23 Cr. L. J. 610, [1922] AIR (A) 435, *Jivanand*, (1882) 5 All. 221, and *Girdhari Lal*, (1886) 8 All. 653, dissented from.

⁷ *Nga Ba Sein*, (1924) 3 B. L. J. 113, 25 Cr. L. J. 1378, [1924] AIR (R) 331.

⁸ *Bingley's Case*, (1821) Russ. & Ry. 446.

⁹ *Kirkwood's Case*, (1831) 1 Mood. Cr. C. 304.

¹⁰ *Dade's Case*, (1831) 1 Mood. Cr. C. 307.

¹¹ *Kashi Nath Naek*, (1897) 25 Cal. 207.

¹² *Padala Venkatasami*, (1881) 3 Mad. 4.

¹³ *Ramgopal Dhur*, (1868) 10 W. R. (Cr.) 7.

¹⁴ *Bayaji Natha*, (1897) Unrep. Cr. C. 917.

Complaint.—A complaint in writing of the Court before which the offence of forgery is committed or of the Court to which such Court is subordinate is necessary.¹⁵ This provision has no application when the document which is alleged to be forged is produced at the trial of the person alleged to have forged it, not having been produced in any independent proceeding.¹⁶

Expert's opinion as to handwriting.—The Court is competent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not and the opinion of an expert is only a piece of evidence whereas the opinion of the Judge is the decision in the case.¹⁷ The opinion of the expert should be substantially corroborated before making it the basis of a conviction.¹⁸ To base a conviction upon the opinion of an expert in handwriting is, as a general rule, very unsafe. Where it was sought to convict a clerk, employed in an office, of forgery, upon the supposed similarity between his handwriting and that of some fragmentary pieces of writing upon which the charge was based, it was held that the prosecution should make an attempt to show that the accused was the only man in the office who could have written the forged document.¹⁹ It is dangerous to come to a conclusion on the question of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents. One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words.²⁰

A conviction for forgery can seldom be based solely on non-resemblance of handwriting.²¹ A person is not entitled to give evidence as an expert in handwriting if his only knowledge on the subject is acquired in the course of a case.²²

Expert's opinion as to finger, thumb, palm, or foot impression.—Evidence of comparison of handwriting is often extremely dangerous. Of all methods of proving a document that of comparison of handwriting by an inexperienced witness is the most unsatisfactory.²³ A man should not ordinarily be convicted of the offence of forgery solely upon the evidence of a finger-print expert relating to similarity of thumb-impression;²⁴ but it is permissible to base a conviction on comparison of thumb-impressions of the accused with his thumb-impression on the document in question.²⁵ The comparison of thumb-impressions has become an exact science and great weight can be attached to the evidence of an expert.¹ The opinion of an expert as to the identity of a palm impression is admissible in evidence.² The expert's opinion must not be taken for granted but the Court must examine the evidence in order to satisfy itself that there can be no mistake, and the responsibility is all the greater when there is no other evidence to corroborate the expert.³ The Court must satisfy itself as to the value of the evidence of a finger print expert in the same way as it must satisfy itself of the value of other evidence. The evidence of a finger print expert need not be corroborated but the Court must be careful not to delegate its authority to a third party.⁴ When a finger print expert tells the Court that it is impossible to find so many cha-

¹⁵ Criminal Procedure Code, s. 195 (1) (c).

¹⁶ *Sanjiv Ratnappa*, (1932) 34 Bom. L. R. 1000, 56 Bom. 488.

¹⁷ *Uohab Santara*, (1921) 23 Cr. L. J. 74.

¹⁸ *Girdhari Lal*, (1925) 2 O. W. N. 174, 26 Cr. L. J. 929, [1925] AIR (O) 413; *Prabh Dial*, (1932) 33 P. L. R. 697, 33 Cr. L. J. 593.

¹⁹ *Srikant*, (1904) 2 A. L. J. R. 444, 2 Cr. L. J. 353. See *Venkata Row*, (1911) 36 Mad. 159.

²⁰ *Bhoru Lal Chodhury v. Mr. W. A. Vincent*, (1922) 3 P. L. T. 653; *Mohammad Kabir Uddin*, (1919) 20 Cr. L. J. 534; *Uohab Sanatra*, (1921) 23 Cr. L. J. 74.

²¹ *Sagarmal Agarwalla*, (1924) 40 C. L. J. 135, 28 C. W. N. 947, 25 Cr. L. J. 1217, [1934] AIR (C) 960.

²² *Rickard*, (1918) 26 Cox 318.

²³ *Suresh Chandra Banerjee*, (1927) 47 C. L. J. 471, 476, 29 Cr. L. J. 705; [1928] AIR (C)

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²⁴ *Jassu Ram*, (1923) 4 Lah. 246; *Jitendra Nath Gupta*, (1936) 38 Cr. L. J. 818, [1937] AIR (C) 99.

²⁵ *Public Prosecutor v. Kandasami Thevan*, (1923) 50 Mad. 402, dissenting from *Bazari Hajam*, (1921) 1 Pat. 242, which laid down that thumb-impression of an accused person should not be taken during trial.

¹ *Dileddad*, (1928) 30 Cr. L. J. 52.

² *Babulal Behari*, (1928) 30 Bom. L. R. 321, 52 Bom. 223.

³ *Harendra Nath Sen*, (1931) 54 C. L. J. 107, 35 C. W. N. 883, 3 Cr. L. J. 1001, [1931] AIR (C) 441; *Saqilain Ahmad*, [1936] A. L. J. R. 317, 37 Cr. L. J. 263, [1936] AIR (A) 165.

⁴ *Fakir Mahomed*, (1935) 38 Bom. L. R. 160, 60 Bom. 187.

racteristics identical in the finger prints of two persons and when that statement entirely agrees with what one has read on the subject in scientific books, the Court need not hesitate in accepting the opinion.⁵

Though the science, if it could be so called, of footprints has not yet progressed very far, evidence of similarity of the impressions of the foot, shod or unshod, is admitted by the Courts and such evidence comes under the head of circumstantial evidence.⁶ Evidence of a person capable of distinguishing and identifying foot-prints is admissible.⁷ Such evidence is not sufficient to bring home the offence to the accused, in the absence of further knowledge regarding differences between one foot and another.⁸

In order to secure evidentiary value to footmarks, it is not enough to show that the footmarks tally with the shoes of the accused. The evidence must go further and show that the marks have some peculiarity which is found in the shoes of the accused and will not be found in most other shoes.⁹

An expert's opinion is valuable but it must be supported by statements of fact, the accuracy or otherwise of which can be verified by the Judge.¹⁰

Non-admissibility of civil judgment in criminal trial.—In a suit by A against the obligors of a bond, the Court held, for the reasons stated in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of A on a charge of forgery. On the trial of A before a jury, this judgment of the civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury. It was held that the judgment could not be admitted.¹¹

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Complaint.—No Court shall take cognizance of any offence described in s. 463 when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.¹² If the prosecution is confined to offences connected with the document committed prior to its production in Court, such prosecution is within the law and requires no sanction.¹³ The offences connected with forgery, which are referred to in s. 195, Criminal Procedure Code, are offences committed by parties to proceedings. That a witness does not fall within this description is laid down by the Allahabad High Court,¹⁴ but that he does come under it is held by the Bombay High Court.¹⁵

A Sub-Registrar is not a Court, and, therefore, his sanction is not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office.¹⁶ But the Income-tax Collector is a Court, and his sanction is necessary.¹⁷

Where it is alleged that the Subordinate Judge, before whom a suit was proceeding, has himself abetted an offence under s. 193 and has also committed offences under ss. 465 and 466, no complaint by the Court is necessary so far as offences under ss. 465 and 466 are concerned as he could not be said to be a party to the proceedings before the Court.¹⁸

Autrefois acquit.—The accused was charged with having forged leases A and B bearing the same date and adduced in evidence by him in the same suit. No mention

⁵ *Fakir Mahomed*, (1935) 38 Bom. L. R. 160, 60 Bom. 187.

⁶ *Myliwami*, [1938] Mad. 262.

⁷ *Sidik Soomar*, [1941] Kar. 525.

⁸ *Oomayun*, [1942] M. W. N. 293, (1941) 55 L. W. 231 (1), 43 Cr. L. J. 702, [1942] AIR (M) 452 (2).

⁹ *Bhika Gober*, (1943) 45 Bom. L. R. 884, 45 Cr. L. J. 221, [1943] AIR (B) 458.

¹⁰ *Baliya Pullayya*, [1940] M. W. N. 761, (1939) 52 L. W. 198, 42 Cr. L. J. 316, [1941] AIR (M) 88.

¹¹ *Gogun Chunder Ghose*, (1880) 6 Cal. 247.

¹² Section 195 (1) (c), Criminal Procedure Code. See *Noor Mahomed v. Kaikhosru*, (1902) 4 Bom. L. R. 268; *Gulabchand Rupji*, (1925) 27 Bom. L. R. 1039, 49 Bom. 799.

¹³ *Lalta Prasad*, (1912) 34 All. 654. A District Judge is not entitled to complain in respect of the user of a forged document in the Court of an Additional District Judge: *Hari Das Shahu v. Dulal Chandra Sadhukhan*, [1942] 2 Cal. 456.

¹⁴ *Mathura Das*, (1892) 16 All. 80, 83.

¹⁵ *Devji valad Bhavani*, (1893) 18 Bom. 581; *Bhau Vyankatesh*, (1925) 27 Bom. L. R. 607, 49 Bom. 608.

¹⁶ *Tulja*, (1887) 12 Bom. 36.

¹⁷ *Punamchand Maneklal*, (1914) 38 Bom. 642, 16 Bom. L. R. 446, F.B., overruling *Katidas Rewadas*, (1906) 8 Bom. L. R. 477, 4 Cr. L. J. 34. See also *Nataraja Iyer*, (1912) 36 Mad. 72.

¹⁸ *Behari Lal v. Abdul Qadir Hamyari*, (1939) 41 Cr. L. J. 843, [1940] AIR (L) 292.

of any charge as to lease B was made in the order of commitment, and the accused having been acquitted on an indictment for forging lease A, it was held that the plea of *autrefois acquit* was inadmissible on a subsequent trial of the accused for forging lease B.¹⁹

Joint trial.—The joint trial of the scribe and attesting witnesses of an alleged forged document for giving false evidence in support of that document is illegal, and vitiates the trial.²⁰

Where more persons than one are charged with forging and using as genuine certain letters and cheques, and cheating a bank by cashing those cheques and with conspiracy in committing these offences, they can be tried at one trial for all the offences, inasmuch as the charges are based on a series of acts alleged to have been committed by the accused with one continuous purpose and design and the acts are also so connected together in point of time that they really form one transaction.²¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, forged a certain document, to wit——(*describe it*), with intent to cause damage or injury to AB, [*or to support a certain claim or title, to wit——; or to cause AB to part with certain property, to wit——; or to enter into a certain contract with AB with regard to (mention the object); or with intent to commit fraud (state the fraud)*]; and that you thereby committed an offence punishable under s. 465 of the Indian Penal Code, and within my cognizance [*or the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

466. Whoever forges a document,¹ purporting to be a record or proceeding of or in a Court of Justice,² or a register of birth, baptism, marriage³ or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant⁴ in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

To bring the act of the accused under this section or s. 471 the elements of fraud or dishonesty, as explained in the Code,²² must be present in his mind.

Scope.—This section “is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer. As, for instance, where a man forges a marriage-certificate duly issued by the officer who ought to have issued it”.²³ But the former Chief Court of the Punjab held that whoever, whether a public servant or a private individual, so tampers with a public register, as to commit forgery, is punishable under this section.²⁴ Intent to defraud is, however, essential.²⁵

1. ‘Document’.—See s. 29, *supra*.

2. ‘Court of Justice’.—See s. 20, *supra*. If a Judge fabricates any record in a pending case, he commits an offence under this section.¹ Where an accused in order that he might successfully practise a fraud upon the Court persuades or bribes some

¹⁹ *Dwarkanath Dutt*, (1867) 7 W. R. (Cr.) 15, F.B.

²⁰ *Gunwant*, (1916) 13 N. L. R. 35, 18 Cr. L. J. 339.

²¹ *Ramrao Burde*, (1932) 34 Bom. L. R. 598, 56 Bom. 304.

²² *Reithy*, (1901) 28 Cal. 434.

²³ Per Garth, C.J., in *Juggun Lall*, (1880) 7 C. L. R. 356, 361.

²⁴ *Mul Singh*, (1895) P. R. No. 13 of 1895.

²⁵ *Hari Chand*, (1908) 5 P. L. R. 15, 1 Cr. L. J. 41.

¹ *Sivaramakrishna Ayyar v. Seshappa Naidu*, (1928) 52 Mad. 347.

clerk in the office of the Munsif to permit him to have access to the record and makes an interpolation in the list of documents filed and inserts a document in the record he is guilty under this section.²

3. 'Register of...marriage'.—This section applies to the forging of a document purporting to be a Register of marriage, although the Register is a private one and not one kept by the public servant as such, e.g. a Register of Marriages of Mahomedans kept by a *Kazi*.³

4. 'Document purporting to be made by a public servant'.—A document is a document purporting to be made by a public servant, notwithstanding the illegibility of the seal and signature on it, if it appears on the face of it to have come from a public servant.⁴

'Public servant'.—See s. 21, *supra*.

Copy.—Where a person who is bound to give a true copy of any document gives a true copy of such document, he cannot be legally convicted of the offence of forgery punishable under this section, merely because the original of which he gives a true copy contains a statement which is false, and is known or believed by him to be such.⁵

CASES.

Fraudulent intent of forger.—A person who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence) is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document.⁶

Alteration in certificate.—The alteration of name and age in an educational certificate and the use thereof by the person altering to obtain an official appointment, which the officer appointing would have withheld if he had known of the alterations, constitute, in the absence of satisfactory explanation, offences under ss. 466 and 471.⁷

Alteration in Government correspondence.—A Government *tumar* (correspondence), in which accused Nos. 2 and 3 were interested, was kept by a Mamlatdar at the house of his clerk. During the absence of the clerk from his house, accused No. 1, another clerk in the Mamlatdar's office, removed the *tumar* without anybody's consent. In the company of accused Nos. 2 and 3 he went with it to a neighbouring town to show it to the pleader of accused Nos. 2 and 3 in connection with some proceeding. Accused No. 1 left the *tumar* with the pleader and went away. Later he brought the *tumar* back and stealthily replaced it from where it was taken. It was afterwards discovered that some papers had disappeared from the *tumar*, whilst others had either been mutilated or altered. It was held that accused No. 1 was guilty of theft as he had removed the *tumar* without the consent of its custodian and accused Nos. 2 and 3 were guilty of abetment of theft; and that accused Nos. 2 and 3 were also guilty of offences under this section and s. 193, in respect of the alteration of the document.⁸

Alteration in register.—Certain goods were consigned to the complainant and on arrival of the goods at their destination the complainant was required by the station-master to unload the goods within a certain period. After the complainant had unloaded the goods, the accused, a goods clerk, entered the time of the unloading in the register. The station-master subsequently discovered that in unloading the goods the complainant had blocked the line on which the wagon was standing and called upon the complainant to clear the line. After the line had been cleared the station-master directed the accused to alter the time of the unloading of the goods from that previously entered in the register to that at which the line had been cleared. It was

² *Mahesh Chandra Prasad*, (1942) 22 Pat. 292.

³ *Bacha Miah*, (1892) 1 Weir 541. A person who personates another before a Registrar of Marriages and signs a document of divorce in the name of that other person is guilty of an offence under this section: *Yasin Sheikh*, (1904) 9 C. W. N. 69, 2 Cr. L. J. 8.

⁴ *Prosunno Bose*, (1866) 5 W. R. (Cr.) 96.

⁵ *Marigawada*, (1891) Cr. R. No. 42 of 1891, Unrep. Cr. C. 583.

⁶ *Haradhan Maiti*, (1887) 14 Cal. 513, F.B.

⁷ *Nga Pye*, (1904) 2 L. B. R. 316, 1 Cr. L. J. 1124.

⁸ *Vallabhram Ganpatram*, (1925) 27 Bom. L. R. 1391, 27 Cr. L. J. 689, [1926] AIR (B) 122.

held that even if the station-master's view as to the correct time when the goods had been unloaded was erroneous, the accused was not guilty of this offence.⁹

PRACTICE.

Evidence.—Prove (1) that the accused forged the document.¹⁰

(2) That the document forged is one of the kinds specified in this section.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

A person can be convicted of abetment of forgery committed by a person or persons unknown.¹¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, forged a certain document, to wit—, which purported to be a record (*or proceeding of a Court of Justice, etc.*), and that you thereby committed an offence punishable under s. 466 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

467. Whoever forges a document¹ which purports to be a valuable security,² or a will,³ or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property,⁴ or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The offence described in this section is an aggravated form of the offence dealt with in s. 466. The section provides punishment for forgery not only of a document purporting to be a valuable security but also of any document which purports to give authority to any person "to receive or deliver any money."¹²

To support a conviction under this section, the forged document must be one of those mentioned in the text.¹³ It must be shown that the document is a false document within the meaning of s. 464, and that it was forged by the accused with some intent mentioned in s. 463. It is not sufficient that some possible intent may be inferred from the facts but it is necessary that such intent should be established by evidence.¹⁴ A mere fraudulent preparation of a deed of sale, with intent to cause injury to certain persons, does not amount to forgery of a valuable security, unless that document be a false document.¹⁵

1. 'Forges a document'.—See s. 29, *supra*, as to 'document'. The fraudulent alteration of a collectorate return is forgery of a document within the meaning of this section.¹⁶ Forgery of a document, even if the person for whom it is forged has no intention of using it, is an offence under this section.¹⁷ Before the writer of a forged receipt can be convicted it must be shown that he was present at the execution

⁹ *Gulab Singh*, (1925) 26 Cr. L. J. 1233, [1926] AIR (A) 751.

¹⁰ *Vide* s. 465, *sup.*

¹¹ *Thakur Shah*, (1943) 70 I. A. 196, 46 Bom. L. R. 514.

¹² *Sachchidanand Prasad*, (1933) 14 P. L. T. 580, 34 Cr. L. J. 892, [1933] AIR (P) 488.

¹³ (1864) 1 W. R. (Cr. L.) 9.

¹⁴ *Kailas Chandra Das*, (1902) 6 C. W. N.

382, not followed in *Somasundram Pillay*, (1909) 10 Cr. L. J. 367, the facts of which are stated under s. 474, *infra*.

¹⁵ (1866) 5 W. R. (Cr. L.) 2.

¹⁶ *Hurish Chunder Bose*, (1864) W. R. (Gap No.) (Cr.) 22.

¹⁷ *Surat Bahadur alias Bharihi*, (1924) 1 O. W. N. 362, 25 Cr. L. J. 1162.

of the receipt or that he helped any person to use it.¹⁸ Where C, a witness to a forged will, in addition to his signature had written an attestation clause to the effect that he had put his signature to the will at the instance of the alleged testator, it was held that, having regard to the definition of 'document,' this attestation was not only a part of the document purporting to record the attested will, but was in itself also a document.¹⁹ Where the accused, who was a paid supervisor of a society connected with the co-operative movement, debited Rs. 2 as the pay of a sweeper woman, took the thumb impression of his nephew against the debit entry, certified the thumb impression to be that of the sweeper woman, and appropriated the amount to himself, it was held that the accused had committed the offence of forgery under this section as he had caused to be affixed to the debit entry the thumb impression of his nephew.²⁰

2. 'Valuable security'.—See s. 30, *supra*. An unregistered document, though not a valuable security until the registration is completed, still purports to be a valuable security within the meaning of this section.²¹ Similarly, two documents with forged signatures, one of which was intended to be filled up as a promissory note and the other as a receipt, but the spaces for particulars of the amount, the name of the person in whose favour the documents were executed, the date and place of execution, and the rate of interest were not filled in, were held to be valuable security.²² But a *sanad* conferring a title of dignity on a person is not a valuable security.²³ A blank paper, or a bond barred by limitation, is not a document of the kind described in this section.²⁴ But forgery may be committed of a promissory note on an unstamped paper even though a statute prohibits the stamp to be annexed afterwards,²⁵ of a hundi,¹ or of a kabuliyat.² It is no objection to the charge of forgery that the instrument is not available by reason of some collateral objection not appearing upon the face of it.³ The accused was found in possession of two documents; one was a registered conveyance in respect of certain lands from A to the wife of the accused; the second purported to be a conveyance in respect of the same lands from the same vendor to the accused himself, but this was not registered. The accused requested a school boy to have the registration endorsement from the former copied on to the latter and was thereupon arrested and charged under this section read with s. 116 and under s. 474. At the trial A deposed that he never executed the second conveyance but as regards the first he said that he had executed it in favour of the accused's wife but that the accused was in possession of the lands and had also paid him the consideration money. The High Court held that as it was not shown that the second document was made with any of the intents mentioned in s. 463 or that it was intended to be fraudulently or dishonestly used, a conviction under any of the above sections was not maintainable.⁴ Accused No. 1 was the creditor of a person for Rs. 38. To pay off his debt, the debtor got out the sum from his father by a postal money order drawn in his name. When the money order arrived at the place, accused No. 1 received the money direct from the postman and had the acknowledgment signed by accused No. 2 under the representation that accused No. 2 was the payee. Neither accused informed the debtor of the money order or the receipt of the money. It was held that the accused were guilty of forging a valuable security, e.g. the money order acknowledgment, an offence punishable under this section.⁵ Where the accused fraudulently brought into existence a registered sale-deed, said to have been executed by the widow of B, intending to deceive and also to injure the reversioners of B, it was held that they were guilty under this section and also s. 82 of the Registration Act.⁶ If an accused having no title to the property represents himself as the person who is the real owner, receives the consideration and transfers the same by himself executing a sale-deed and the real owner then sues for a declaration that the transaction was a fraud, the liability of the accused under this sec-

¹⁸ *Mazher Ahmed*, (1924) 25 Cr. L. J. 1253, [1924] AIR (C) 192.

¹⁹ *Chatru Malik*, (1928) 10 Lah. 265.

²⁰ *Keshavrao*, (1934) 36 Bom. L. R. 1120, 36 Cr. L. J. 522, [1935] AIR (B) 30.

²¹ *Kashi Nath Naek*, (1897) 25 Cal. 207; *Ramasami*, (1888) 12 Ma. 148; *Govind Ramappa*, (1899) Cr. R. No. 25 of 1899, Unrep. Cr. C. 467.

²² *Jawahir Thakur*, (116) 38 All. 430.

²³ *Jan Mahomed*, (1884) 10 Cal. 534.

²⁴ *Rughoonundur Pottanuvees*, (1871) 15 W.

R. (Cr.) 19.

²⁵ *Morton's Case*, (1795) 2 East P. C. 955.

¹ *Lekhraj*, (1910) P. R. No. 31 of 1910, 11 Cr. L. J. 639.

² *Ismail Panju*, (1925) 26 Cr. L. J. 1115, [1925] AIR (N) 337.

³ *M'Intosh's Case*, (1800) 2 East P. C. 956, 2 Leach 883.

⁴ *Kailas Chandra Das*, (1902) 6 C. W. N. 382.

⁵ *Jogidas Babu*, (1921) 24 Bom. L. R. 99, 23 Cr. L. J. 264, [1922] AIR (B) 82.

⁶ *Ganga Dibya*, (1942) 22 Pat. 95.

tion is not avoided even on the assumption that the person to whom representation was made knew that the accused was not the person he represented himself to be since he is hit by all the ingredients of the offence though it was clear in the case in question that he had no such knowledge.⁷

Material alteration of incomplete document.—An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was altered by the addition of some material terms by the accused who was one of the two executants without the consent or knowledge of the other executant and was not signed by the other parties to the agreement. The accused was in possession of the instrument which was altered by him. It was held that the accused was guilty of the offence of forgery of a valuable security under s. 467, or of being in possession of a forged document under s. 474.⁸

3. 'Will'.—See s. 31, *supra*.

4. 'Moveable property'.—See s. 22, *supra*. The forging of a document which purports on the face of it to be a copy only, and which, even if a genuine copy, would not authorize the delivery of moveable property, is not punishable under this section.⁹

PRACTICE.

Evidence.—Prove (1) that the accused committed forgery.¹⁰

(2) That the document forged is one of the kinds mentioned in this section.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

But when the valuable security is a promissory note of the Central Government—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—The word 'forgery' is used as a general term in s. 463, and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code so as to embrace all the species of forgery afterwards provided for as to punishment and this includes a case falling under this section.¹¹

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, forged a certain document purporting to be a valuable security, to wit—, [*or a will made by—; or an authority to adopt given by—to—, or an authority given to—to make or transfer a certain valuable security, to wit—*] with intent—; and that you thereby committed an offence punishable under s. 467 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

The charge must set out the intention of the accused.¹²

Punishment.—Where the forged documents are alternative drafts of any document they do not call for separate punishment.¹³ In a conviction under this section a sentence of imprisonment should be inflicted. The sentence of fine alone is not legal.¹⁴

468. Whoever commits forgery, intending that the document¹ forged shall be used for the purpose of cheating,² shall

Forgery for purpose of cheating.

be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Forgery, though a substantive offence, partakes of the nature of an attempt. It is usually an act done in furtherance of some other criminal design. If it can be proved

⁷ *Onkar*, [1945] N. L. J. 231.

⁸ *Ramaswami Ayyar*, (1917) 41 Mad. 589.

⁹ *Naro Gopal*, (1868) 5 B. H. S. (Cr. C.) 56

¹⁰ *Vide* s. 465, *sup*.

¹¹ *Tulja*, (1887) 12 Bom. 36, 41; *Teni Shah v. Belahi Shah*, (1909) 14 C. W. N. 479, 11 Cr. L. J. 280.

¹² *Haidar Ali Pradhania*, (1912) 17 C. W. N. 354, 14 Cr. L. J. 120.

¹³ *Surat Bahadur*, (1924) 1 O. W. N. 302, 25 Cr. L. J. 1162.

¹⁴ *Vira Reddy*, [1939] M. W. N. 514, 41 Cr. L. J. 11, [1939] AIR (M) 780.

that the purpose of the offender in committing the forgery is to obtain property dishonestly, or, if his guilty purpose comes within the definition of cheating, he is punishable under the present section. The intention of the forger may be fairly inferred in most cases from the contents of the forged documents.¹⁵

If the cheating is complete, and the subsequent forgery is for the purpose of concealing that offence, this section does not apply.¹⁶

To establish fraudulent intention under this section it is not essential to prove pecuniary advantage.¹⁷

1. 'Document'.—See s. 29, *supra*. A hammer for marking sleepers is a document within the meaning of this section.¹⁸

2. 'Cheating'.—See s. 415, *supra*.

CASES.

Falsifying account-books.—Where a person's object was to deceive his employer by falsifying account-books which were in his custody, such deception being likely to cause damage to his employer, it was held that he had committed forgery with intent to cheat under this section, and not an offence under s. 465.¹⁹

Making false register.—Forgery of a school attendance register, for the purpose of obtaining a Government grant, is punishable under this section.²⁰ The entry of an excess payment in a muster-roll will not make the muster-roll a forged document.²¹

Making false return.—Where a process-server prepared and filed into Court a false return with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under this section and s. 471.²²

Preparing false bill.—The accused, a Talati, prepared a full week's bill for distribution of doles in his village, while staying out of the village, on the basis of the bill for the foregoing week, in utter ignorance of what had happened in the village and in order to avoid the trouble of going to the village personally. The bill was sent to the Circle Inspector, who, on comparing it with the original register kept at the village, found that no doles had been distributed for four out of the seven days of the week. It was held that the accused was not guilty of an offence under this section as he had no criminal intention to commit fraud which was requisite to complete the offence of forgery under this section.²³

Sending false telegram.—The accused sent a telegram to the complainant in America purporting to be from her husband, asking her to remit money. It was held that the accused was guilty of three distinct offences, namely, (1) an offence under this section which he committed when he filled in the telegram form, (2) an offence under s. 29 of the Indian Telegraph Act which he committed when he sent the false telegram, and (3) an offence of cheating when the receiver of the telegram sent the money, each offence being complete before the other.²⁴

PRACTICE.

Evidence.—Prove (1) that the document is a forgery.

(2) That the accused forged the document.²⁵

(3) That he did as above intending that the forged document would be used for the purpose of cheating.¹

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

¹⁵ M. & M. 418; *Jagan Nath*, (1926) 28 Cr. L. J. 461. In this case the accused had forged a letter of recommendation purporting to have been written by the Governor of the Punjab.

¹⁶ *Hurmukh Rai*, (1876) P. R. No. 15 of 1876.

¹⁷ *Madhavlal Chaganlal*, Crim. Appln. for Rev. No. 195 of 1920, decided on September 9, 1920, per Shah and Crump, JJ., (Unrep. Bom.).

¹⁸ *A. V. Joseph*, (1924) 3 Ran. 11.

¹⁹ *Banessur Biswas*, (1872) 18 W. R. (Cr.) 46.

²⁰ *Kuppana Pillai*, (1885) Weir (3rd. Edn.)

330.

²¹ *Ram Ghulam Singh*, [1929] A. L. J. R. 592, 30 Cr. L. J. 403.

²² *Kamatchinatha Pillai*, (1918) 42 Mad. 558.

²³ *Madhavlal Chaganlal*, Crim. Appln. for Rev. No. 195 of 1920, per Shah and Crump, JJ., decided on September 9, 1920 (Unrep. Bom.).

²⁴ *Mahomed Rafiq*, (1930) 25 S. L. R. 9, 33 Cr. L. J. 41, [1931] AIR (S) 116.

²⁵ *Vide* s. 465, sup.

¹ *Vide* s. 417, sup.

Complaint.—A complaint in writing of the Court, before which the offence is committed or of some other Court to which such Court is subordinate, is necessary.² An offence under s. 463 mentioned in clause (c) of s. 195, Criminal Procedure Code, covers an offence under this section, the object of mentioning s. 463 in s. 195, Criminal Procedure Code, being to include all cases of forgery whatever the nature of the fraudulent intention may be.³

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, forged a certain document, to wit—, intending that it shall be used for the purpose of cheating, and that you thereby committed an offence punishable under s. 468 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

469. Whoever commits forgery, intending that the document¹ forged shall harm the reputation² of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Forgery for purpose of harming reputation.

COMMENT.

The making of a false document for the purpose of injuring the reputation of any person is punishable under this section. For instance if A, with the intention of harming B's reputation or knowing that what he does is likely to have this effect, writes a letter in imitation of B's hand-writing purporting to be addressed to a confederate in some disgraceful or dishonest transaction and shows this letter to other persons, he commits this offence.

1. 'Document'.—See s. 29, *supra*.

2. 'Harm the reputation'.—See s. 499, *infra*. A person, who forged a draft petition, with the intention of using it as evidence and which contained false statements calculated to injure the reputation of another person, was held guilty of this offence.⁴

PRACTICE.

Evidence.—Prove (1) that the document in question is a forgery.⁵

(2) That the accused forged it.

(3) That he did so intending that the document forged would harm the reputation of some one, or knew that it was likely to be used for that purpose.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, forged a certain document to wit—, intending that it shall be used for harming the reputation of—, or knew that it was likely to be used for that purpose, and that you thereby committed an offence punishable under s. 469 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

470. A false document made wholly or in part by forgery is designated "a forged document".

² Crim. Pro. Code, s. 195 (1) (c).

³ *Assistant Sessions Judge, North Arcot v. Ramaremal*, (1911) 36 Mad. 387.

⁴ *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

⁵ *Vide* s. 465, *sup*.

471. Whoever fraudulently or dishonestly uses as genuine any document¹ which he knows or has reason to believe to be a forged document,² shall be punished in the same manner as if he had forged such document.

Using as genuine
a forged document.

COMMENT.

This section lays down that the sentence that can be imposed for the offence of using a forged document as genuine is the same as the sentence that can be imposed for the offence of forgery.⁶

The use of a forged document which is contemplated by this section is such use as causes wrongful gain or wrongful loss. That is to say, the section applies to the case of a person who appears before some other person, or before a Court with a document and endeavours to induce that person or Court to do some act which he or it would not do if it was known to be a forgery.⁷ The offence is complete once the document is produced or given in evidence.⁸ Where in a judicial inquiry under s. 202, Criminal Procedure Code, against a person accused of having forged a document, the accused stated before the inquiring Magistrate that the document was genuine, it was held that he could not be said to have used the document so as to make himself amenable to the provisions of this section even though he knew the document to be a forged one.⁹

Scope.—The Allahabad High Court is of opinion that this section is directed against some person other than a person proved to be the actual forger. A forger cannot be punished both for forging a document (s. 465) and for using it as genuine (s. 471).¹⁰ The Madras High Court has dissented from this view and held that a person who both forged a document and used it as genuine can be sentenced for both the offences.¹¹ But it has also held that an abettor of the forgery of a document cannot be convicted of the offence of using it as genuine.¹² The decisions of the former Judicial Commissioner's Court at Nagpur are conflicting.¹³

Ingredients.—Under this section there must be—

1. Fraudulent or dishonest use of a document as genuine.
2. Knowledge or reasonable belief on the part of the person using the document that it is a forged one.

1. **'Fraudulently or dishonestly uses as genuine any document'.—**The use of a document as genuine must be fraudulent or dishonest.¹⁴ "The word, 'fraudulently' is used in ss. 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part".¹⁵ If the Court is satisfied that the accused uttered the forged document as a true one, meaning it to be taken as such, and at that time knew it to be forged, the Court ought to find, as a necessary consequence of law, that the accused intended to defraud.¹⁶ When a document, known or believed to have been forged, is used as genuine with the

⁶ *Sriramulu Naidu*, (1928) 52 Mad. 532.

⁷ *Asimuddi Sheikh*, (1907) 11 C. W. N. 838, 5 C. L. J. 454, 5 Cr. L. J. 351.

⁸ *Fasal Iahvi v. Mohan Lal*, (1922) 24 Cr. L. J. 388.

⁹ *Asimuddi Sheikh*, (1907) 11 C. W. N. 838, 5 C. L. J. 454, 5 Cr. L. J. 351.

¹⁰ *Umrao Lal*, (1900) 23 All. 84; *Pirbhu Dial*, (1912) P. R. No. 4 of 1913, 14 Cr. L. J. 183. See *Badri Prasad*, (1912) 35 All. 63, where *Umrao's* case was not pointed out and the Court expressed the opinion that an accused person could be convicted at the same trial of forging a document and using that document as forged. See *Gajanan Sakharan*, (1923) 25 Cr. L. J. 473, [1924] AIR (N) 162 (1).

¹¹ *Sriramulu Naidu*, (1928) 52 Mad. 532; *Madu Chinnagi Reddi*, (1915) 17 Cr. L. J. 73,

[1917] AIR (M) 147.

¹² *Authone Valappil Syed Ahmad Musaliyar*, (1914) 15 Cr. L. J. 568, [1914] AIR (M) 144 (2).

¹³ *Gajanan Sakharan*, (1923) 25 Cr. L. J. 473, [1924] AIR (N) 162 (1), laid down that a forger could be convicted both of forgery and of using as genuine that forged document; *Digambar*, (1925) 26 Cr. L. J. 1275, and *Ismail Panju*, (1925) 26 Cr. L. J. 1387, 21 N. L. R. 152, [1926] AIR (N) 187, laid down that he could not be convicted for both the offences.

¹⁴ *Sudarsan Behra*, (1926) 8 P. L. T. 104, 27 Cr. L. J. 1263, [1927] AIR (P) 87.

¹⁵ Per Maclean, C. J., in *Abbas Ali*, (1897) 25 Cal. 512, 521, F.B.

¹⁶ *Hill*, (1838) 8 C. & P. 274, *Chunku*, [1930] A. L. J. R. 1451, 32 Cr. L. J. 559, [1931] AIR (A) 258.

intent that some person should thereby be deceived, and that by such deception either an advantage should accrue to the person so using it, or injury should befall some other person, it is used 'fraudulently'.¹⁷ A person cannot be convicted of fabricating a false document if his intention is simply to clear up matters and is not fraudulent and no wrongful loss or gain is caused to any person thereby.¹⁸

'Uses'.—To constitute a 'use' it is not necessary that the forged document should be used as evidence in a Court. It is sufficient that it is used in order that it may ultimately appear in evidence or used dishonestly or fraudulently.¹⁹ The nature of the use is not material.²⁰ It is not necessary that the Court should accept the document produced before it or filed in Court. If a person puts forward a document as supporting his claim in any matter, whether that document is acted upon by the Court, or used in evidence, is immaterial for the purpose of constituting use of the document by the party within the meaning of this section.²¹ The use of a forged document will be fraudulent and dishonest under this section, even though the document itself is unnecessary for the case of the party who uses it, and though, in fact, he has a perfectly good title without it.²²

The Madras High Court is of opinion that the use of the document must be for one of the purposes mentioned in s. 463. Thus an involuntary production of a document in Court in obedience to an order to produce it is no use of it.²³ In such a case it is immaterial even if the person producing the document has deposed as a witness to its genuineness. The giving of false testimony with a fraudulent intention by itself cannot amount to a fraudulent user of a document with reference to which that evidence is given. A mere statement that a document is genuine does not amount to using it as genuine.²⁴ These two cases have been dissented from by the Calcutta High Court which has held that where a person fraudulently or dishonestly presents a document to another person as being what it purports to be, or causes the same to be so presented, knowing or having reason to believe that it is forged, the document is used as genuine within the meaning of this section. It is immaterial whether it was produced by the accused of his own motion or under the order of a Court if in the event he uses it as genuine. If a person summoned to produce a document fails to disclose that he believes it to have been forged, and fraudulently or dishonestly puts it forward as being a genuine document, he is not acting involuntarily, but is deliberately using it for a criminal purpose.²⁵

A mere reference in a written statement of an accused to a document which is produced and put in evidence by the prosecution is not "user" by the accused; and if the pleader for the accused cross-examines the prosecution witness who produces the document upon his evidence, including the evidence which he has given about the written document, such cross-examination is not "user".¹ The filing of forged documents with a plaint is user of them.² The filing of a forged document as the basis of a plaint or as a necessary sequel to the pleas in the plaint constitutes a user of it.³ Similarly, putting in of a document in the course of the hearing is a user.⁴ It is also a user by a party to a suit to file receipts and place them before the other side for admission or denial.⁵ The presentation of a forged document for

¹⁷ *Mohit Kumar Mukerjee*, (1925) 52 Cal. 881, disapproving *Surendra Nath Ghose*, (1910) 38 Cal. 75.

¹⁸ *Sudarsan Behra*, (1926) 8 P. L. T. 104, 27 Cr. L. J. 1263, [1926] AIR (P) 87.

¹⁹ *Ramappa Hebbara*, (1890) 1 Weir 550.

²⁰ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram Mudi*, (1932) 59 Cal. 1233.

²¹ *Bansi Sheikh*, (1923) 51 Cal. 469; *Ibrahim*, (1928) 29 Cr. L. J. 849; *Hampana Gowd*, [1935] M. W. N. 1346, 70 M. L. J. 109, 43 L. W. 226, 37 Cr. L. J. 421, [1936] AIR (M) 280. The head-note of *Ambika Prasad Singh*, (1908) 35 Cal. 820, is declared to be wrong in this case and also in *Rati Jha*, (1911) 39 Cal. 463. See also *Mohit Kumar Mukerjee*, (1925) 52 Cal. 881, where it is adversely commented on, and *Krishna Proshad v. Rabinendra Nath*, (1911) 13 Cr. L. J. 6.

²² *Dhunum Kazee*, (1882) 9 Cal. 58; *Bans*

Sheikh, (1923) 51 Cal. 469; *Daya Ram*, (1885) P. R. No. 16 of 1885.

²³ *Assistant Sessions Judge, North Arcot v. Ramammal*, (1911) 36 Mad. 387; *Kedar Nath*, (1935) 37 Cr. L. J. 46, [1935] AIR (A) 940.

²⁴ *Muthiah Chetty*, (1911) 36 Mad. 392. See also *Mobarak Ali*, (1912) 17 C. W. N. 94, 13 Cr. L. J. 440.

²⁵ *Mohit Kumar Mukerjee*, (1925) 52 Cal. 881.

¹ *Taralnath Baidya*, (1935) 63 Cal. 481; *Abdul Sattar Abdul Aziz*, (1937) 39 Cr. L. J. 592, [1938] AIR (R) 194.

² *Idu Golaha*, (1917) 3 P. L. J. 386, 19 Cr. L. J. 709, [1918] AIR (P) 274.

³ *Mobarak Ali*, (1912) 17 C. W. N. 94, 13 Cr. L. J. 440.

⁴ *Rati Jha*, (1911) 39 Cal. 463; *Baju Jha*, (1928) 9 P. L. T. 800, 30 Cr. L. J. 236, [1929] AIR (P) 60.

⁵ *Kedar Nath*, [1935] A. L. J. R. 493, 36 Cr. L. J. 1199, [1935] AIR (A) 521.

registration, and obtaining registration is a using of that document.⁶ The production of a forged document in proceedings before the manager under the Chota Nagpur Encumbered Estates Act is a user.⁷ A person who actively participates in the process of presentation of a forged document for registration can be convicted of this offence even though he does not physically present it for registration.⁸

It is user of a document whether the party files the document personally or, as more usually happens, through a legal representative. Further, such legal representative will be presumed to have filed a document with the knowledge and authority of his client until the contrary is shown.⁹

A presented a document for registration before a Sub-Registrar alleging that S had executed it. S having denied execution, the Sub-Registrar reported the matter to the District Magistrate. The District Magistrate ordered a judicial inquiry, and the Deputy Magistrate who was conducting the same called upon A to state whether the document was genuine or forged. A appeared and stated that the document was genuine, but the Deputy Magistrate held otherwise. A was, thereafter, tried and convicted under this section. It was held that A was not guilty as it was impossible to say that he 'used' the document.¹⁰ The accused was charged with having fraudulently or dishonestly used a document which purported to be a receipt granted to him by the manager of a ward's estate for certain papers and which receipt was alleged to be false. Subsequently, some of the papers mentioned in the receipt were on search found in the estate office, while the other papers had not been searched for. It was held that those facts were not sufficient to show that the user of the document was fraudulent or dishonest or that the accused had committed any offence.¹¹ The accused, who was the plaintiff in a rent suit, himself filed a *kabulayat* which was forged and which purported to be filed by the complainant, the defendant in the rent suit. It was held that the act constituted a user within the meaning of this section.¹²

The accused was told to produce copies of revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine. It was held that this was not an involuntary production of a document in Court and that the accused was guilty of an offence under this section.¹³ A person tendering, during the course of a police investigation, a forged document to the investigating officer, and thereby causing that officer to do something which he would otherwise not have done, is guilty of having used a forged document within the meaning of this section.¹⁴ Where in order to support a false claim, a forged document is so mentioned in another document that it can be easily identified, it constitutes the offence of using a forged document within the meaning of this section.¹⁵ The production of a forged title-deed in answer to a citation in which no particular deed is specified and giving evidence in regard to it amounts to user within the meaning of this section.¹⁶ Where two persons were jointly tried in a case and the pleader of the first accused filed a forged document in the case under the instruction of the second accused for the common benefit of both and both of them took advantage of the document, it was held that there was a user of the document by the second accused also within the meaning of this section.¹⁷

'Document'.—A hammer for marking sleepers is a document within the meaning of this section.¹⁸

Conditional uttering.—A conditional uttering of a forged instrument is as much a crime as any other uttering. Where a person gave a forged acceptance to the manager of a banking company where he kept an account, saying that he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied that that

⁶ *Azimooddeen*, (1869) 11 W. R. (Cr.) 15; *Cheta Mahto*, (1924) 26 Cr. L. J. 1482.

⁷ *Kewal Ram*, (1935) 15 Pat. 69, 81.

⁸ *Sriramulu Naidu*, (1928) 52 Mad. 532.

⁹ *Ali Ahmed*, (1932) 55 C. L. J. 336, 34 Cr. L. J. 39, [1932] AIR (C) 545; *Hampana Gowd*, [1935] M. W. N. 1346, 70 M. L. J. 109, 43 L. W. 226, 37 Cr. L. J. 421, [1936] AIR (M) 280.

¹⁰ *Asimuddi Sheikh*, (1907) 5 C. L. J. 454, 11 C. W. N. 838, 5 Cr. L. J. 351.

¹¹ *Ram Prasad Maity*, (1908) 8 C. L. J. 317, 12 C. W. N. 1113, 8 Cr. L. J. 418.

¹² *Asrabuddin Sarkar v. Katidayal Mullik*,

(1914) 19 C. W. N. 125, 16 Cr. L. J. 309, [1915] AIR (C) 596.

¹³ *Ishar Das*, (1924) 6 Lah. 50.

¹⁴ *Sajanlall Biswas*, (1920) 22 Cr. L. J. 274, [1920] AIR (P) 800.

¹⁵ *Sithava Naik*, (1915) 16 Cr. L. J. 703, [1916] AIR (M) 1049.

¹⁶ *Digambar Chakravarti v. Ram Taran Mitter*, (1917) 18 Cr. L. J. 839, [1917] AIR (C) 35.

¹⁷ *Baju Jha*, (1928) 9 P. L. T. 800, 36 Cr. L. J. 236, [1929] AIR (P) 60.

¹⁸ *A. V. Joseph*, (1924) 3 Ran. 11.

would depend on the result of inquiries respecting the acceptors, it was held that this was a sufficient uttering.¹⁹

2. 'Knows or has reason to believe to be a forged document'.—The person using the document must have specific knowledge that the document is a forgery. The words 'knows or has reason to believe to be a forged document' are of general application. The mere fact that a pleader's suspicions ought to have been aroused by the sight of a forged document is not *prima facie* evidence that he knew, or had reason to believe, the document to be forged. A pleader is under no higher obligation than any other agent would be, and to justify his prosecution it should be shown that he had been a party to the concoction of the document, or that he had the knowledge that it was concocted.²⁰

The accused purchased one-ninth share of 437 *kanals* 12 *marlas* land, this one-ninth share being set out in the deed as amounting to 48 *kanals* 12 *marlas*. Eleven years after, the deed was presented to the Putwari by the accused with a request that he should enter up mutation "according to the terms set out in the deed", the deed being previously tampered with so as to make the one-ninth share appear to be a two-ninths share, but the other recitals and figures in the deed remained untouched. It was not established that the accused had himself made the alteration. The Putwari entered up mutation of 97 *kanals* 4 *marlas*, that is, two-ninths share. On the mutation coming before the Tahsildar for sanction, the alteration in the deed came to light. It was held that though the accused had used the deed as a genuine document, it was not shown that he had so used it fraudulently or dishonestly knowing or having reason to believe it to be a forged document; and that the alteration made in the deed did not, in the face of the figures given therein, make it a sale of anything more than 48 *kanals* 12 *marlas*.²¹

'Reason to believe'.—See s. 26, *supra*.

Copy.—A person may be convicted of using as genuine a document which he knows to be forged, though he, in the first instance, produced only a copy of a copy of it.²² Where a person took copies of a forged document and put these copies forward as evidence in support of his title, it was held that this was a use by him of the forged document.²³ When forgeries were committed by a person inside the record room and copies reproducing the false entries were put up in a suit to establish a claim, the use of such certified copies is a use of forged documents when they are put in the case. The mere circumstance that the documents had been forged would not be sufficient to justify a conviction. It is necessary to prove that the use has been fraudulent or dishonest and in addition that the person putting in the copies knew, or had reason to believe, that the originals were forged.²⁴

The Calcutta High Court has held that it is doubtful whether the mere filing of a copy is the user of a forged document. But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes. A certified copy of a forged document is not a forged document.²⁵ The making of a copy of a forgery does not constitute forgery unless the maker of the copy was authorized to make the copy.¹ The accused was told to produce copies of revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine. It was held that this was not an involuntary production of a document in Court and that he was, therefore, guilty of an offence under this section.²

Proceedings *ultra vires*.—If during the course of proceedings which were *ultra vires* and illegal, any offence under this section was committed, it could be said that it was committed in or in relation to, or by a party to any judicial proceedings, in which evidence could be legally taken, and therefore any complaint under s. 195, Criminal

¹⁹ *Cooke*, (1838) 8 C. & P. 582.

²⁰ *Ranchhodas Nagardas*, (1896) 22 Bom. 317; *Abdul Rahim Khan*, [1940] N. L. J. 183, (1939) 41 Cr. L. J. 753, [1940] AIR (N) 300.

²¹ *Karim Dad*, (1913) P. R. No. 25 of 1913, 14 Cr. L. J. 687, [1914] AIR (L) 577.

²² *Nujum Ali*, (1866) 6 W. R. (Cr.) 41.

²³ *Mulai Singh*, (1909) 28 All. 402; *Girdhari*

Lal, (1925) 2 O. W. N. 174, 26 Cr. L. J. 929, [1925] AIR (O) 413; *Hayat Khan*, (1931) 26 S. L. R. 73, 33 Cr. L. J. 452, [1932] AIR (S) 90.

²⁴ *Mathura Prasad*, (1925) 1 Luck. 306.

²⁵ *Krishna Govinda Pal*, (1915) 48 Cal. 783.

¹ *Lachman Lal*, (1918) 4 P. L. J. 16, 20 Cr. L. J. 142.

² *Ishar Das*, (1924) 6 Lah. 50.

Procedure Code, by the Court which had no jurisdiction to entertain such proceedings, must be dismissed.³

C A S E S .

Altering document without fraudulent intent.—The creditors of a police constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed, directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs. 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which the debtor had altered by the figure "1" so as to make it appear that the receipt was for Rs. 18. It was held that the real intent in the accused's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court, in a criminal case, ought not to speculate as to some other intent over and above this that might have presented itself to him; that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditors' claim; and that, therefore, he was not guilty under this section.⁴

The accused made a change in a document so that it might be taken in evidence. The document related to certain transactions which the Settlement Officer could not take into consideration but would not have been bound by what it stated. In fact the accused's case was ruined. It was held that the accused acted improperly but not dishonestly and could not be convicted of an offence under this section.⁵

Certificate.—The accused applied to the Superintendent of Police at Poona for employment in the Police force. In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate. It was held that the accused was guilty of offences under s. 463 and this section.⁶ Where the accused used a forged certificate of competency as an engine-room first tindal, he was held guilty under this section and s. 463.⁷ With a view to qualify for appearing at the competitive P. C. S. Examination the accused presented to the Punjab University a certified copy of the certificate granted to him by the University at his Matriculation examination, in which the date of birth had been altered from "5th January 1901" to "15th January 1904." It was held that he had committed an offence under this section inasmuch as the document presented, being a false document, was used with intent to cause damage and injury to the other candidates in the competitive examination and to support accused's claim to appear.⁸

Plaint.—The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. It was held that he was guilty not of an attempt to commit an offence under this section but of the offence itself.⁹ If a party to a suit sets up two different titles and supports one of them with a false document he is guilty of this offence even if it be found that the other title is good.¹⁰

Fabrication of receipts.—Where it was found that four forged receipts for the payment of rent, used by the accused, had been fabricated in lieu of genuine receipts which had been lost, it was held, with reference to the definitions of the terms 'dishonestly' and 'fraudulently' in ss. 24 and 25, that the accused had not committed this offence.¹¹ This case lays down bad law in view of several cases noted under ss. 24 and 25. Where the accused gave forged receipts to his pleader and asked him to produce them in Court in support of his defence to a suit, it was held that this amounted to using the receipts as genuine.¹²

A declared insolvent wishing to obtain some contract work was asked to produce an order to the effect that he was solvent. In order to obtain the necessary certi-

³ *Sumat Prasad*, [1942] All. 42.

⁴ *Syed Husain*, (1885) 7 All. 403.

⁵ *Kali Din*, (1919) 17 A. L. J. R. 872, 20 Cr.

L. J. 573, [1919] AIR (A) 387.

⁶ *Khandusingh*, (1896) 22 Bom. 768.

⁷ *Abbas Ali*, (1897) 25 Cal. 512, F.B.

⁸ *Chanan Singh*, (1928) 10 Lah. 545.

⁹ *Lala Ojha*, (1899) 26 Cal. 863; *Jiwan*,

(1887) 7 A. W. N. 195; *Mohit Kumar Mukerjee*, (1925) 52 Cal. 881.

¹⁰ *Sivananda Mudali*, (1925) 27 Cr. L. J. 994, [1926] AIR (M) 1072.

¹¹ *Sheo Dayal*, (1885) 7 All. 459.

¹² *Hampana Gowd*, [1935] M. W. N. 1346, 70 M. L. J. 109, 43 L. W. 226, 37 Cr. L. J. 421, [1936] AIR (M) 280.

ificate of solvency he produced before the Official Receiver a forged receipt showing that he had paid up a certain debt which the creditor had written off as a bad debt. It was held that the intention of the accused was by means of deceit to obtain a wrongful gain for himself, so that he had acted dishonestly, and was therefore guilty of an offence under this section.¹³ Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation, it was held that the offence came under the provisions of s. 467 and this section.¹⁴

Where the accused by obtaining a forged letter acknowledging the receipt of money and using the letter was not only protecting himself from punishment but was also rendering it probable that other persons would suffer loss, it was held that the act of the accused was a criminal act within the provisions of s. 467 and this section.¹⁵

Diary.—False alteration of a police diary by a head constable will fall under this section as the forgery of a document made by a public servant.¹⁶

Sanad.—The accused, in order to obtain a recognition from a Settlement Officer that they were entitled to the title of 'loskur', filed a *sanad* before that officer purporting to grant that title. This document was found not to be genuine. The Sessions Judge convicted them under this section and s. 464. It was held that even supposing they had used the document knowing it not to be genuine, they could not be found guilty as their intention was not to cause wrongful gain or wrongful loss to any one, their intention being to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of 'loskur', and that this could not be said to constitute "an intention to defraud."¹⁷

Decree.—Where the accused, a pleader's clerk, altered the date in the copy of a decree in order to hide his fault in not filing the execution petition in time and filed it with the copy of the altered decree, it was held that the accused was not guilty under s. 467 the copy of the decree not being a valuable security, but was guilty of offences under s. 193 and this section.¹⁸

Making false return.—Where a process-server filed into Court a false return with false signatures in order to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty, it was held that he was guilty under s. 468 and this section.¹⁹

Prescription.—Where the accused obtained a prescription from a medical man for one tube of morphia and altering the words "one tube" to "four tubes" presented the prescription to a chemist and obtained four tubes of morphia from him, it was held that he had committed this offence.²⁰

English cases.—Uttering.—If A exhibits a forged receipt to B, a person with whom he is claiming credit for it, this is an uttering.²¹ Delivering a box containing, among other things, forged stamps to the party's own servant that he might carry them to an inn to be forwarded by a carrier to a customer in the country, was an uttering.²² But showing a man an instrument the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, was not uttering.²³ Where the accused placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person, it was held that this was an uttering.²⁴ The accused, being the secretary of an enrolled benefit society of which his wife was a member, and having received a sum of money belonging to the members with directions to pay it into a certain savings bank, uttered what purported to be a bank pass-book containing a false entry of the receipt of the money, knowing it to be forged, in order to induce the members of the society to believe that he had paid the money into the bank when he had not done so.

¹³ *Abdul Ghafur*, (1920) 43 All. 225.

¹⁴ *Nga Ba Sein*, (1924) 3 B. L. J. 113 25 Cr. L. J. 1378, [1924] AIR (R) 331.

¹⁵ *Chandu Lal*, [1940] A. L. J. R. 759, (1940)

42 Cr. L. J. 247, [1940] AIR (A) 551.

¹⁶ *Rughoo Barrick*, (1869) 11 W. R. (Cr.) 44.

¹⁷ *Jan Mahomed*, (1884) 10 Cal. 584. Is it not supporting a claim to a title to which he is not legally entitled?

¹⁸ *Godlavedu Balayya*, (1902) 1 Weir 551.

¹⁹ *Kamatchinatha Pillai*, (1918) 42 Mad. 558.

²⁰ *Robison*, (1921) 22 Cr. L. J. 681.

²¹ *Radford's Case*, (1844) 1 Den. 59; *Adikanda Swami*, (1945) 47 Cr. L. J. 317.

²² *Collicott's Case*, (1812) Russ. & Ry. 212.

²³ *Shukard's Case*, (1811) Russ. & Ry. 200.

²⁴ *Ion*, (1852) 6 Cox 1; *Fitchie's Case*, (1857) Dears. & B. 175.

It was held that he was guilty of uttering a forged writing.²⁵ Where the accused forged a bill payable to his own order, and uttered it without endorsement as a security for a debt, he was held guilty of uttering.¹ Where a person presented a bill of exchange for payment with a forged endorsement upon it of a receipt by the payee, and the clerk, to whom he presented it, objected to a variance between the spelling of the payee's name in the bill and the endorsement, upon which the person altered the endorsement into a receipt by himself for the drawer, it was held that the act of presenting the bill to the clerk previous to his objection was sufficient to constitute the offence of uttering the forged endorsement.²

If an engraving of a forged note be given to a party as a pattern or specimen of skill, the party giving it not intending that the particular note should be put in circulation, it is not uttering.³

PRACTICE.

Evidence.—Prove (1) that the document was a forged one.⁴

(2) That the accused used such document.

(3) That he used it as a genuine one.⁵

(4) That he knew, or had reason to believe, that it was a forged one and used it fraudulently or dishonestly.⁶

In a case in which the accused was charged with dishonestly using as genuine a lease which he knew to be forged, and in which there was a fraudulent intention, it was held that it was not necessary to prove that he personally inserted the word, but it was sufficient if it was inserted with his knowledge.⁷

In a case for uttering forged bills, the guilty knowledge of the accused was proved by producing other forged bills on the same house in the possession of the accused.⁸ If the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments were forged.⁹ Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.¹⁰ In a charge for administering *dhatura* with the intention of robbing the victim, the fact that the accused had *dhatura* in his possession months afterwards in no way helps the prosecution, because it cannot possibly be inferred from the fact that he was in possession of *dhatura* that he was at a place where and on the date when, the alleged administration of *dhatura* had taken place.¹¹ See also *ill. (c)* to s. 159 of the Indian Evidence Act.

(5) That he used it dishonestly or fraudulently.¹²

In deciding whether there has been a 'using as genuine' of the document, the Court will advert to the nature of the document. Some documents, such as receipts, are intended to remain in the holder's possession, other documents, such as cheques or promissory notes, must be tendered to the persons who are to pay them. Whatever the document, the dealing with it by the accused person must be such as to satisfy the Court that he intended to defraud, but it is not necessary that wrongful gain or wrongful loss should actually be caused by the use.¹³

On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested, had been written over pencil marks which had been rubbed out, it was held that evidence of an engraver, who had examined the paper with a mirror and traced the pencil marks, was admissible on the part of the prosecution.¹⁴

Where a party to a judicial proceeding relies on a forged document in support of his case a witness who states that he saw the execution of the document by the person

²⁵ *Moody's Case*, (1862) L. & C. 173.

¹ *Birkett's Case*, (1805) Russ. & Ry. 86.

² *Arscott*, (1834) 6 C. & P. 408; *Moni Lal Mitter*, (1939) 72 C. L. J. 46.

³ *Harris*, (1836) 7 C. & P. 428.

⁴ *Vide s.* 465, *sup.*

⁵ *Jaha Bux*, (1867) 8 W. R. (Cr.) 81; *Muker Srinivasa Padyachi*, (1889) 1 Weir 550.

⁶ *Bholay Pramanick*, (1872) 17 W. R. (Cr.) 32; *Radhika Prasad Singh*, (1936) 38 Cr. L. J. 235; *Bajinath Bhagat*, (1940) 21 P. L. T. 206, [1940] P. W. N. 474, 41 Cr. L. J. 427, [1940] AIR (P.) 486.

⁷ *Hemoruddi Mundul*, (1868) 9 W. R. (Cr.) 22.

⁸ *Hough's Case*, (1896) Russ. & Ry. 120. See *Ball's Case*, (1807) Russ. & Ry. 132; *Colclough*, (1882) 15 Cox 92.

⁹ *Millard's Case*, (1813) Russ. & Ry. 215.

¹⁰ *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57.

¹¹ *Ramsumiran Pande*, (1941) 43 Cr. L. J. 413, [1942] AIR (P) 291.

¹² *Kishen Pershad*, (1870) 2 N. W. P. 202.

¹³ *M. & M.* 419.

¹⁴ *Williams*, (1838) 8 C. & P. 434.

by whom it purports to have been executed, intentionally aids by his deposition the using of the document as genuine and is liable to prosecution for an offence under this section read with s. 109, although he could not be charged with abetment of forgery itself.¹⁵

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by the same Court as that by which the forgery is triable.

When the forged document is a promissory note of the Central Government—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate, is necessary.¹⁶ No such complaint is required for the prosecution of a person in respect of a forged document when he is not a party to the proceeding in which the forged document is produced,¹⁷ or where subsequent to the complaint a suit was instituted in a Court on the document in question.¹⁸

If a complaint is filed under this section and it appears that some other offence has also been committed, it is not necessary to have a fresh complaint.¹⁹

Sanction.—Where a postman, being a person employed in connection with the affairs of the Government of India forged the thumb impression of the payee on a money-order form for misappropriating the amount of money entrusted to him and used the forged document by returning it to the post office in token of payment, it was held that the sanction of the Governor-General was necessary under s. 270, cl. 1, of the Government of India Act, 1935, but that there was no ban to the trial of offences under ss. 409 and 467.²⁰

Sections 467 and 471.—Where owing to some reason (e.g. absence of jurisdiction) the accused cannot be charged under s. 467, he can be charged and convicted under s. 471.²¹ Where the accused was charged under s. 467, but it appeared in evidence that he had committed an offence under s. 471 for which he might have been charged under s. 236 of the Criminal Procedure Code, it was held that although he was not charged with it, he could be convicted of an offence under s. 471.²² When a person is convicted under ss. 467 and 109 for having abetted the forging of a document, he cannot be further convicted and sentenced under s. 471 for using that document as genuine.²³

Sections 471 and 466.—A conviction under s. 471 of a person convicted in respect of the same document under ss. 466 and 109 cannot stand. It is immaterial that the latter conviction is under s. 109 and s. 466, not under s. 466 alone, and an abettor of forgery cannot be punished under both the sections any more than the forger can be so punished. He may be punished as if he were the forger.²⁴

Sections 471 and 474.—Convictions under s. 471 and s. 474 cannot stand together.²⁵

Sections 471 and 196.—The using of a forged document is punishable under this section and not under s. 196.¹ The accused used as true or genuine evidence a receipt acknowledging the receipt of a certain sum in cash by the complainant which he knew to be forged. He was charged and tried under s. 196. It was held that the accused should have been charged under s. 471 and not under s. 196.²

Sections 471 and 167.—The offence of a public servant framing an incorrect document with intent to cause injury under s. 167 is included in the offence of forging a document and using it as genuine under ss. 467/471 and a conviction both under the provisions of s. 167 and ss. 467/471 is not maintainable.³

¹⁵ *Gajadhar Prasad*, (1925) 2 O. W. N. 707, 26 Cr. L. J. 1587, [1925] AIR (O) 610.

¹⁶ Criminal Procedure Code, s. 195 (1) (c); *Kanhaiya Lal v. Bhagwan Das*, (1925) 48 All. 60.

¹⁷ *Sessions Judge of Cuddapah v. Konditi Obalesu*, (1914) 26 M. L. J. 220, 15 Cr. L. J. 242.

¹⁸ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Biswambhar Brahmin*, (1929) 56 Cal. 1041.

¹⁹ *Jamuna Singh v. Laldhari Singh*, (1934) 15 P. L. T. 694, 36 Cr. L. J. 26, [1934] AIR (P) 586; contra, *Ram Samajh*, (1926) 1 Luck. 523.

²⁰ *Sannaya*, [1941] Mad. 258.

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²¹ *Bhagavatty Perumal Pillay*, (1912) 13 Cr. L. J. 862.

²² *Jagdeo Parshad*, (1920) 21 Cr. L. J. 410. But see *Harun Rashid*, (1925) 53 Cal. 466.

²³ *Ismail Panju*, (1925) 21 N. L. R. 152, [1926] AIR (N) 137.

²⁴ *Mokand Lal*, (1901) P. R. No. 26 of 1901.

²⁵ *Nuzur Ali*, (1873) 6 N. W. P. 39.

¹ *Kherode Chunder Mozumdar*, (1880) 5 Cal. 717.

² *Hara Mohun Das*, (1926) 44 C. L. J. 113, 30 C. W. N. 840, 27 Cr. L. J. 871.

³ *Gulzari Lal*, (1926) 3 O. W. N. 760, 28 Cr. L. J. 90.

Separate charges.—The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three separate occasions, each set with a written statement in three suits pending against him. A charge was framed against him in respect of the using of each set of receipts, and he was tried on those three charges and convicted and sentenced. On appeal, it was contended that a separate charge should have been framed in respect of each of the documents as the using of each document constituted a distinct and separate offence and that consequently the trial was illegal and should be set aside, the accused having been tried for more than three offences in one and the same trial. It was held that as the 'using' charged was the putting in of each set of documents with the respective written statements in three suits, and as there was nothing to show that any of the documents had been used at any other time, there was only one using in respect of each set of documents and that there was, therefore, no valid ground for questioning the conviction.⁴

Charge.—This section does not specify the punishment, but declares that using a forged document shall be punished like forgery, and a charge for using a forged document should make mention of it coupled with one or other of s. 465, 466, or 467, according to the nature of the document forged.⁵ The definition of forgery should not be entered in the charge: simply describing the offence as one of using a forged document is sufficient.⁶

The charge should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently (or dishonestly) used as genuine a certain document, to wit——, which you knew, or had reason to believe, at the time you used it, to be a forged document; and that you thereby committed an offence punishable under ss. 465 and 471 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—The offence of uttering forged documents requires to be punished with the severest punishment allowed by law.⁷ If a document is used fraudulently and dishonestly and if it purports to be a valuable security, the punishment provided by s. 467 and not that provided by s. 465 will be that to which the accused will be liable under this section.⁸

472. Whoever makes or counterfeits¹ any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession² any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punishable with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.

COMMENT.

The making or counterfeiting or possession of any seal, plate, or instrument for forging valuable securities, etc., specified in s. 467, is made punishable under this section. In the Chapter of offences relating to Coin and Government Stamps, there are similar provisions. This section and the section following are akin to ss. 235, 255 and 256.

1: 'Counterfeits'.—See s. 28, *supra*. **2: 'Possession'.—**See s. 27, *supra*.

⁴ *Raghu Nath Das*, (1893) 20 Cal. 413.

⁵ (1864) 1 W. R. (Cr. L.) 10; (1865) 3 W. R. (Cr. L.) 8; *Gangaram Malji*, (1869) 6 B. H. C. (Cr. C.) 43; *Tikaram Lohar*, (1893) 8 C. P. L. R. (Cr.) 1.

⁶ (1867) 8 W. R. (Cr. L.) 7.

⁷ *Mohesh Chunder Sircar*, (1865) 3 W. R. (Cr.) 13.

⁸ *Sagarmal Agarwalla*, (1924) 40 C. L. J. 135, 28 C. W. N. 947, 25 Cr. L. J. 1217, [1924] AIR (C) 960.

PRACTICE.

Evidence.—Prove (1) that the accused made or counterfeited the seal, plate, etc., or that he had such seal, etc., in his possession, and that he knew it to be counterfeit.

(2) That such seal, etc., was made in order to produce impressions.

(3) That he intended to use such seal, etc., for the purpose of committing forgery.

(4) That such forgery was punishable under s. 467.

Counterfeit seals and forged documents were found in the accused's possession; and as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently.⁹

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, made (*or counterfeited*) a seal, (*or plate, or instrument*) for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under s. 467 of the Indian Penal Code, [*or had in your possession the seal (or plate, or instrument) intending that the same shall be used for the purpose of committing any forgery*], and that you thereby committed an offence punishable under s. 472 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

473. Whoever makes or counterfeits any seal, plate or other

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.

instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

If the forgery is not of such a serious nature as is punishable under s. 467, then it will be punishable under this section.

Where counterfeit seals and forged documents are found in the accused's possession, and he can give no satisfactory information as to how he became possessed of them, it can be inferred that he is keeping them with the intention of using them fraudulently.¹⁰ Where the accused was in possession of a counterfeit stamp for making an impression by letters or marks on trees in order to indicate that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of an offence under this section.¹¹

PRACTICE.

Evidence.—Prove points (1) to (3) as those for s. 472; and further—

(4) That such forgery was punishable under any section of this Chapter.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Separate offences.—Where several seals of different descriptions were found in the possession of the accused with intent to commit forgery, it was held that there was a complete and separate offence committed in respect of every seal found, and that the accused could be legally convicted of a separate offence in regard to each seal,

⁹ *Kisto Soonder Deb*, (1865) 2 W. R. (Cr.) 5.

¹⁰ *Ibid.*

¹¹ *Krishappa Khandappa*, (1925) 27 Bom. L. R. 509, 26 Cr. L. J. 1014, [1925] AIR (B) 827.

unless it appeared that several such seals were in their possession for the purpose of committing one particular forgery.¹²

Charge.—See s. 472, *supra*.

474. Whoever has in his possession¹ any document,² knowing the same to be forged, and intending that the same shall fraudulently³ or dishonestly⁴ be used as genuine, shall, if the document is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.

COMMENT.

Persons who have in their possession forged documents of any description knowing that they are forged, are guilty of this offence if they intend that the document shall be used for a fraudulent or dishonest purpose. It does not signify whether such fraudulent use will be by themselves or by other persons to whom they may dispose of the documents for the purpose of such fraudulent use. It may be reasonably inferred that a person in whose possession several forged documents are found has an intention to use them fraudulently, unless he can give a satisfactory information as to how he became possessed of them and as to the purpose for which he retains them in his possession.¹³

A person cannot be convicted under this section when the document fabricated by him does not fall within the description given in s. 466 or 467. Nor can he be convicted of forgery when he does not make it with any of the intents mentioned in s. 468. In the absence of a complaint by the Court the offence of attempting to fabricate evidence cannot be proceeded with when the offence is committed in relation to a proceeding in Court.¹⁴

This section resembles ss. 242, 243 and 259.

1. 'Possession'.—See s. 27, *supra*. Where a person took a forged document into a Court in connection with a case, but did not actually use it, although he intended to do so, if necessary, he was held guilty of an offence under this section.¹⁵

The accused were charged with and convicted of the offence of having fabricated a document purporting to have been executed by one M in their favour while, as a fact, M had not executed it. The accused pleaded that the property comprised in the document already belonged to them by virtue of some documents executed in the name of M *benami* for them, and that the document in question was only intended to confirm their already existing title to the property. It was held that the accused were rightly convicted of forgery and that it made no difference that the fabricated document was intended to confirm an already existing title.¹⁶

2. 'Document'.—See s. 29, *supra*. **3. 'Fraudulently'.**—See s. 25, *supra*.

4. 'Dishonestly'.—See s. 24, *supra*.

PRACTICE.

Evidence.—Prove (1) that the document was a forged one.¹⁷

(2) That the accused had it in his possession.

(3) That he knew it to be forged when he had it in his possession.

(4) That he intended that it should be used as a genuine document.

¹² *Goluck Chunder*, (1870) 13 W. R. (Cr.) 16.

¹³ *M. & M. 421; Kisto Soonder Deb*, (1865) 2 W. R. (Cr.) 5

¹⁴ *Radha Kishan*, (1925) 26 P. L. R. 95, 26 Cr. L. J. 847, [1925] AIR (L) 327.

¹⁵ *Hatim Moonshree*, (1867) 8 W. R. (Cr.) 11

¹⁶ *Somasundram Pillay*, (1909) 10 Cr. L. J. 367.

¹⁷ *Vide* s. 465, *sup*.

(5) That he intended as above dishonestly or fraudulently.

Prove also whether the forged document is one of the description mentioned in s. 466 or 467.¹⁸

It is not sufficient for a conviction to say that the accused might possibly have used an altered document; the guilty intent must be proved, not inferred.¹⁹ But where forged documents were found in the possession of the accused and he could not give satisfactory information as to how he became possessed of them it was inferred that he kept them with the intention of using them.²⁰

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

475. Whoever counterfeits¹ upon, or in the substance of, any

Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.

material, any device or mark used for the purpose of authenticating any document² described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or

thereafter to be forged on such material, or who, with such intent, has in his possession³ any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The commencement of the forgery of bank-notes and other similar securities where it has proceeded to the length which is described in this section, is treated as a substantive offence and punished. Also the possession of the prepared material, etc., is punished.

This section supplements the provisions of s 472.²¹

The document must be of a nature mentioned in s. 467.²²

1. 'Counterfeits'.—See s. 28, *supra*. 2. 'Document'.—See s. 29, *supra*.

3. 'Possession'.—See s. 27, *supra*.

PRACTICE.

Evidence—Prove (1) that the accused counterfeited upon or in the substance of any material, a device or mark.

(2) That such device or mark is used for the purpose of authenticating any document described in s. 467.

(3) That the accused intended to use such device or mark for the purpose of giving the appearance of authenticity to some document.

(4) That such document was forged or was thereafter to be forged.

Or prove—

(1) That the accused was in possession of the papers referred to in the charge;

(2) that the device or mark was counterfeited on them;

(3) that the marks were such as are used for the purpose of authenticating any document described in s. 467; and

(4) that the accused intended that the marks should be used for the purpose of giving the appearance of authenticity to documents, either then forged or thereafter to be forged.²³

As to the admissibility in evidence of other forged documents, see *Queen-Empress v. Abaji Ramchandra*²⁴ and *Reg. v. Parbhudas*.²⁵

¹⁸ *Abaji Ramchandra*, (1891) 16 Bom. 165.

¹⁹ *Lokenath Shah*, (1864) W. R. (Gap No.) (Cr.) 12.

²⁰ *Kisto Soonder Deb*, (1865) 2 W. R. (Cr.) 5.

²¹ M. & M. 421.

²² *Rughoonundun Puttronupees*, (1871) 15 W.

R. (Cr.) 19.

²³ *Abaji Ramchandra*, (1891) 16 Bom. 165; *Rughoonundun Puttronupees*, *supra*.

²⁴ (1890) 15 Bom. 189.

²⁵ (1874) 11 B. H. C. 90.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint.—A complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate, is necessary.¹

Charge.—In the trial of an accused person on a charge under this section, the charge should be so framed as to specify distinctly that part of the section which is applicable to the case, and should distinctly specify the particular papers bearing a counterfeit mark or device which the accused was alleged to have had in his possession with the intent mentioned in the section.²

The charge should run thus :—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, counterfeited upon (*or in the substance of*) any material, to wit——, a device (*or mark*), to wit——, used for the purpose of authenticating any document, [*or that you were in possession of any material, to wit——, upon*] (*or in the substance of*) which device (*or mark*) was used for the purpose of authenticating a document, intending that such device (*or mark*) shall be used for the purpose of giving the appearance of authenticity to some document then forged (*or thereafter to be forged on such material*), and that you thereby committed an offence punishable under s. 475 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

476. Whoever counterfeits¹ upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document² other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession³ any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.

COMMENT.

This section is similar to the last section, but as the document, the counterfeit of which is made punishable, is not of so much importance as in the last, the punishment is not so severe.

1. 'Counterfeits'.—See s. 28, *supra*.
2. 'Document'.—See s. 29, *supra*.
3. 'Possession'.—See s. 27, *supra*.

PRACTICE.

Evidence.—Prove the same points as those for s. 475, showing in (2) that such device or mark is used for the purpose of authenticating any document other than the document described in s. 467.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate, is necessary.³

¹ See Criminal Procedure Code, s. 195 (1) (c).

² *Abaji Ramchandra*, (1890) 15 Bom. 189.

³ Criminal Procedure Code, s. 195 (1) (c).

477. Whoever fraudulently¹ or dishonestly,² or with intent to cause damage or injury³ to the public⁴ or to any person,⁵ cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document⁶ which is or purports to be⁷ a will,⁸ or an authority do adopt a son, or any valuable security,⁹ or commits mischief¹⁰ in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section applies when the document tampered with or destroyed is either a will, or an authority to adopt, or a valuable security. Owing to the great importance of documents of this kind the punishment provided is severe. The document must be a genuine one. The offence under this section cannot be committed in respect of a document which is a forgery.⁴

1. 'Fraudulently'.—See s. 25, *supra*. 2. 'Dishonestly'.—See s. 24, *supra*.

3. 'Injury'.—See s. 44, *supra*. Where the accused was convicted under this section for destroying a *patta* but the prosecution failed to prove that the act was done with intent to cause damage or injury, it was held that the act might have been a very foolish act but the conviction under this section could not be maintained.⁵

4. 'Public'.—See s. 12, *supra*. 5. 'Person'.—See s. 11, *supra*.

6. 'To secrete any document'.—See s. 29, *supra*, as to the meaning of the word 'document'. A person may 'secrete' a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. In the latter case, he may secrete it for the purpose, for example, of preventing it being produced in evidence or for the purpose of raising difficulties in the way of its being produced in evidence. But it is not necessarily enough to show that, upon an occasion on which it became his duty to produce the document, he failed to discharge that duty, though this may be a cogent piece of evidence in certain circumstances. The fact that a man perjures himself by denying the existence of a document which, to his knowledge, is in his custody would be a still more cogent piece of evidence. But whether the offence of secreting the document is committed or not must depend in each case upon the facts.⁶

7. 'Purports to be'.—These words make the law of India upon this matter what it has in a long succession of cases been held to be in England, namely, that the absence of a stamp is insufficient to deprive the document of its character of a valuable security in the view of penal law.⁷

8. 'Will'.—See s. 31, *supra*. Where a will is fraudulently concealed, the grant of letters of administration which operates as a judgment *in rem* and presupposes the non-existence of the will, is no bar to a prosecution for this offence.⁸

9. 'Valuable security'.—See s. 30, *supra*. Tearing up of a lease,⁹ a promissory note,¹⁰ or a rough account showing a liability on the part of the accused¹¹ amounts to the destruction of a valuable security, within the meaning of this section, even though the document may not be stamped, and is therefore inadmissible to enforce any legal claim. A person tearing to pieces a registered conveyance is guilty under this section although the document is invalid for want of consideration.¹²

⁴ *Akbar Hossain*, (1938) 43 C. W. N. 222.

⁵ *Ram Barakh Pathak*, (1925) 48 All. 140.

⁶ *Susenbihari Ray*, (1930) 58 Cal. 1051, 1061, s.b.; *Nukur Chandra Sarcar v. Ranjit Kumar Mullick*, (1938) 58 C. L. J. 283. 35 C. L. J. 716, [1934] AIR (C) 217.

⁷ (1873) 7 M. H. C. (Appx.) 26, 1 Weir 552.

⁸ *Mali Muthu Servay*, (1926) 4 Ran. 251.

⁹ *Nittar Mundle*, (1865) 3 W. R. (Cr.) 88.

¹⁰ *Madurai*, (1888) 12 Mad. 45.

¹¹ *Ramasami*, (1888) 12 Mad. 148; *Ram Parshad v. Dhanna*, (1938) 41 P. L. R. 198.

¹² *Kotha Goundan*, (1890) 1 Weir 554.

An administrative order passed by the Criminal Superintendent of a Court of Session directing the Nazir of the Court to release an accused on bail is not a valuable security.¹³

10. 'Mischief'.—See s. 425, *supra*.

PRACTICE.

Evidence.—Prove (1) that the document in question is, or purports to be, a will, or an authority to adopt, or a valuable security.¹⁴

(2) That the accused has cancelled, destroyed, defaced, or secreted the same or has attempted to do so, or that he has committed mischief in respect of it.

(3) That he did as above fraudulently or dishonestly or to cause damage or injury to the public, or to some person.¹⁵

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Sections 467 and 477.—Where the act of the accused which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under ss. 467 and 477.¹⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently [*or dishonestly, or with intent to cause damage or injury to AB (or to the public)*] cancelled [*or destroyed, or defaced, or attempted to cancel, destroy, deface, or secreted, or attempted to secrete, or committed mischief, in respect of*] a document, to wit——, which is [*or purports to be*] a will [*or an authority to adopt, or valuable security*], and that you thereby committed an offence punishable under s. 477 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [*by the said Court*] on the said charge.

477A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant,¹ wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account² which belongs to or is in the possession of his employer,³ or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets⁴ the making of any false entry in, or omits or alters or abets the omission⁵ or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

COMMENT.

This section speaks of two offences: (1) falsification of accounts; and (2) making of false entry, or omitting or altering, or abetting the omission or alteration of an entry. These two offences are distinct and not interdependent.¹⁷

¹³ *Sher Alam Khan*, (1933) 35 Bom. L. R. 1062, 35 Cr. L. J. 479, [1933] AIR (B) 494.

¹⁴ *Ibid.*

¹⁵ (1865) 4 W. R. (Cr. L.) 2.

¹⁶ *Firbhu Dial*, (1912) P. R. No. 4 of 1913,

¹⁴ Cr. L. J. 183.

¹⁷ *Prafulla Chandra Kharghoria*, (1930) 34 C. W. N. 925, 32 Cr. L. J. 318, [1931] AIR (C) 8.

This section makes the falsification of books and accounts punishable even though there is no evidence to prove misappropriation of any specific sum on any particular occasion.

Object.—This section was introduced by Act III of 1895, s. 4. It is intended to meet a glaring defect in the law which was proved to exist in *Shama Churn Sen's* case,¹⁸ in which a man was charged with defrauding a bank to the extent of three lakhs of rupees. He was acquitted because it could not be shown that the three lakhs had been abstracted upon any one particular occasion or in any particular sum. The present section is intended to meet such cases and to make the falsification of books punishable even though no particular sum of money or particular occasion can be shown. It is, with some verbal alterations, the same in substance, as s. 1 of the Falsification of Accounts Act, 1875,¹⁹ which runs thus :—

“That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.”

Scope.—The marginal note to this section indicates that the section only applies where there is falsification of accounts. The Explanation to the section imports the same idea, namely, that the section refers to something in the way of book-keeping or written accounts. This point was raised but not decided in *Emperor v. Bibudhananda Chakravarti*,²⁰ where it was held that the removal of new Court-fee stamps from documents and substitution in their places of used stamps, with alterations of figures on them, did not fall within the scope of this section.

Ingredients.—The section requires the following essentials :—

1. The person coming within its purview must be a clerk, officer, or servant, or acting in the capacity of a clerk, officer or servant.

2. He must wilfully and with intent to defraud—

(i) destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which

(a) belongs to, or is in possession of, his employer, or

(b) has been received by him for or on behalf of his employer ; or

(ii) make or abet the making of any false entry in, or omit or alter or abet the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security, or account.

1. ‘Clerk, officer or servant employed or acting in the capacity of a clerk, etc.’—See ss. 381 and 408, *supra*. Where a partner in a firm is appointed as such to manage the business of the firm or to write its account, he acts as its servant ; and if he falsifies accounts he is liable to be punished under this section.²¹ The mere fact that he is a partner and not a clerk or a servant is no answer to a charge of falsification of accounts.²²

The words ‘acting in the capacity of a clerk or servant’ include a person who undertakes to perform and does perform the duties of a clerk or servant whether in fact he is a clerk or servant or not, and though he is under no obligation to perform such duties and receives no remuneration.²³

Payment by percentage of gross takings is no bar to the relation of master and servant.²⁴

2. ‘Wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, etc.’—‘Wilfully’ means that the act is done deliberately

¹⁸ Calcutta case, Unreported.

¹⁹ 38 & 39 Vic., c. 24.

²⁰ (1919) 47 Cal. 71, 74.

²¹ *Lalloo Ghella*, (1904) 6 Bom. L. R. 558, 1 Cr. L. J. 757; *Mahomed v. Mahomed Idris*, (1924) 18 S. L. R. 274, 26 Cr. L. J. 1101, [1925]

AIR (S) 328.

²² *Monindra Mohan Biswas v. Srish Chandra Das*, (1981) 36 C. W. N. 303, 33 Cr. L. J. 597, [1932] AIR (C) 464.

²³ *Annasami Aiyangar*, (1901) 1 Weir 554.

²⁴ *Alfred Solomons*, (1909) 2 Cr. App. R. 288.

and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it.²⁵

'Intent to defraud'.—See Comment on s. 25, *supra*, as to the meaning of this expression.

The Rangoon High Court has held, differing from the Bombay High Court and agreeing with the Allahabad and the Calcutta High Courts, that the meaning of the term 'with intent to defraud' is not restricted to cases of "deceit and injury to person deceived." The term means either an intention to deceive and by means of deceit to obtain an advantage or an intention that injury should befall some person or persons. Advantage which is intended must relate to some future occurrence or, in other words, must be of a prospective nature.¹ The Bombay High Court has held that the term 'intent to defraud' is restricted to cases of "deceit and injury to the person deceived."²

Even if the intention with which the false entries are made is to conceal a fraudulent or dishonest act previously committed, the intention will be to defraud.³ Making a false document with a view to prevent persons already defrauded from ascertaining that misappropriations had been committed, and thus to enable the person who committed the misappropriations to retain the wrongful gain which he had secured, amounts to the commission of a fraud and brings the case under this section.⁴ The issuing of a false statutory report of a company calculated to deceive the public and intended to induce them to invest their money in the company which they would not otherwise have invested is an act done with intent to defraud.⁵ Where a *talati* committed a breach of a departmental rule that he was to pay small sums collected by him into the treasury within five days, but paid them beyond time, and altered dates in his books to show that payments were made within time, it was held that he was not guilty of this offence as he had no fraudulent intent.⁶

'Falsifies'.—The expression 'falsify' applies to the preparation of an entirely new document containing false information. To 'falsify' means to 'render false' and a new document containing false information is correctly described as false document and the act of preparing such a document is called the falsification of the document.⁷

'Valuable security'.—See s. 30, *supra*.

'Account'.—The offence is complete when accounts are falsified with intent to defraud.⁸ An alteration of the accounts made after embezzlement will come within the section, if it is a part of the scheme to deprive another of his moneys.⁹ But the alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation is not an offence under this section, there being no intent to commit fraud. The accused were the post-master and treasurer of a post office. The post-master despatched to a person four sacks of waste-paper forms of the post office kept in his custody and appropriated the proceeds of the sale which amounted to Rs. 10. The fact was discovered and an inquiry was set on foot. The post-master, to cover his failure to credit the proceeds of the sale, with the help of the treasurer, changed the accounts. The post-master was charged and convicted under ss. 409, 465, 471 and this section and the treasurer, under ss. 465, 471 and this section. It was held, on appeal, that the conviction of the post-master under s. 465 and this section was wrong, as there was no intent to commit fraud. The cases of *Lalit Mohan Sarkar v. Queen-Empress*¹⁰ and *Emperor v. Rash Behari Das*¹¹ were distinguished on the ground that in this case the entry showed that the post-master was liable and that it was a statement of the true position of affairs, whereas in the two above-mentioned cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs.¹²

²⁵ *Senior*, [1899] 1 Q. B. 288, 290; *Ryan*, (1914) 24 Cox 185, 187.

¹ *Maung Tint*, ((1938) 40 Cr. L. J. 552, [1932] AIR (R) 156; *Muhammad Saeed Khan*, (1898) 21 All. 118; *Mohit Kumar Mukerjee*, (1925) 52 Cal. 881.

² *Harjivan Valji*, (1925) 50 Bom. 174, 28 Bom. L. R. 115; *Sanjiv Ratnappa*, (1932) 34 Bom. L. R. 1090, 56 Bom. 488.

³ *Rash Behari Das*, (1908) 35 Cal. 450.

⁴ *Ragho Ram*, (1933) 55 All. 788.

⁵ *Ram Chand Gurwala*, (1926) 27 Cr. L. J. 88, 1387, (1926) AIR (L) 385.

⁶ *Kashinath Ramchandra Davari*, (1931) Crim. Appeal No. 525 of 1930, decided by Beaumont, C. J., and Murphy, J., on January 7, 1931 (Unrep. Bom.).

⁷ *Ram Chand Gurwala*, (1926) 27 Cr. L. J. 1383, 1387, [1926] AIR (L) 385.

⁸ *Narain Dat Tiwari v. Rudra Dat Bhat*, (1925) 47 All. 948.

⁹ *Annasami Aiyangar*, (1901) 1 Weir 554.

¹⁰ (1894) 22 Cal. 313.

¹¹ (1908) 35 Cal. 450.

¹² *Jyotish Chandra Mukerjee*, (1909) 33 Cal. 955.

The word 'account' includes any contrivance for registering words or figures. The figures on an automatic taximeter may be an account. An offence under this section is committed if a servant wilfully and with intent to defraud tampers with a mechanical instrument used by his employer for registering figures from which an account is subsequently prepared. There are now in use a number of mechanical means for counting money and calculating sums received or paid, and it would be a serious thing to say that to falsify the mechanical means whereby an account is brought into existence is not to falsify an account. A company were the owners of certain motor-cabs and had in their service a number of cab-drivers. Each cab was fitted with a taximeter, that is, a mechanical instrument which, when in action, registers upon a dial the amount earned by the driver from persons hiring the cab. The taximeter was put into and out of action by the driver depressing and raising a lever respectively. From the figures appearing on the dial at the end of the day an account was prepared stating the proportions due to the company and to the driver for the use of the cab. For several successive days a driver in the company's service took certain passengers on a definite round, receiving from them on each day the same fare. While taking the passengers on this round, the driver, wilfully and with intent to defraud, drove the cab with the lever of the taximeter raised, so that the instrument was put out of action and registered nothing. It was held that the driver was guilty of falsifying an account.¹³

3. 'Belongs to or is in the possession of his employer'.—The account which an accused person renders false must belong to, or be in the possession of, his employers.¹⁴ Documents containing accounts, in respect of which falsifications were alleged to have been made, were prepared by an agent but were never made over to the employer, who was many thousand miles away in another country, and there was no falsification after they reached the hands of the complainant, it was held that it did not amount to an offence under this section as the documents could not be said to be belonging to or in possession of the employer.¹⁵

4. 'Abets'.—See s. 107, *supra*.

5. 'Omission'.—See s. 33, *supra*.

CASES.

Alteration or falsification in book, register, etc.—The accused, a Forest clerk, made alterations in the cash book and the office register of his office, so as to make it appear from the books that certain moneys due in respect of "compounding fees" were in fact paid into the Government treasury, when they had been embezzled by the Forest Guard whose duty it was to collect them. It was held that the accused was guilty under this section inasmuch as the false entries were made with a view to conceal the embezzlement, and thereby to deprive the Government of their money.¹⁶ The accused was a sub-overseer in the Wards and Encumbered Estates Department and his duty was to prepare estimates of repair works to buildings, etc., of the estates under administration, to supervise the works, to measure and certify the amount of work done and calculate what was due to the contractor to whom payment was made on bills prepared by him. He prepared a bill purporting to be based on measurements made on March 25, 1986. The bill contained a certificate that the work had been satisfactorily completed and had been measured by the accused on that date, the measurements being entered in his measurement book. On the basis of the certificate the bill was passed and paid. The accused, having been prosecuted on a charge under this section, admitted that the entries in the measurement book were fictitious and that he had not in fact measured up the work. His defence was that if the whole of the work done by the contractor had been measured up, it would have been found that the contractor in fact had not been overpaid but had done work in excess of the amount billed for. It was held that the accused having wilfully falsified the measurement book and bill with the intent that the contractor's bill might be passed without actual measurement, he wilfully exposed the estate to risk of loss, and his act amounted to a 'fraudulent' falsification of account, and that it was no answer to the charge for

¹³ *Solomons*, [1909] 2 K. B. 98C.

¹⁴ *Palin*, [1906] 1 K. B. 7.

¹⁵ *E. A. Morely*, (1936) 37 Cr. L. J. 927,

[1936] AIR (R) 299.

¹⁶ *Annasami Aiyangar*, (1901) 1 Weir 554.

the accused to say that he did not know that wrongful loss would be caused to Government or wrongful gain to the contractor, when he certified the correctness of a claim which he believed was not exaggerated.¹⁷

False entries in register.—Certain sums of money were received at a Munsifi for payment into the Government treasury but they were never paid. The accused, an accountant in the Munsifi's Court, did not enter these sums in the Chelan Register. But after the commencement of an inquiry into the matter, he, for the purpose of concealing the non-payment, made false entries in the register showing that these sums had been paid to the credit of the Collector. It was held that inasmuch as the accused, in making the false entries, was in reality furthering the fraud which had been committed upon the Government, he acted fraudulently and was guilty under this section.¹⁸ Where a postal clerk was alleged to have retained money, the proceeds of a V. P. P. sale, for three months, and made a false entry in his register of V. P. P.'s to the effect that the parcel had been refused by the addressee and returned to the vendor, and then after he had been transferred to another station, to have remitted the money, to the vendor, it was held that an offence under this section had been committed.¹⁹ The accused a sub-postmaster, received a V. P. letter to be delivered to a person on payment of the V. P. amount. He handed over the letter to that person without getting payment on or before October 20, 1925, and then altered his accounts so as to make it appear that he only handed over the letter on October 24, 1925. It was held that the accused was guilty of falsification of accounts.²⁰

The accused made unauthorised entries in a book showing certain donees of land as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors. The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not and *prima facie* the new entries made by the accused were correct. It was held that it could not be said that accused (who acted bona fide) fraudulently altered any book or register within the meaning of this section.²¹ The accused, the managing director of a bank, wishing the bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the shareholders and the public and so to make possible a project for increasing largely the bank's capital, on December 17, 1912, got his son to present a pro-note for Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account from Rs. 4,050, which he had actually drawn, to Rs. 1,050, and thus deceiving the shareholders as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent. which would otherwise have been the most possible. Later, in January 1913, i.e., after the close of the financial year, the whole thing was readjusted and matters returned to the *status quo ante* December 17, 1912. It was held that the accused was guilty of an offence under this section inasmuch as he falsified the balance-sheet of 1912 and the books of the bank by showing as profits Rs. 3,000 which were not profits and that he falsified them none the less because he first manufactured a pro-note in order to give the falsified balance-sheet and books an appearance of correctness.²² Where the accused, who was a paid supervisor of a society connected with the co-operative movement, debited Rs. 2 as the pay of a sweeper woman, took the thumb impression of his nephew against the debit entry, certified the thumb impression to be that of the sweeper woman, and appropriated the amount to himself, it was held that the accused had committed the offence of falsification of accounts under this section as he had made a false debit entry.²³

English cases.—B, a collector in the employment of N, collected on February 22, from S £8 14s. 10d., due to N. The ordinary course of business was for B, at the end of each day, to account to E, N's cash clerk, for moneys collected during the day, E's duty being to enter payments accounted for by B in the cash-book. On the evening of February 22, B gave E a slip of paper on which he had written, "Shepard, on ac-

¹⁷ *Sukhamoy Maitra*, (1937) 16 Pat. 688.

¹⁸ *Rash Behari Das*, (1908) 35 Cal. 450.

¹⁹ *W. C. Das*, (1909) 1 U. B. R. (P. C.) 29, 11 Cr. L. J. 185.

²⁰ *Kandasami Aiyar*, (1926) 52 M. L. J. 703, 25 L. W. 656, 28 Cr. L. J. 552, [1927] AIR (M) 626.

²¹ *Muhammad Sirdar*, (1914) P. R. No. 25 of 1914, 16 Cr. L. J. 19, [1914] AIR (L) 586.

²² *Daulat Rai*, (1915) P. R. No. 28 of 1915, 16 Cr. L. J. 473.

²³ *Keshav Rao*, (1934) 36 Bom. L. R. 1120, 36 Cr. L. J. 522, [1935] AIR (B) 30.

count, £5", which E copied into the cash-book, believing that it represented the whole amount collected by B from Shepard. It was held that B was rightly convicted under s. 1 of the Falsification of Accounts Act.²⁴ The accused was employed by a firm carrying on business in London, to manage their branch in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit those slips to them in London in order that the amounts might be entered up in a cash book kept in London. On a certain day the accused received three sums in Paris, which he fraudulently appropriated to his own use, and omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing and intending that the same would in consequence be omitted from the cash-book, as was the case. It was held that the accused was guilty under s. 1 of the Falsification of Accounts Act.²⁵

PRACTICE.

Evidence.—Prove (1) that the accused destroyed, altered, mutilated, or falsified the book, paper, writing, valuable security, or account in question.

(2) That the accused was a clerk, officer, or servant, or acted in any such capacity.

(3) That the book, paper, etc., belonged to, or was in the possession of, his employer, or had been received by him for or on behalf of his employer.

(4) That the accused did as in (1) wilfully and with intent to defraud.

Or prove (1) that the accused made or abetted the making of any false entry in or omitted or altered or abetted the omission or alteration of some material particular from or in such book, paper, etc.

(2), (3) and (4) as above.

It is necessary to show not merely false entries in the books of accounts, but that such false entries were made with intent to defraud.¹ It is not necessary to prove that any person or persons was or were actually deceived; it is quite sufficient if it is proved that the false statutory report by a company had that tendency.²

When a person is charged with falsification of accounts, any number of falsifications may be proved in order to sustain the principal charge of falsification.³

Although one accused is charged for the whole offence, he can be convicted under this section for having done one of the acts which make up the offence committed in furtherance of the common intention of himself and his co-actors.⁴

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Sanction.—No sanction is required for institution of a prosecution under this section with regard to a document produced in Court as this section is not covered by the provisions of s. 195 (1) (c) of the Criminal Procedure Code.⁵

Where the accused, a Sub-Assistant Surgeon, was charged with an offence under this section for wilfully and with intent to defraud omitting to record certain entries in a stock book of medicines belonging to the hospital where he was employed and in his possession, it was held that the consent of the Governor as required for the institution of proceedings under s. 270 (1) of the Government of India Act, 1935, as he did the act in the execution of his duty.⁶ Where a public servant withdrew money from the cash in his keeping and misappropriated it and made false entries in the cash book showing sums totalling this amount as paid to certain forest guards, it was held that the sanction for the prosecution of an offence under this section was necessary.⁷

Charge.—Each act of falsification of a distinct document amounts to a separate offence; and an accused person can only be charged with and tried at one trial in respect of any number of such falsifications not exceeding three committed in the space of one year.⁸ The alteration in the law by s. 222 (2) of the Criminal Procedure Code does not apply to a charge under this section. It applies only to criminal breach of

²⁴ *Butt*, (1884) 15 Cox 564.

²⁵ *Oliphant*, [1905] 2 K. B. 67.

¹ *Drewett*, (1904) 21 T. L. R. 164.

² *Ram Chand Gurwala*, (1926) 27 Cr. L. J. 1383, [1926] AIR (L) 385.

³ *Prafulla Chandra Kharghoria*, (1930) 34 C. W. N. 925, 32 Cr. L. J. 318, [1931] AIR (C) 8.

⁴ *Satyamnarayan*, (1943) 22 Pat. 681.

⁵ *Jethmal Lalchand*, (1931) 25 S. L. R. 471,

33 Cr. L. J. 328.

⁶ *Hori Ram Singh*, [1939] F. C. R. 159.

⁷ *Mangharam Ghumanmal*, [1941] Kar. 328.

⁸ *Fitzmaurice*, (1926) 27 Cr. L. J. 793, [1926] AIR (L) 193; *Manant K. Mehta*, (1925) 27 Bom. L. R. 1343, 49 Bom. 892; *G. S. Ramsheshan*, (1935) 31 N. L. R. 337, 36 Cr. L. J. 1216, [1935] AIR (N) 178.

trust or dishonest misappropriation of money.⁹ A series of falsification of accounts made to cover a single act of defalcation may be laid in one charge.¹⁰ The terms of this section indicate that a certain elasticity is permissible in framing a charge under it, and it is not necessary to confine the charge to one particular false entry. A general falsification of specified books, papers, or accounts may be alleged in combination with an allegation of fraudulent intent, no details of the person affected by the fraud or the amount involved, or the date or dates on which the offence was committed being required. A number of falsifications can be included in a single charge provided they are connected with the same fraud; that is to say although it is possible to regard them as separate offences, the law provides that they may also be regarded as one offence. A charge under s. 408, combining a number of offences of criminal breach of trust under s. 222 (2), Criminal Procedure Code, can be combined with a charge under this section, of falsification of accounts relating to that charge generally and covering a large number of false entries in account books, provided that the offence alleged under this section can be said to have been committed in the course of the same transactions as the offence under s. 408.¹¹ But where the prosecution selected more than three charges under this section although by the device adopted by the public prosecutor twenty-eight charges were condensed into four by using sub-headings under each charge, it was held that the charges as framed were illegal.¹² The offences of criminal breach of trust by misappropriating public money, and of falsifying muster-rolls month after month for a full year can be tried together.¹³

The accused was charged with three distinct offences of criminal breach of trust under s. 409 in respect of three items received by him and with three distinct offences of falsification of accounts under this section. It was held that the case was not covered by ss. 234 and 235 of the Criminal Procedure Code, and consequently under s. 233, Criminal Procedure Code, there should have been separate charges and every charge should have been tried separately.¹⁴

The charge should run thus :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, being a clerk (*or officer, etc.*), to AB, wilfully, and with intent to defraud, destroyed (*or altered, mutilated, etc.*), a certain book (*or paper, writing, etc.*) to wit—, which belonged to (*or which was in the possession of*) the said AB, your employer; and thereby committed an offence punishable under s. 477A of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

Of Trade, Property and Other Marks.

Sections 478 to 489 were substituted for the original sections by the Indian Merchandise Marks Act (IV of 1889), s. 3.

Object.—The Madras High Court has observed: “Ordinarily the infringement of a trade mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed of resort to the criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction”.¹⁵ This view has been preferred by the Bombay High Court¹⁶ to the contrary view taken by the Calcutta High Court.¹⁷

⁹ *Mati Lal Lahiri*, (1899) 26 Cal. 560; *Raman Behari Das*, (1913) 41 Cal. 722; *Kalka Prasad*, (1915) 38 All. 42.

¹⁰ *Mangal Sen*, (1929) 30 Cr. L. J. 958, [1929] AIR (L) 843.

¹¹ *Debi Prasad*, [1944] O. W. N. 1, (1943) 45 Cr. L. J. 538, [1944] AIR (O) 122.

¹² *Ramautar Lal*, (1941) 21 Pat. 113.

¹³ *Dubri Misir*, (1930) 6 Luck. 441.

¹⁴ *Bhu Prakash*, [1940] A. L. J. R. 796.

¹⁵ *Ruppell v. Porinusami Tevan*, (1899) 22 Mad. 488, 490.

¹⁶ *Abdulsatar Khan*, (1935) 37 Bom. L. R. 580, 59 Bom. 551.

¹⁷ *Akshoy Kumar Dey*, (1928) 32 C. W. N. 699, 30 Cr. L. J. 252, [1928] AIR (C) 495; *Nagendranath Shaha*, (1929) 57 Cal. 1158.

A person aggrieved by the infringement of his trade-mark has two remedies open to him : (1) he can institute criminal proceedings under the Code, or (2) he can bring an action for an injunction and damages ; and, although the criminal Court has a discretion in view of the peculiar circumstances of a particular case, e.g. if there exists a bona fide dispute as to the right to use a trade-mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands, and direct the complainant to establish his rights in a civil Court it is nowhere laid down by the Legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court.¹⁸

Abetment.—"If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would ...under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted."¹⁹

478. For the purposes of this Code, the expression "trade mark" includes a trade mark registered under the Trade Marks Act, 1940, and any mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right to use the mark.

Trade Mark.

COMMENT.

This section was substituted in the place of the old section by Act II of 1941, s. 12.

A trade-mark is some symbol, consisting in general of a picture, label, word, or words, which is applied or attached to a trader's goods, so as to distinguish them from similar goods of other traders, and to identify them as his goods or as those of his successors in the business in which they are produced or put forward for sale.

The Trade Marks Act (V of 1940) has been passed to provide for the registration and more effective protection of trade marks.²⁰ British India has now a system of registration of trade-marks similar to the English Trade Marks Act. The provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force (s. 3). The Act does not affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof (s. 20 (2)).

A trade-mark may be acquired by adoption and user upon a vendible article, and when such user has been proved, the property of the person using the trade-mark will be protected. Property in or right in respect of a mark may be acquired by user.²¹ If a photographer applies a trade mark to photographs which he sells, the provisions of this section are as applicable to such trade-mark as they are to trade-marks on other goods and vendible articles.²² A person may to some extent appropriate to his own use a name suggested by his trade, without infringing the law relating to trade-marks or trade descriptions.²³

Scope.—The section deals with trade-marks and not with cases analogous to those of trade-marks. The Bombay High Court has held that the general resemblance or get-up, irrespective of the circumstance that the registered trade-mark is different, does amount to counterfeiting a trade-mark.²⁴ Similarly, the Calcutta High Court has laid down that the expression 'trade-mark' must not be confined to the trade-

¹⁸ *Banarsi Das*, (1928) 9 Lah. 491; *Muham-mad Raza*, (1930) 6 Luck. 183.

¹⁹ Merchandise Marks Act (IV of 1889), s. 22.

²⁰ The Act came into force on June 1, 1942, *G. I. Extraordinary*, 1942, p. 684. Notification No. 405-Ind. (1) 142.

²¹ *P. A. Pakir Mahomed*, [1929] Cr. C. 498;

Hafizullah v. Sheikh Papa, (1933) 30 N. L. R. 45, 35 Cr. L. J. 373, [1933] AIR (N) 344.

²² *Klier v. Ahuja*, (1907) 6 Cr. L. J. 392.

²³ *Bakaulah Mallik*, (1904) 31 Cal. 411.

²⁴ *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L. R. 78, 15 Cr. L. J. 522, [1914] AIR (B) 128; *P. A. Pakir Mahomed*, [1929] Cr. C. 498.

mark of the complaining party registered in England, but must include the whole design and label.² The former Chief Court of Lower Burma had held a contrary opinion.³

1. 'Mark'.—A mark to be a trade-mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person.⁴ A trade-mark must be some visible and concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade-mark is.⁵ A mark in order to be trade-mark must be 'distinctive', that is to say, adapted to distinguish the goods of the proprietor of a trade-mark from those of other persons. A mark which merely describes the quality or origin of an article or is such as is commonly used in the trade to denote goods of a particular kind is not 'distinctive'. To determine whether a mark has become a trade-mark, the Court has to take into consideration the extent to which its user has rendered the mark in fact distinctive of the goods in question.⁶ A label which, from long use, has come to be associated in the market with goods manufactured by a particular person is his trade-mark.⁷ "The right which a manufacturer has in his trade-mark is the exclusive right to use for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured."⁸ A mark which has been used by the complainant in the market for six years can become his trade-mark.⁹ "A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself, and if such symbol or emblem comes by use to be recognised in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description".¹⁰ "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may require purchasers to believe, that the goods which he is selling are the manufacture of another person".¹¹ It is immaterial whether the deception arises from the use of a name which is, as it happens, the name of the defendant, or whether it arises from the use of any other description which in a sense may be accurate of that which he sells. For, if the article which he sells has come to be known in the market as meaning something made by somebody other than himself, it is impossible for him to sell it *simpliciter* by that name, although it be his own, without misleading purchasers.¹²

Where a manufacturer has no exclusive right to manufacture a certain article or even articles of a particular brand, all that he can claim is that no other manufacturer should so mark such articles as to pass them off as the former's when they are not.¹³

Property in a trade-mark is "the right to the exclusive use of some mark, name, or symbol in connexion with a particular manufacture, or vendible commodity; consequently, the use of the same mark in connexion with a different article is not an infringement of such right of property. If, therefore, the trade-mark includes in itself a clear and distinct description of the commodity to which it is affixed, it is not pirated by the use of a mark which, although in other respects similar, does not contain or give the same description, and which is impressed upon an article which is not of the nature or quality so described".¹⁴ There can be no right to the exclusive ownership of any symbol or mark universally in the abstract. Thus, an iron-founder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods: for the property in a trade-

² *Nilmoney Nag v. Durga Pada Banerji*, (1915) 19 C. W. N. 957, 16 Cr. L. J. 719, [1916] AIR (C) 538.

³ *Petley & Son v. S. Ah Kyan*, (1903) 2 L. B. R. 159, sub-nom. *Stephen Ah Kyan v. James Petley*, (1903) 1 Cr. L. J. 375.

⁴ *Anookool Chunder Nundy*, (1900) 27 Cal. 776.

⁵ *Anath Nath Dey*, (1912) 40 Cal. 281.

⁶ *Loke Nath Sen v. Ashwini Kumar De*, [1938] 1 Cal. 665.

⁷ *Sri Narayan v. Mohammad Abu Saleh*, [1940] 2 Cal. 1, 2.

⁸ Per Lord Cranworth in *Leather Cloth Company v. American Leather Cloth Company*, (1865) 11 H. L. C. 523, 533, 534.

⁹ *Lakhan Chandra*, (1924) 25 Cr. L. J. 1098,

[1925] AIR (C) 149.

¹⁰ Per Lord Kingsdown in *Leather Cloth Company v. American Leather Cloth Company*, (1865) 11 H. L. C. 523, 538.

¹¹ Per Lord Langdale in *Perry v. Truefitt*, (1842) 6 Beav. 66, 73.

¹² *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, (1900) 83 L. T. 259. See *Dunlop Pneumatic Tyre Company v. Dunlop Motor Company, Limited*, [1907] A. C. 430; *Eno v. Dunn*, (1890) 15 App. Cas. 252.

¹³ *Ananth Nath Dey*, (1912) 40 Cal. 281.

¹⁴ Per Lord Chancellor Westbury in *The Leather Cloth Company (Limited) v. American Leather Cloth Company (Limited)*, (1863) 33 L. J. Ch. 199, 201, on appeal, (1865) 11 H. L. C. 523.

mark consists in the exclusive right to the use of that mark as applied to some particular manufacture or vendible 'commodity'.¹⁵

A letter or a combination of letters may constitute a trade-mark.¹⁶ But it is doubtful whether a bottle itself could be considered a trade-mark.¹⁷

A design or pattern, which covers the whole body of the goods and appears to be part and parcel of the goods, is not a trade-mark, or trade description.¹⁸

2. 'Merchandise'.—Merchandise is not synonymous with goods and in connection with trade-marks clearly conveys the idea of goods offered for sale by some person or persons concerned in or connected with the origin or history of the goods, of whose guarantee as to the reliability of the goods the trade-marks are a symbol. Merchandise implies goods not only offered for sale but also selected and so to say guaranteed by the proprietor of the trade-mark.¹⁹

Mark of importer of goods.—A distinctive mark may be adopted by a person who is not the manufacturer but the importer of goods, and he will acquire property in that mark as indicating that all goods which bear it have been imported by him. Where the complainants, importers of hand-made sugar, used a distinctive mark denoting that the sugar contained in the bags so marked had been imported by them (their customers accepting the mark as a guarantee that the sugar was hand-made), and the accused were found as having used the same mark whereby the complainants had established a special trade, it was held that the accused were guilty of using a false trade-mark.²⁰ A merchant importing goods is entitled to the same protection of his trade-mark as the manufacturer, and the selector-importer who affixes his name or other trade-mark to the goods is a person whose merchandise they are. Such goods, if bought by a person for selling them again, do not become his merchandise in the same sense. The name of an importer duly appended to the goods can be a valid trade-mark; so also a number having nothing to do with the cloth except as an indication of its manufacturer or importer.²¹ Where in the course of a user extending over a large number of years, goods were sold by a firm bearing a certain mark which had been known to purchasers by that mark, it was held that a prosecution would lie at the instance of the firm.²²

479. A mark used for denoting that moveable property belongs to a particular person is called a property mark.

COMMENT.

The distinction between 'trade-mark' and 'property-mark' is not recognized in English law.

480. Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon,¹ in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked,² have a connection in the course of trade with a person with whom they have not any such connection, is said to use a false trade mark.

COMMENT.

This section says what constitutes the user of a false trade mark.

It is good law as well as common sense that no man has a right to put off his goods

¹⁵ Per Lord Chancellor Westbury in *Hall v. Barrows*. (1868) 33 L. J. Ch. 204, 207-8.

¹⁶ See *Banarsi Das*, (1928) 9 Lah. 491.

¹⁷ *E. S. Olpadavalla v. James Wright*, (1928) 32 C. W. N. 1115, 30 Cr. L. J. 832, [1928] AIR (C) 873.

¹⁸ *Narumal Khemchand v. The Bombay Co., Ltd.*, (1914) 8 S. L. R. 89, 15 Cr. L. J. 670, [1914] AIR (S) 109.

¹⁹ *J. M. Dunbar v. The Holland Bombay Trading Co.*, (1918) 12 S. L. R. 129, 20 Cr. L. J. 277, [1914] AIR (S) 98.

²⁰ *Latif*, (1916) 39 All. 123.

²¹ *J. M. Dunbar v. The Holland Bombay Trading Co.*, (1918) 12 S. L. R. 129, 20 Cr. L. J. 277, [1914] AIR (S) 98.

²² *P. A. Pakir Mahomed*, [1929] Cr. C. 498.

for sale as the goods of a rival trader, and with the object to use names, marks, letters or other indications by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person's. Still less is he entitled to use marks containing a falsehood on their face for the purpose of deceiving purchasers and palming off upon them an article other than that which they believed they were contracting to buy.

Ingredients.—This section has two essentials :—

1. Marking any goods or any case,²³ package, or receptacle, containing goods ; or using any case, package, or receptacle, with any mark thereon.

2. Such marking or using must be in a manner reasonably calculated to cause it to be believed that the goods so marked, or the goods in the marked receptacle, are the manufacture or merchandise of a person whose manufacture or merchandise they are not.

1. 'Whoever marks any goods or any case, package or other receptacle containing goods, etc.'—If the goods of a manufacturer have from the mark he has used come to be known by a particular name, the adoption by a rival trader of any mark which would cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as an actual copy of his device. In such cases dissimilarity of the rival marks is not a complete defence.²⁴ The word 'goods' includes books.²⁵ On a complaint alleging that the accused printed and sold an unauthorised edition of a book with the contents, outer cover and title-page being exactly the same as in the authorised edition, it was held that in order to bring the case under this section it must be shown that the accused had marked the book he was selling in a manner reasonably calculated to cause it to be believed that it was the manufacture or merchandise of, or that it belonged to, a person whose manufacture or merchandise it was not, or to whom it did not belong. If this is shown it will be on the accused to show that it was not done to defraud any one.¹

2. 'In a manner reasonably calculated to cause it to be believed, etc'.—The test of the infringement of a trade-mark is whether the acts alleged as an infringement are likely to mislead the public into dealing with the alleged infringer under the belief that they are dealing with a person who first used the mark.² How is this to be tested? Lord Herschell said: "It seems to me...that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other".³ Mere "differences in detail do not prevent the two designs being essentially the same".⁴ "The imitation of a man's trade-mark, in a manner liable to mislead the unwary, cannot be justified by shewing, either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled."⁵ Thus, it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *a priori*. All that the Court of Justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. Actual physical resemblance of the two marks is not the sole question for consideration.⁶ The proper test is whether the 'get-up' of the accused's goods is likely to deceive a purchaser who is acquainted with the complainant's 'get-up', but who trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without the distinguishing features being concealed and the Court must

²³ *Manavala Chetty*, (1906) 29 Mad. 569.

²⁴ *Abdul Majid*, (1916) 9 L. B. R. 31, 17 Cr. L. J. 488, [1917] AIR (LB) 149.

²⁵ *Kanai Das Bairagi v. Radha Shyam Basack*, (1898) 26 Cal. 232; *Raghavulu Naidu v. Sundramurthi Mudali*, (1907) 31 Mad. 512.

¹ *Raghavulu Naidu v. Sundramurthi Mudali*, (1907) 31 Mad. 512.

² *Hall v. Barrows*, (1863) 33 L. J. Ch. 204; *Leather Cloth Company v. American Leather Cloth Company*, (1865) 11 H. L. C. 523; *Taridas Durlabhdas*, (1907) 9 Bom. L. R. 732, 6 Cr. L. J. 75.

³ *Hecla Foundry Co. v. Walker, Hunter & Co.*, (1889) 14 App. Cas. 550, 555.

⁴ Per Lord Herschell in *John Harper & Co., Limited v. Wright and Butler, & Co., Limited*, [1896] 1 Ch. 142, 147. *Nugendranath Shaha*, (1929) 57 Cal. 1153.

⁵ Per Lord Selborne, L. C., in *Singer Manufacturing Company v. Loog*, (1882) 8 App. Cas. 15, 18.

⁶ *Seizo v. Provezende*, (1865) L. R. 1 Ch. 192, 196; *Johnstone v. Ewing*, (1882) 8 App. Cas. 219. See also *John Smidt v. Reddaway & Co.*, (1905) 32 Cal. 401; *Nemi Chand v. Wallace*,

also have regard to the class of purchasers by whom the goods would normally be bought.⁷ The question is not whether a purchaser would be deceived if he had the two articles side by side but the matter must be considered from the point of view of the ordinary unwary purchaser.⁸

Mere imitation is no offence unless there is an attempt to pass off goods as goods of another dealer or manufacturer either by using a false trade-mark or false description or a trade-mark or description likely to deceive purchasers by a deliberate imitation of a genuine mark or description or by falsely giving out goods as the goods of some other dealer or manufacturer.⁹

If the mark complained of is found likely to deceive customers, it is not necessary to bring evidence of any person who is actually deceived.¹⁰

The question whether the trade mark, the subject-matter of the prosecution, is a colourable imitation of another trade-mark is one of fact and the Court must come to its own conclusion after having placed itself in the position of an unwary customer. It is enough that there should be such similarity that an unwary customer may not be able to distinguish the one from the other, especially when he sees the one without having the other before him. The question is not whether anyone has been deceived in fact, but whether an average customer can be deceived and for this, the Court must form its own opinion.¹¹

Amendment.—The words “have a connection in the course...connection” were added by Act II of 1941, s. 13, for the words “are the manufacture or merchandise of a person whose manufacture or merchandise they are not.”

CASES.

Calendars.—The complainant, a descendant of Shri Chandu, used to prepare calendars bearing the name of “Shri Chandu Panchang” at Jodhpur and sent each year the copy of such calendar to the publishers in different parts of India allowing them to use the name of “Shri Chandu Panchang” to denote calendars prepared in Jodhpur by the descendants of Chandu. These calendars had acquired the reputation that they were prepared by those descendants and under their authority. The defendant, a publisher in Bombay, published a calendar and used the words “Shri Chandu Panchang” on the cover, although it was not prepared by the descendants of Chandu. The complainant, thereupon, proceeded against the defendant under this section. It was held that the defendant's act could not come under this section, for the title “Shri Chandu Panchang” could not fall within the definition of ‘trade-mark’ under s. 478.¹²

Labels.—The complainants, the Holland Bombay Trading Co., used to import white shirting bearing the mark “H. B. T. C. 40,000”, a label with a design of a lion and snake and an oval stamp containing written in it the words “Sole Importers, Holland Bombay Trading Company, Limited”, and a buff heading. The accused had in their possession for purposes of sale some packages of white shirtings bearing the mark H. P. F. C. 40,000, a label with two lions and two snakes and an oval stamp containing written in it the words “Sole Importers, Holland Export Company,” and a buff heading. The letters H. B. T. C. in the complainant's and H. P. F. C. in the accused's mark were printed in similar types and were similar in size and colour. The colour and size of the labels, as also the colour, size and type of the oval stamps in both were similar. It was held (where it was proved that the complainants had a property in their marks) that the accused had used a false trade-mark and were liable

(1907) 34 Cal. 495; *Nga Po Saing*, (1907) 4 L. B. R. 192, 7 Cr. L. J. 113; *Nallaya Pillai*, (1895) 1 Weir 556. In a Madras case though there was considerable resemblance to the get-up of the complainant's mark yet the High Court set aside the conviction holding that the dispute was one which might be fitly decided in a civil Court: *Rassolkhan Saheb*, [1912] M. W. N. 85, 13 Cr. L. J. 175. See *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L. R. 78, 15 Cr. L. J. 522.

⁷ *A. M. Mahumiar & Company v. Finlay Fleming & Company*, (1929) 7 Ran. 189; *Roshan Singh*, [1940] All. 751.

⁸ *Aswini Kumar Pal*, (1930) 34 C. W. N. 524, 32 Cr. L. J. 187, [1930] AIR (C) 728; *Faqir Chand*, (1934) 16 Lah. 114.

⁹ *Hafizullah v. Shekh Papa*, (1933) 30 N. L. R. 45, 35 Cr. L. J. 373, [1933] AIR (N) 344; *Walkins Mayor & Co. v. Ramji Lal*, [1942] O. W. N. 117.

¹⁰ *Lakhan Chandra*, (1924) 25 Cr. L. J. 1098, [1925] AIR (C) 149.

¹¹ *Girdharilal Marwari*, (1936) 17 P. L. T. 667, 38 Cr. L. J. 35, [1936] AIR (P) 579.

¹² *Radha Krishna v. Kissonlal*, (1901) 3 Bom. L. R. 883, 26 Bom. 289.

to conviction under ss. 482 and 486.¹³ The complainant had for many years carried on business as a vendor of ground coffee. He sold this in cylindrical tin boxes, each containing one pound of coffee. On the outside of the cylindrical portion of each box he had affixed a paper label on which was printed, *inter alia*, a picture of a railway engine and carriage. Over the lid and round each box vertically he had pasted an orange-coloured paper band, and on this, in the portion crossing the lid, a facsimile of his signature was printed. The accused sold coffee in similar tin boxes, bearing a similar band, though of a shade of pink, and a label on which was printed a picture of a steamer, the pink band purporting to be a facsimile of the accused's signature in the same position as that in which the complainant's facsimile signature appeared on his boxes. It was held that on the complainant's boxes the chief trade-mark was the picture of a railway train; that he might have a trade-mark in his facsimile signature, but the trade-mark could not reasonably be held to be infringed by the use of a signature of another person of a very different name; and that consequently a prosecution based on the use of what purported to be a facsimile of the accused's name could not succeed. It was held, further, that the band round the boxes vertically did not constitute a trade-mark as defined in the Penal Code and such band was merely a part of the 'get-up' of the boxes.¹⁴ The complainant firm had been manufacturing hair dyes since 1924 and introduced a hair dye styled "Horse Brand Shining Black Hair Dye" to the market in 1927. In addition to these words the figure of a horse was also printed on the labels. About the middle of 1932, the accused commenced to turn out a hair dye styling it the "Arabic Horse Shining Black Hair Dye." The design on it was also a horse, but there was a rider on the horse and the colours were not the same. It was held that a person asking for "*Ghora Marka*" hair dye might easily be given the brand of the accused though it was written on it that it was "*Arabi Ghora marka*" hair dye. The similarity of the get-up would also help in this deception, and that could be taken into consideration even though the complainant firm could not claim protection for the general get-up.¹⁵

Gold bars.—The mere fact that a bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a bank that had ceased to exist, and where there was no proof of any transfer of assignment of the mark, or that the new bank succeeded the other in the sense either that it was a continuation of that bank under another name, or that it succeeded to the business or acquired the goodwill of that bank, was held not to be sufficient to establish that the mark was the trade-mark of the new bank.¹⁶

General name cannot be trade-mark.—The appellants, who sold fish-hooks in boxes similar to those of the respondents with a design of one fish with its head and tail turned up, were held not to have infringed the trade-mark of the respondents, who also sold fish-hooks with the design of two fish crossed, with their heads and tails turned up. It was held further that where the public had chosen a name for its own use such as "*mash Marka*" (fish mark), that fact could not be held to prevent other persons from applying a mark to fish-hooks, which might be generally known by the same term.¹⁷

Use of same receptacle.—A sold illuminant kerosene oil of his own refining in tins originally issued with oil of the same description by B and bearing B's trade-mark. The tins had been altered in minor particulars, and paper labels indicating the true manufacturer of the oil had been fixed. The bodies of the tins, however, on which B's trade-mark appeared, remained unaltered. It was held that A had committed this offence.¹⁸ According to an agreement between oil companies it was settled that one company could use the tins of another company, provided the company so using the tins put on the cap a distinctive mark showing that the oil was not the manufacture of the company whose tins were being used. In pursuance of this agreement the Burma Oil Company could use the tins of the Standard Oil Company (U.S.) by

¹³ *Holland Bombay Trading Company v. Bukear Mull*, (1903) 8 C. W. N. 421, 1 Cr. L. J. 300.

¹⁴ *Stephen Ah Kyan v. James Pelley*, (1903) 1 Cr. L. J. 375, sub-nom. *Pelley & Son v. S. Ah Kyan*, (1903) 2 L. B. R. 159.

¹⁵ *Faqir Chand*, (1934) 16 Lah. 114.

¹⁶ *Anookool Chunder Nundy*, (1900) 27 Cal. 776. See *Dahyabhai Chakasha*, (1904) 6 Bom. L. R. 513, 1 Cr. L. J. 581.

¹⁷ *Bakaullah Mallik*, (1904) 31 Cal. 441.

¹⁸ *Po Saing*, (1907) 4 L. B. R. 192, 7 Cr. L. J. 113.

putting on the cap the word "Victoria". The accused sold eight tins of kerosene oil, but only two of the tins had the word "Victoria" on the tin caps and the other six had plain tin caps. At the time of selling he had told the purchaser that the tins contained oil of the Burma Oil Company and the price agreed upon was the price of the Burma Oil Company as prevailing in the market. It was held that although the accused was guilty of using a false trade-mark so far as the six tins with plain caps were concerned, yet (in the absence of a conspiracy between the purchaser and the accused), the accused could not be convicted of using a false trade-mark, as he had acted without intent to defraud.¹⁹

481. Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon,¹ in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong,² is said to use a false property mark.

COMMENT.

This section defines the offence of using a false property-mark.

A property-mark is intended to denote ownership over all moveable property belonging to a person whether it is all of one kind or of different kinds. So long as the person owns moveable properties his property-marks impressed upon them remain his, though any particular article out of it may after such impression pass out of his hands and cease to be his.²⁰

The function of a property-mark to denote certain ownership is not destroyed because any particular property on which it was impressed has ceased to be of that ownership.²¹

Ingredients.—This section requires two essentials:—

1. Marking any moveable property or goods or any case, package or receptacle containing goods; or using any case, package or receptacle, with any mark thereon.

2. Such marking or using must be in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the property or goods contained in such receptacle belonged to a person to whom they did not belong.

1. 'Marking any moveable property or goods, etc.'—"The term 'moveable property'...was intended by the Legislature to include a class or category of properties falling under one ownership, not merely the parts of it which may pass from the hands of the owner into other hands. The class is stable, though the units are ambulatory. The class may be likened to a chain with a multitude of links some of which from time to time drop off but there are others left or those extinct are replenished by fresh links to keep the chain going. So long as the chain remains, the moveable property represented by it is there, though its component parts fluctuate. The term 'moveable property'...was intended to include collective class nouns, *i.e.*, nouns that express a number of objects of the same class collected together."²²

2. 'In a manner reasonably calculated to cause, etc.'—See Comment on s. 480, p. 1186.

Trade-mark and property-mark.—The term 'property-mark' is one unknown to English law, and the description of its wrongful use as given in s. 481 would, in most cases, if not in every possible case, be within the scope of English law, viewing the wrong either as a crime or a civil injury. The distinction in the Penal Code between a 'trade-mark' and a 'property-mark' is, that the former denotes the manufacture or quality of the goods to which it is attached, and the latter denotes the ownership

¹⁹ *Abdul Rashid*, (1918) 18 A. L. J. R. 476, 19 Cr. L. J. 722, [1918] AIR (A) 109.

²⁰ *Dahyabhai Chakasha*, (1904) 6 Bom. L. R. 513, 1 Cr. L. J. 581.

²¹ *Ibid.*

²² *Dahyabhai Chakasha*, (1904) 6 Bom. L. R. 513, 515, 1 Cr. L. J. 581.

of them; or more briefly, the former concerns the goods themselves, the latter the proprietor of them. From s. 481 it may be gathered that the result of this distinction is to secure greater precision of definition, rather than to extend the law of trade-marks as known to English lawyers. Thus, if A is known not to be the maker or manufacturer of the goods he sells, but only to have selected and put them up and he uses a certain mark to indicate to his customers that they will thus have the benefit of his skill in selection, then, in the terminology of the Penal Code, the mark would be a property and not a trade-mark: but if the main purpose of the mark were to indicate the quality of the goods, then even though A was not the maker of them, it would be a trade-mark and not a property-mark. On the other hand, a mark may be applied to a natural product as distinguished from a manufactured one and though such mark would then probably be called in Indian law a property-mark, it would be equally protected by English law as a trade-mark.

The words "The National Bank of India" impressed on gold bars imported by the bank constituted their "trade-mark" and not their "property-mark," for the object of the mark was not to inform the public that the gold belonged to the bank but to give an assurance that the gold no matter whose property it might be for the time being was imported and was guaranteed by the bank.²³

482. Whoever¹ uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for using a false trade mark or property mark.

COMMENT.

The use of false trade-mark (with 'intent to defraud') constitutes the offence under this section. If the maker of an article puts on it the trade-mark of another maker and he does this with the intention that purchasers may be induced to believe that the article was made by such other maker, he commits this offence. It will be no defence to show that the article is in every respect equal or even superior to similar articles made by the other maker, if the offender intended to practise deception and used the mark for this purpose. Where the trade-marks are so different that no one would be misled, no offence is committed.

1. 'Whoever'.—This word means the same thing as "every person who" and shows that the provisions of the section apply to persons generally. In law a corporation is a person. A limited company or a corporation is liable for using a false trade-mark or property-mark.²⁴

PRACTICE.

Evidence.—For using a false trade-mark prove (1) that the accused marked the goods in question, or some case, package, or receptacle containing goods; or that he used some case, package, or receptacle bearing some mark.

(2) That the accused did as above in a manner reasonably calculated to cause it to be believed that the goods so marked, or the goods contained in the receptacle so marked, were the manufacture or merchandise of some person.

(3) That such goods are not the manufacture or merchandise of that person.

The complainant must prove that the goods sold under his label and get-up, were goods which had a reputation in the market as being goods manufactured or sold by him of which the label and get-up were distinctive and well-known in the particular market.²⁵

For using a false property-mark prove (1) that the accused marked moveable property or goods in question, or some case, package, or receptacle containing moveable property or goods; or that he used some case, package, or receptacle bearing some mark.

²³ *Lokumal*, (1914) 8 S. L. R. 199, 16 Cr. L. J. 230.

²⁴ *Seena M. Haniff & Co. v. Liptons Ltd.*, (1914) 7 L. B. R. 306, 15 Cr. L. J. 337; P. A.

Pakir Mahomed, [1929] Cr. C. 408.

²⁵ *Ma Pan Ei*, (1938) 40 Cr. L. J. 546, [1939] AIR (R) 145.

(2) That the accused did as above in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the property or goods contained in the receptacle so marked, belonged to some person.

(3) That such property or goods did not belong to that person.

Onus.—An important alteration of principle has been made in regard to offences under this section. Ordinarily, it is incumbent on the prosecution to prove that the person charged had acted with intent to defraud; under this section it is incumbent on the person charged to prove that he acted innocently or that he acted without intent to defraud.¹

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

See ss. 8 and 9 of the Indian Merchandise Marks Act (IV of 1889), the former of which provides for unintentional contravention of the law relating to marks and description, and the latter for forfeiture of goods when a person is convicted under this section. They run as follows:—

8. Where a person is accused under s. 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in s. 480 or s. 481 of that Code, as the case may be, or under s. 6 of this Act of applying to goods any false trade description, or under s. 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, and proves—

(a) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(b) that he took reasonable precautions against committing the offence charged, and

(c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(d) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons in whose behalf the mark or description was applied, he shall be acquitted.

9. (1) When a person is convicted under s. 482 of the Indian Penal Code of using a false trade mark, or under s. 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under s. 487 or s. 488 of that Code of making, or making use of, a false mark, or under s. 6 or s. 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession or sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in s. 486 of the Indian Penal Code or s. 7 or s. 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Civil action.—When a bona fide dispute exists between the parties as to the right to use a trade-mark, action should be taken before a civil and not before a criminal

¹ *Abdul Shakur*, (1935) 37 Cr. L. J. 528, [1936] AIR (R) 96.

Court.² One of the tests which is always applied as to whether a dispute between the parties over trade marks and commercial designs should be allotted to a civil Court or to a criminal Court, is the question of diligence in bringing the action. Another point which has to be considered is the question of abandonment of user. The real practical test, as to the difference controlling prosecutions with regard to statutory crimes for counterfeiting trade marks and civil actions is this, that the Criminal Procedure Code is only to be used in simple and clear-cut cases where a very speedy relief is required by the prosecution. In all cases where complicated matters of registration, abandonment of user and some sort are concerned, it is very much better that the dispute should be given to the civil Courts.³

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, counterfeited a trade-mark (*or property-mark*), to wit—, to denote that certain goods were the manufacture of AB, whose manufacture they were not (*or were the property of AB, whose property they were not*) in a manner reasonably calculated to cause it to be believed that such goods were the manufacture (*or property*) of AB; and that you thereby committed an offence punishable under s. 482 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—The measure of punishment should be the damage caused to the complainant.⁴

Burma.—The period of limitation prescribed by s. 15 of the Burma Merchandise Marks Act for prosecuting an offender under the Penal Code for the use of a false trade mark is three years from the date of the commission of the offence charged or one year from the date of the discovery by the prosecutor of the offence charged, whichever is less.⁵

483. Whoever counterfeits¹ any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counterfeiting a trade mark or property mark used by another.

COMMENT.

Where the trade-mark of the complainant's goods contains a name to which there might be no right of exclusive use, and another person using a similar trade-mark with the same name is charged with selling goods marked with a counterfeit mark, a material circumstance that has to be considered in the case is what the general effect of the trade-mark adopted by the accused is and whether an incautious purchaser would be led to believe that he is buying the complainant's goods.⁶

1. 'Counterfeits'.—See s. 28, *supra*.

A trader cannot, even with some claim to the mark or name, adopt a trade-mark which will cause his goods to bear the same name in the market as that of a rival trade. But this rule does not mean that the physical resemblance between the two marks is not to be taken into consideration at all, and it does not mean that the fact that one mark might in the market be known under the same name as another was necessarily a violation of rights of the owner of the first mark. There must be some inherent similarity in the marks themselves which justifies the use of the same name for both.⁷

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited the mark in question.

(2) That such mark is the trade-mark or property-mark of some person.

² *Surja Prasad v. Mohabir Prasad Tribedy*, (1907) 11 C. W. N. 887, 6 Cr. L. J. 151.

³ *Asutosh Das v. Keshav Chandra Ghosh*, (1936) 64 C. L. J. 539, Cr. L. J. 143, [1936] AIR (C) 488.

⁴ *Girdharilal Marwari*, (1936) 17 P. L. T. 607, 38 Cr. L. J. 35, [1936] AIR (P) 579.

⁵ *Mohammad Cassim v. Shaikh Thumby*, [1940] Ran. 244.

⁶ *Nallaya Pillai v. Rangasami Pillai*, (1895) 1 Weir 556.

⁷ *Abdul Shakur*, (1935) 37 Cr. L. J. 528, [1936] AIR (R) 96.

(3) That it was so used by that person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you] (*name of accused*) as follows :—

That you, on or about the—day of—, at—, counterfeited a trade-mark or property-mark, to wit—, used by AB, and that you thereby committed an offence punishable under s. 483 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

484. Whoever counterfeits¹ any property mark used by a public servant,² or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the preceding one. An enhanced punishment is, therefore, given where a property-mark used by a public servant is counterfeited.

1. 'Counterfeits'.—See s. 28, *supra*. 2. 'Public servant'.—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited the property-mark, or some other mark in question.

(2) That such mark is used by some public servant.

(3) That it was used to denote that the property had been manufactured by a particular person; or at a particular time or place; or that the property was of a particular quality, or had passed through a particular office, or was entitled to some exemption.

Or prove—

(1) That the accused used the property-mark, or some other mark in question.

(2) and (3) as above.

(4) That he used the mark as genuine.

(5) That when he used it he knew the same to be counterfeit.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of,— at—, counterfeited any mark (or property-mark), to wit—, used by a public servant, to wit—, to denote that some property was manufactured by AB [or at a particular time or place, to wit—, or that the property was of a particular quality, to wit—, or had passed through a particular office, to wit—, or that it was entitled to a certain exemption, to wit—] [or used as genuine a mark, to wit—, knowing the same to be counterfeit], and that you thereby committed an offence punishable under s. 484 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Making or possession of any instrument for counterfeiting a trade mark or property mark.

COMMENT.

The making or possession of instruments for counterfeiting a trade-mark or property-mark is hereby punished. This section resembles ss. 285, 256 and 472.

As to the definition of "possession," see s. 27, *supra*.

Where a trade-mark consisted of an impression moulded in glass of which bottles were made together with label and the accused was found in possession of the mould with the intention of counterfeiting that trade mark, although the apparatus for counterfeiting the label which would complete the trade-mark had not been found, it was held that he could be convicted under this section.⁸

PRACTICE.

Evidence.—Prove (1) that the accused made, or had in his possession the die, plate, or instrument in question.

(2) That such die, etc., was for the purpose of counterfeiting a trade-mark or property-mark.

Or prove—

(1) That the accused had in his possession the trade-mark or property-mark in question.

(2) That he possessed such trade-mark or property-mark for the purpose of denoting that goods bearing such mark were the manufacture or merchandise of some person, or that they belonged to some person.

(3) That such goods were not the manufacture or merchandise of that person or that they did not belong to that person.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

See ss. 8 and 9 of the Merchandise Marks Act, 1889, set out under s. 482, *supra*.

486. Whoever¹ sells, or exposes, or has in possession² for sale or any purpose of trade or manufacture, any goods or thing with a counterfeit trade mark³ or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

⁸ *Abdul Sovan v. Ramani Mohan*, (1930) 32 Cr. L. J. 136, [1930] AIR (C) 664.

COMMENT.

This section saves from punishment persons dealing with goods bearing false trade-marks if they are able to prove that after taking reasonable precautions they had no ground to suspect the genuineness of the mark, and that they gave all the information in their power as to the source from which the goods were obtained or that otherwise they had acted innocently in the matter. Thus they are saved from punishment, and it becomes possible to trace the goods to the importer. Section 17 of the Merchandise Marks Act may be compared with this section. See the Appendix where it is set out in full.

Object.—The provisions of this section are aimed at a retailer who connives with a fraudulent wholeseller or manufacturer in palming-off on an unsuspecting public goods which purport to be other than what they are.⁹

Scope.—This section does not extend to persons who act as commission agents and intermediaries only between the importers and manufacturers and order out goods marked with a counterfeit trade-mark, which is seized on the way and which never reaches the place of business.¹⁰

For the purpose of this section it is not necessary that the mark in question should be the exclusive property of anybody. The only consideration which is of importance is whether the mark has come to be so identified with the merchandise of the person using the mark as to be regarded as a distinctive mark to denote that particular merchandise.¹¹

1. 'Whoever'.—This word includes a limited liability company or a corporation.¹²

2. 'Possession'.—See s. 27, *supra*.

3. 'Counterfeit trade-mark' is one by means of which resemblance to a genuine one is intended to deceive and to lead a purchaser to imagine that the counterfeit is in reality the genuine article.¹³ A general resemblance constitutes infringement.¹⁴ The word 'counterfeit' does not connote an exact reproduction of the original counterfeited and the difference between the counterfeit and the original is not therefore limited to a difference existing only by reason of faulty reproduction. A person, for instance, convicted of counterfeiting the King's coin would not be able to avoid conviction on the ground that he had deliberately made a small alteration in the design or omitted a letter from the superscription surrounding the Monarch's head. The same principle would apply in the counterfeiting of a trade-mark.¹⁵ The distinction between a "false" trade mark and a "counterfeit" trade mark is somewhat subtle; it depends on the degree of resemblance between the false and the genuine trade marks. As laid down in expln. 1 to s. 28, it is not essential to counterfeiting that the imitation should be exact; but a thing is not ordinarily said to be counterfeit unless it bears on the face of it the semblance of validity and is such as to deceive the average person on ordinary observation with, presumably, some care.¹⁶ A representation that the goods of the manufacture of A are those of B need not be made orally or in writing, but it may be made by the manner in which the goods are made up by the wrapper or by the name or design. The counterfeit is itself a representation.¹⁷

In trade-mark cases the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase and marks with many differences may yet have an element of similarity which will cause deception, more specially if the goods are in practice asked for by a name which denotes the mark or the device on it.¹⁸

⁹ *Local Government v. Seth Motilal Jain*, [1988] Nag. 192, 200.

¹⁰ *Hargobind v. Greaves Cotton & Co., Bombay*, (1902) P. R. No. 32 of 1902.

¹¹ *Sri Narayan v. Mohammad Abu Saleh*, [1940] 2 Cal. 1.

¹² *Seena M. Haniff & Co., v. Liptons Ltd.*, (1914) 7 L. B. R. 306, 15 Cr. L. J. 887.

¹³ *Hargobind v. Ralli Brothers*, (1902) P. R. No. 85 of 1902.

¹⁴ *Ganpat Sitaram Mukadam*, (1914) 16 Bom.

L. R. 78; contra, *Pelley & Sons v. S. Ah Kyun*, (1908) 2 L. B. R. 159, sub-nom. *Stephen Ah Kyun v. James Pelley*, (1908) 1 Cr. L. J. 875.

¹⁵ *Local Government v. Seth Motilal Jain*, (1938) Nag. 192, 195.

¹⁶ *Roshan Singh*, [1940] All. 751.

¹⁷ *Tapidas Durlabhdas*, (1907) 9 Bom. L. R. 782, 6 Cr. L. J. 75.

¹⁸ *Kimatrai Tarachand v. Chellaram Jhanguldas*, (1942) 48 Cr. L. J. 927, [1943] AIR (S) 55.

Where a person sold books with a counterfeit property-mark, it was held that he was guilty of an offence under this section.¹⁹

Where the accused used marks on his bars which were likely to deceive an ignorant and unwary purchaser, but which did not bear a resemblance close enough to deceive a person of ordinary observation comparing the two marks side by side, it was held that the accused was guilty of using a false trade-mark under s. 482 and not of using a counterfeit trade-mark under this section.²⁰ K, a merchant of Calcutta, ordered certain goods from Europe, but refused to take delivery of the consignment on its arrival in Calcutta. The goods were thereupon sold in the market with the labels of the firm of K attached thereto, and were purchased by M, a dealer in piece-goods. M sold the goods without removing the labels of K and was convicted under this section for selling the goods with a counterfeit trade-mark. It was held that no offence had been committed by M either under s. 482 or under this section.²¹ The accused was in possession of certain goods which bore the complainant's trade-mark. The manufacturers of the goods in Japan had by mistake either put the complainant's trade-mark on the goods or had forwarded the goods to a wrong party from whom the accused had purchased them in good faith. It was held that the accused had not committed an offence under this section because the mark was not counterfeit as defined by s. 28, nor could it be said that he had committed an offence under ss. 480 and 482 because there was no intention on his part to defraud.²² The complainant and the accused were manufacturers of aerated waters. At the place where the parties carried on their business it was a common practice for various kinds of bottles to be used by different mineral-water manufacturing firms indiscriminately, i.e., bottles of one firm were sent by customers to another firm for being filled with mineral water. The accused firm thus came to use the bottles of the complainant firm. It was held that since there was no intention to do anything harmful, the accused firm was not guilty of any offence.²³

As to the meaning of the word 'counterfeit', see s. 28, *supra*.

Clauses (a) and (b).—These are linked together for the purpose of defence.

Clause (c).—This clause permits the accused to offer any evidence he chooses as to his innocence when once he admits that he was not deceived into thinking the label to be a genuine one.²⁴

PRACTICE.

Evidence.—Prove (1) that the accused sold, or exposed or had in possession for sale or some purpose of trade or manufacture, the goods or things in question.

The signature of the accused in the forwarding note does not necessarily prove that he was in possession of the goods and his conviction under this section cannot be sustained.²⁵

(2) That such goods or things had some trade-mark or property-mark affixed to, or impressed upon, them, or had some trade-mark or property-mark affixed to, or impressed upon, some case, package, or other receptacle in which they were contained.

(3) That such trade-mark or property-mark was counterfeit.

Where a person is charged with the commission of an offence under this section and the facts mentioned in the first paragraph thereof are proved, there are two alternative defences open to the accused: the first being that indicated by clauses (a) and (b) of the section read together, and the second being that indicated by clause (c). The first defence presupposes that the person charged believed the trade-mark in question to be a genuine one. The second defence presupposes that the person charged did not know that the trade-mark in question was the trade-mark of any firm or person.¹

The defence cannot be restricted to the proof of ignorance concerning the infringement of the trade mark.²

¹⁹ *Kanai Das Bairagi v. Radha Shyam Basack*, (1898) 26 Cal. 232.

²⁰ *Lokumal*, (1914) 8 S. L. R. 199, 16 Cr. L. J. 230.

²¹ *Motilal Premeek v. Kanhai Lal Dass*, (1905) 32 Cal. 969.

²² *Syon Premeek & Co. v. R. Solomon*, (1925) 4 Ran. 16.

²³ *E. S. Olpadcalla v. James Wright*, (1928) 32 C. W. N. 1115, 30 Cr. L. J. 832, [1928] AIR

(C) 873.

²⁴ *Local Government v. Seth Motilal Jain*, [1938] Nag. 192, 197.

²⁵ *Kollapalli Subramanyam*, [1940] M. W. N. 535, (1939) 41 Cr. L. J. 28, [1940] AIR (M) 822.

¹ *Ilahi Bakhsh*, (1897) 17 A. W. N. 99.

² *Local Government v. Seth Motilal Jain*, [1938] Nag. 192.

Onus.—The onus is not on the complainant to show that the accused acted dishonestly, but on the accused to show that he has not committed any offence under this section.³

Procedure.—Not cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

In *Dowlat Ram v. King-Emperor*,⁴ Maclean, C. J., said: "It seems to me that when a case of this class [counterfeiting a trade-mark] is brought into a Criminal Court, if the Magistrate is of opinion that there is a *bona fide* dispute as to whether the complainant has any trade-mark at all or whether the accused is or is not entitled to use the mark he is using, I say, if the Magistrate is satisfied that there is this *bona fide* dispute, he should not deal with the matter as a criminal matter, but leave it to the complainant to maintain, if he can, in a civil Court the right which he claims. If after the decision of the civil Court it be found that he has a trade-mark, and that the accused is fraudulently counterfeiting that trade-mark, the case could then be properly brought into a criminal Court under the section [s. 486] to which I have referred."

A person can be legally convicted under both ss. 482 and 486 simultaneously. If a false trade mark has been used, and it amounts to a counterfeit trade mark and goods having such mark are sold or exposed for sale, it is perfectly legal to sustain a conviction under both the sections.⁵

Jurisdiction.—A Magistrate has jurisdiction to try an offence under this section, although the sale, or the trade, or the manufacture, be not intended to take place within the jurisdiction of a Court in which the complaint is lodged. Possession of certain tins of clarified butter at Howrah, bearing a counterfeit trade-mark though intended for sale in Rangoon, was held to constitute an offence committed at Howrah.⁶

Limitation.—Prosecution should be instituted either before the expiration of three years after the commission of the offence or within one year from the first discovery of it by the prosecutor.⁷ The limitation runs from the date of the infringement complained of, and "offence" means the offence charged.⁸ A prosecution for using a counterfeit trade-mark need not be instituted within three years of the first of the series of offences committed by the accused but can be instituted within three years of the specific offence complained against.⁹

For period of limitation in Burma, see the Burma Merchandise Marks Act.

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

It would not be proper for the High Court in revision to pass any order for confiscation of goods or for costs of prosecution in a trade mark case, where no such order was passed by the lower Courts and there were no materials on the record to assess the costs and the rights of third parties might be affected by an order of confiscation.¹⁰

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, sold (or exposed or had in possession for sale, etc.), certain goods, to wit——, with a counterfeit trade mark [or property-mark], to wit——, affixed to [or impressed upon] the said goods, and that you thereby committed an offence punishable under s. 486 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it

Making a false mark upon any receptacle containing goods.

³ *Holland Bombay Trading Company v. Buktair Mull*, (1903) 8 C. W. N. 421, 1 Cr. L. J. 300; *Local Government v. Seth Motilal Jain*, [1988] Nag. 192.

⁴ (1905) 32 Cal. 431, 436.

⁵ *Roshan Singh*, [1940] All. 751.

⁶ *Yusuf Mahomed Abaruth v. Bansidhar Strangi*, (1898) 25 Cal. 639.

⁷ Merchandise Marks Act, 1889, s. 15;

Ruppell v. Ponnusami Tevan, (1890) 22 Mad. 488; *Akshoy Kumar Dey*, (1919) 82 C. W. N. 699, 30 Cr. L. J. 252, [1928] AIR (C) 495.

⁸ *Nagendranath Shaha*, (1929) 57 Cal. 1153.

⁹ *Muhammad Ahmad v. Bezvada Venkanna*, [1930] M. W. N. 1263, 32 Cr. L. J. 809, [1931] AIR (M) 276.

¹⁰ *Roshan Singh*, [1940] All. 751.

does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud,¹ be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The fraudulent making of false marks of any description on goods for the purpose of deceiving public servants such as customs officers, is punishable under this section. Thus, importation of contraband goods under false marks will come under the purview of this section. The section is more comprehensive than ss. 482 and 486.

1. 'Intent to defraud'.—See ss. 45 and 486, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made some mark upon some case, package, or other receptacle containing goods.

(2) That such mark was a false mark.

(3) That he did so in a manner reasonably calculated to cause some public servant or some other person to believe (a) that such receptacle contained goods which it did not contain, or (b) that it did not contain goods which it did contain, (c) that the goods contained in such receptacle were of a nature or quality different from the real nature or quality thereof.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, made a false mark, to wit——, upon a case, to wit——, (*or package or other receptacle containing goods*), in a manner reasonably calculated to cause a public servant, to wit——, (*or AB*) to believe that such case contained goods, to wit——, which it did not contain [*or that it did not contain goods which it did contain (or that the goods contained in such receptacle were of a nature or quality different from the real nature or quality thereof)*], and that you thereby committed an offence punishable under s. 487 of the Indian Penal Code, and within my cognizance (*or within the cognizance of the Court of Session (or the High Court)*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud,¹ be punished as if he had committed an offence against that section.

Punishment for making use of any such false mark.

COMMENT.

This section punishes the making use of a false mark. The foregoing section punishes the making of such a mark.

1. 'Intent to defraud'.—See ss. 45 and 486, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made use of some mark upon some case, package, or receptacle containing goods.

(2) and (3) same as for s. 487.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Charge.—See s. 487, *supra*.

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury¹ to any person,² shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Tampering with property mark with intent to cause injury.

COMMENT.

This section punishes the tampering with of a property-mark. Criminal intention or knowledge on the part of the accused is required under it.

1. 'Injury'.—See s. 44, *supra*. 2. 'Person'.—See s. 11, *supra*.

PRACTICE.

Evidence.—Prove (1) that the mark in question is a property-mark.

(2) That the accused removed, destroyed, or defaced, or added to, such mark.

(3) That he did so intending thereby to cause injury to some person; or that he did so knowing that he might thereby cause injury to some person.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, removed (*or destroyed, defaced or added to*) a property-mark, to wit——, intending [*or knowing it to be likely*] that you might thereby cause injury to AB, and that you thereby committed an offence punishable under s. 489 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Currency-Notes and Bank-Notes.

489A. Whoever counterfeits,¹ or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Counterfeiting currency-notes or bank-notes.

Explanation.—For the purposes of this section and of sections 489B, 489C and 489D, the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for, money.

COMMENT.

This section is similar to ss. 231 and 255.

Object.—Sections 489A, 489B, 489C and 489D were introduced by the Currency Notes Forgery Act (XII of 1899), s. 2, in order to provide more adequately for the protection of currency-notes and bank-notes from forgery. Under the Indian Penal Code, which was passed prior to the existence of a paper currency in India, currency notes were not protected by any special provisions but merely by the general provisions applying to the forgery of valuable securities. Before these sections were introduced, charges for forging currency-notes had to be preferred under s. 467, for uttering them, under s. 471, and for making or possessing counterfeit plates, under s. 472. The provisions of s. 467 afforded sufficient means of dealing both with forgery generally

and with forgery of currency-notes. But it was at times difficult to obtain conviction under the other sections.

1. 'Counterfeits'.—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the note in question is a currency-note or bank note.

(2) That the accused counterfeited it, or knowingly performed any part of the process of counterfeiting it.

A conviction under this section cannot be maintained unless it is provided that the accused really intended to counterfeit and either did counterfeit or perform any part of the process of counterfeiting.¹¹

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, counterfeited (*or knowingly performed a part of the process of counterfeiting, to wit——*), a currency-note (*or a bank-note*) (*state the value of the note*), and thereby committed an offence punishable under s. 489A of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried [by the said Court] on the said charge.

489B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine,¹ any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Using as genuine, forged or counterfeit currency-notes or bank-notes.

COMMENT.

The object of the Legislature in enacting this section is to stop circulation of forged notes by punishing all persons who, knowing or having reason to believe them to be forged, do any act would lead to their circulation.

This section resembles ss. 239, 241 and 258. A person who knowingly sells a forged note to a person who also knows it to be forged is guilty under this section.¹²

1. 'Uses as genuine'.—The words "as genuine" govern only the verb "uses" and not any other verb.¹³

PRACTICE.

Evidence.—Prove (1) that the currency-note or bank-note in question was forged or counterfeited.

(2) That the accused sold to, or bought or received from, some person, or trafficked in, or used as genuine, such currency-note or bank-note.

(3) That when he did so he knew or had reason to believe that it was forged or counterfeited.

Where the accused is charged with using as genuine a forged note, the burden is on the prosecution to prove that at the time when the accused was passing the note he knew that it was a forged one, and the mere possession of it by him does not place the burden on him to account for its possession and to prove his innocent possession thereof.¹⁴

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

¹¹ *Meera*, (1917) 18 Cr. L. J. 362, [1917] AIR (LB) 105.

¹² *Rannun*, (1926) 7 Lah. 84.

¹³ *Bhika Ram*, (1925) 7 Lah. 80.

¹⁴ *Habu*, (1924) 25 Cr. L. J. 935.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, sold to AB (*or bought from AB, etc.*) a forged (*or counterfeit*) currency-note, to wit——, knowing (*or having reason to believe*) the same to be forged (*or counterfeit*), and that you thereby committed an offence punishable under s. 489B of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

489C. Whoever has in his possession¹ any forged² or counterfeit³ currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Possession of
forged or counter-
feit currency-notes
or bank-notes.

COMMENT.

This section deals with possession of a forged or counterfeit currency-note or bank-note knowing or having reason to believe the same to be forged and intending to use it as genuine. It resembles ss. 242, 248 and 259.

1. 'Possession'.—See s. 27, *supra*. Where thirty-eight counterfeit currency-notes were found in the possession of the accused, it was held that the only reasonable presumption that could be drawn was that the accused was in possession of those notes with the intention of using them as genuine.¹⁵

2. 'Forged'.—See ss. 463, 464 and 470, *supra*.

3. 'Counterfeit'.—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the currency-note or bank-note in question was forged or counterfeited.

(2) That the accused was in possession of it.

(3) That he at the time of his possession knew, or had reason to believe, that it was forged, or counterfeited.

(4) That he intended to use it as genuine or that it might be used as genuine.

The onus lies on the prosecution to prove circumstances which lead clearly, indubitably and irresistibly to the inference that the accused had the intention to foist the notes on the public. Such intention can be proved by collateral circumstances such as that the accused had palmed off such notes before, or that he was in possession of such and similar notes in such large numbers that his possession for any other purpose is inexplicable.¹⁶

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, had in your possession a forged (*or counterfeit*) currency-note (*or bank-note*), to wit——, knowing (*or having reason to believe*) the same to be forged (*or counterfeit*) and intending to use the same as genuine or that it may be used as genuine, and that you thereby committed an offence punishable under s. 489C of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

¹⁵ *Public Prosecutor v. Kondalrao*, [1938] M. W. N. 1121, 48 L. W. 754, 40 Cr. L. J. 458, L.C.—70

[1939] AIR (M) 96.

¹⁶ *Bur Singh*, (1930) 11 Lah. 555.

489D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his profession,¹ any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting² any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.

COMMENT.

This section is analogous to ss. 233, 234, 256, 257 and 485. It was introduced by Act XII of 1899.

1. 'Possession'.—See s. 27, *supra*.

2. 'Counterfeiting'.—See s. 28, *supra*. For a thing to be termed counterfeit there should be some sort of resemblance sufficient to cause deception. In a case of counterfeiting currency-notes, where the ability of the accused persons and the capacity of the materials with which they worked were not such as to produce a currency-note which would take in even the most ignorant villager, it was held that there could be no conviction under this section read with s. 511 of the Code. The Court observed: "In the case of the counterfeiting of a currency note both ability and materials of a particular kind are required. If those materials and ability are not present it cannot be said that an act performed without the ability to counterfeit and without materials which may help to a useful counterfeiting would be an attempt".¹⁷ Where the opinion of an expert witness was that with the use of the materials found in possession of the accused a five-rupee note could be counterfeited and it was further discovered that the accused, who was a man of small means, had destroyed a five-rupee note while treating it chemically, it was held that it might safely be presumed that the intention of the accused was to counterfeit a five-rupee note with the materials produced in Court.¹⁸

PRACTICE.

Evidence.—Prove (1) that the thing in question was machinery, instrument or material necessary for or used in forging or counterfeiting a currency-note or bank-note.

"In some cases a mere inspection of the articles would satisfy the court that they are capable of being used in the making of counterfeit notes. But where that is not the case, it is the duty of the Crown to adduce evidence of a competent and qualified witness who would be able to explain to the court the process by which the instruments or materials in question could be used in making a counterfeit note...Instruments and materials which may be useful in making correct drawing of the outlines of the designs and figures of a currency-note may be of no use whatever in manufacturing counterfeit notes".¹⁹

(2) That the accused made, or performed, some part of the process of making the machinery, instrument, or material, in question; or that he bought, sold, or disposed of it; or that he had it in his possession.

(3) That the object of the accused was that such machinery, instrument, or material might be used for the purpose of forging or counterfeiting currency-notes or bank-notes; or that he knew, or had reason to believe, that the same was intended to be used for such purpose.

Before the Court could come to the conclusion that the accused had the objects in question for the purpose of counterfeiting, the Crown should establish that he had formed in his mind the purpose or intention of counterfeiting currency-notes. The onus of doing so is on the Crown according to the language of the section—unlike the

¹⁷ *Jwala*, (1928) 51 All. 470, 472.

¹⁸ *Ayyub*, (1928) 26 A. L. J. R. 1891, 30 Cr. L. J. 47, [1928] AIR (A) 759.

¹⁹ Per Abdur Rahim, J., in *Abdul Rahiman*, (1911) 21 M. L. J. 766, 768, 769, 12 Cr. L. J. 337, F.B.

English law wherein the case of a similar offence with respect to the counterfeiting of Bank of England notes the onus is laid on the accused of proving a lawful excuse "for knowingly having in his custody or possession any plate, stone or other material or any instrument or device for engraving a bank note." But "if the purpose and intention of the accused be proved, it is not necessary that all the articles required for counterfeiting should be found on him to hold him guilty of an offence under the section ... A man may not be able to command all the articles required for the purpose but he may be actually proved to be *in possession* of only some. This would not deter the court from convicting him of an offence under the statute".²⁰

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, made (*or performed any part of the process of making, or bought or sold or disposed of, or had in your possession*) an instrument (*or material*) to wit—, for the purpose of being used (*or knowing or having reason to believe that it was intended to be used*) for forging (*or counterfeiting a currency-note (or a bank-note), to wit—, and that you thereby committed an offence punishable under s. 489D of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).*

And I hereby direct that you be tried [by the said Court] on the said charge.

489E. (1) Whoever makes, or causes to be made, or uses for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note shall be punished with fine which may extend to one hundred rupees.

(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse, to disclose, to a police-officer on being so required the name and address of the person by whom it was printed or otherwise made, he shall be punished with fine which may extend to two hundred rupees.

(3) Where the name of any person appears on any document in respect of which any person is charged with an offence under sub-section (1) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that that person caused the document to be made.

COMMENT.

This section was added by the Indian Penal Code (Amendment) Act (VI of 1948), s. 2. In the Statement of Objects and Reasons it was observed: "Photo-prints and other reproductions of currency-notes and bank-notes, though printed for innocent purposes, have passed into circulation in a number of cases and it is considered undesirable that in a country like India, with a large mass of illiterate and ignorant persons such reproductions should be permitted to go unchecked before it menaces the safety of the currency. It is proposed, therefore, to put a stop to this practice by making it a punishable offence.

2. While the counterfeiting of any currency-note or bank-note constitutes a criminal offence under section 489A read with section 28 of the Indian Penal Code, there is no legal provision prohibiting the reproduction, or the production of imitations of currency and bank-notes for such purposes as advertisement and the like where there is no intention to practise deception on any one nor even a knowledge that deception is likely to be practised with the help of imitations. The Bill is designed to fill this lacuna in the present law".

²⁰ Per Sundara Aiyar, J., in *Abdul Rahiman*, (1911) 21 M. L. J. 766, 773, 776, 12 Cr. L. J. 337, F. B.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

Object.—The authors of the Code say : “We agree with the great body of jurists in thinking that in general a mere breach of contract ought not to be an offence, but only to be the subject of a civil action.”

“To this general rule there are, however, some exceptions. Some breaches of contract are very likely to cause evil such as no damages or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation.”¹

490. (*Breach of contract of service during voyage or journey Repealed by s. 2 and schedule of Act III of 1925.*)

491. Whoever, being bound by a lawful contract¹ to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness,² is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits³ so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Breach of contract to attend on and supply wants of helpless person.

COMMENT.

Object.—The authors of the Code say : “We...think that persons who contract to take care of infants, of the sick and of the helpless lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair ; they generally come from the lower ranks of life, and would be unable to pay anything. We therefore propose to add to this class of contracts the sanction of the penal law”.²

Ingredients.—This section requires three essentials :—

1. Binding of a person by lawful contract.
2. Such contract must be to attend on or to supply the wants of a person who is helpless or incapable of providing for his own safety or of supplying his own wants by reason of (i) youth, or (ii) unsoundness of mind, or (iii) disease, or (iv) bodily weakness.

3. Voluntary omission to perform the contract by the person bound by it.

1. ‘Whoever, being bound by a lawful contract’.—Under this section it is not the breach of contract towards the other party to the contract that is to be regarded, but the breach of the legal obligation towards the incapable person, which has been accepted and transferred by the contract.

2. ‘To attend on or to supply the wants of any person who, by reason of youth, etc’.—The Law Commissioners observe : “We are not prepared to punish as a criminal every menial servant, who quits his employer without a certain notice upon the expiration of the term for which he is hired, under ordinary circumstances. But we conceive that Clause 465 [s. 491] may be improved in one respect. It seems as it stands, not to be applicable to any but those servants who have contracted specially to attend upon the sick, insane, &c., but we think it should be made to apply to servants who are or ought to be in attendance upon a sick or insane master, though they may have only contracted with him in the ordinary way, while he was of sound

¹ Note P, p. 170.

² Note P, p. 171.

body and mind, and to servants, whether engaged specially for the purpose or not, who by the lawful command of their employers have been ordered to take care of young children and have not objected to do so".³ The accused, a cook, on a morning whilst the complainant's wife was ill and unable to supply her own wants, left his service without a warning or permission. It was alleged that the illness of the complainant's wife was aggravated thereby. It was held that the accused was engaged only as an ordinary cook to a family, and was not bound to attend on, or to supply the wants of, any helpless person, and that, therefore, this section did not apply to such a case.⁴

3. 'Voluntarily omits'.—The omission to perform the contract must be without any reasonable cause. A person who is disabled by illness cannot be said to voluntarily omit. As to the meaning of the word 'voluntarily', see s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused entered into a contract to attend on, or supply the wants of, the person in question.

(2) That such contract was a lawful one.

(3) That such person was helpless or incapable of providing for his own safety or of supplying his own wants.

(4) That such helplessness or incapableness was due to youth, or unsoundness of mind, disease or bodily weakness.

(5) That the accused omitted to attend on such person, or to supply his wants.

(6) That he did so voluntarily.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

492. [*Breach of contract to serve at distant place to which servant is conveyed at master's expense. Repealed by s. 2 and schedule of Act III of 1925.*]

³ 2nd Rep., s. 329, p. 437.

⁴ *Solomon*, (1887) Cr. R. No. 43 of 1887, Unrep. Cr. C. 354.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

493. Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

COMMENT.

Object.—This section punishes the offence committed when a man, either married or unmarried, induces a woman to become, as she thinks, his wife, but in reality his concubine. The form of the marriage ceremony depends on the race or religion to which the person entering into the marriage belongs. When races are mixed as in India, and religion may be changed or dissembled, this offence may be committed by a person falsely causing a woman to believe that he is of the same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which, according to the law under which she lives, is valid. Suppose a person half English half Asiatic by blood, calls himself a Mahomedan or Hindu and by this deception causes a Mahomedan or a Hindu woman to go through the ceremony of marriage, in a form which she deems valid and to cohabit with him, he has committed this offence. A man who deceives a woman into the belief that a certain ceremony which he causes to be performed by some accomplice, constitutes a valid marriage and thus induces the woman to cohabit with him may be punished under this section.¹

The act falling within the purview of this section will also come under cl. (4) of s. 375.

Ingredients.—The section has two ingredients:—

1. The deceit that causes a false belief in the existence of a lawful marriage.
2. Cohabitation or sexual intercourse with the person causing such belief.

PRACTICE.

Evidence.—Prove (1) that the accused caused the woman in question to believe that she was lawfully married to him.

- (2) That he induced that woman to cohabit with him under that belief.
- (3) That he caused such belief by deceit.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint by person aggrieved necessary.—No Court shall take cognizance of this offence except upon a complaint made by some person aggrieved by it.²

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, by deceit caused a certain woman, to wit AB, who was not lawfully married to you, to believe that she was lawfully married to you, in that belief, cohabited or had sexual intercourse with her; and that you thereby committed an offence punishable under s. 493 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

¹ M. & M. 432.

494. Whoever, having a husband or wife living,¹ marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife,² shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

COMMENT.

This section punishes the offence known to English law as bigamy. It makes the offence of bigamy punishable both as regards a person, having a wife living, marrying another and as regards a wife, having her husband living, remarrying, in any case in which such remarriage would be void by reason of its taking place during the life of such a wife or husband. The person to whom the woman has remarried cannot be punished under this section. He can only be charged with abetment of that offence.³

Scope.—This section does not apply to Hindu or Mahomedan males, who are allowed to marry more than one wife, except in the Province of Bombay where a Hindu cannot marry a second wife only under certain circumstances owing to the promulgation of the Bombay Prevention of Bigamous Marriage Act (Bom. XXV of 1946 as amended by Bom. Act XXXVIII of 1948). It applies to Hindu and Mahomedan females and to Christians⁴ and Parsis⁵ of either sex.

Ingredients.—This section requires :—

1. Existence of the first wife or husband when the second marriage is celebrated.
2. The second marriage being void by reason of the subsistence of the first according to the law applicable to the person violating the provisions of the section.

1. '**Having a husband or wife living**'.—The validity of a marriage in the case of Hindus, Mahomedans, Jews, Budhists, Sikhs and Jains will be determined in accordance with their religious usages. In the case of Christians it will be determined by Act XV of 1872, and of Parsis by Act III of 1936. The validity of a marriage celebrated under the Special Marriage Act⁶ will be determined by its provisions.

If the first marriage is not a valid marriage no offence will be committed by contracting a second marriage. For instance, if A marries B, a person within prohibited degrees of affinity, and during B's lifetime marries C, A has not committed bigamy.⁷

A "marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract".⁸ But a union formed between a man and a woman in a foreign country, although it may there bear the name of mar-

³ *Munir*, (1925) 24 A. L. J. R. 155, 27 Cr. L. J. 101, [1926] AIR (A) 189.

⁴ Act XV of 1872.

⁵ Act III of 1936.

⁶ Act III of 1872, as amended by Act XXX of 1923.

⁷ *Chadwick*, (1847) 11 Q. B. 205. See *Kay*, (1887) 16 Cox 292.

⁸ *Warrender v. Warrender*, (1835) 2 Cl. & F. 488, 580; *Brinkley v. Attorney General*, (1880) 15 P. D. 76.

riage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man and one woman to the exclusion of all others.⁹

'Living'.—It must be shown that the husband or wife is alive at the date of the second marriage.

A *nikah* marriage¹⁰ or *sagai*¹¹ or *pat*¹² marriages or *anand* marriage by a Hindu professing Sikh religion though a *mona*,¹³ falls within the purview of this section, but not *jhingara*.¹⁴ It is doubtful if a marriage between an Oriya male and Telugu female is valid;¹⁵ but a marriage between a Jat male and a Mazhabi female is valid.¹⁶ A marriage between a Sikh belonging to the Brahmin caste and a Hindu Brahmin girl according to Hindu rites is a valid marriage.¹⁷

Mahomedan law allows minor to repudiate marriage on attaining puberty.—

"Under the Mahomedan law, when a child is given in marriage by any person other than the father or grandfather, he or she has the option of either ratifying it or repudiating it on attaining puberty (Radd-ul-mukhtar, Vol II, Egypt edition, p. 500. and the Sharaya-ul-Islam, p. 300). This is called the *Khyar-ul-balugh*, or option of puberty. Under the Shiah law such a marriage is of no effect, and produces no legal consequences until it has been ratified by the minor upon his or her attaining majority. The Shafees agree with the Shiahs in this view. There is no evidence in this case to show to which sect the girl belongs. Assuming, however, that she is a Hanafi Sunni, how would the matter stand? The only difference between the Sunni and the Shiah law on the question of option of puberty is that whereas according to the latter school a marriage contracted for a minor by a person other than the father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty, according to the (Hanafi) Sunni school it continues effective until it is cancelled by the minor. Both schools give to the minor an absolute power either to ratify or to cancel the unauthorized marriage. The (Hanafi) Sunni law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage. In the present case the man to whom the girl is said to have been married was in jail where she attained puberty. It was not necessary for her, therefore, to signify her assent or dissent. After attaining puberty she entered into a contract of marriage with the second accused. This is sufficient indication in my opinion that she never ratified the unauthorised marriage, which was never consummated".¹⁸ B, a Mahomedan girl, whose father was dead, was alleged to have been given in marriage by her mother to J, some years before she attained puberty. Prior to her attaining puberty, J was sentenced to a term of imprisonment for theft. While he was in jail, B, after she had attained puberty, contracted a marriage with P. The marriage with J was never consummated. On J being released from jail, he proceeded to prosecute B and P for bigamy and abetment of bigamy, and also charged P with adultery. It was held that B and P had not committed any offence, because, assuming that B was properly married to J by B's mother when B was a child, B had the option of either ratifying or repudiating such marriage on attaining puberty.²⁰ Where a minor, a Mahomedan girl, before attaining puberty, entered into a contract of marriage arranged by her father, who did not formally appear as her guardian at the

⁹ *Bethell: Bethell v. Hildyard*, (1888) 38 Ch. D. 220; *Nachimson v. Nachimson*, [1930] P. 217.

¹⁰ *Jadoo Mussulmanee*, (1866) 6 W. R. (Cr.) 60.

¹¹ *Mussamut Chamia*, (1880) 7 C. L. R. 354; *Bissuram Koiree*, (1878) 3 C. L. R. 410.

¹² *Karsan Goja*, (1864) 2 B. H. C. 117; *Ramjee Teli v. Ragho Teli*, (1899) 12 C. P. L. R. (Cr.) 19.

¹³ *Walu Ram*, (1923) 25 Cr. L. J. 1269, [1925] AIR (L) 168.

¹⁴ *Gigal v. Phio*, (1888) P. R. No. 25 of 1888.

¹⁵ *Ramanathan*, (1926) 28 Cr. L. J. 268.

¹⁶ *Sohan Singh v. Kabla Singh*, (1928) 10

Lah. 372.

¹⁷ *Inder Singh v. Sadhu Singh*, [1944] 1 Cal. 233

¹⁸ *Badal Aurat*, (1891) 19 Cal. 79, 82; *Rahmat Ali v. Mst. Allah Ditti*, (1929) 11 Lah. 172; *Abdul Karim v. Aminabai*, (1934) 37 Bom. L. R. 398.

²⁰ *Badal Aurat*, *ibid.*; *Ghulam Mohammad*, (1932) 33 P. L. R. 1062, 34 Cr. L. J. 77. See *Nainsukh*, (1874) 1 O. D. 44, where the Court held that if a child marriage was not consummated by cohabitation, a civil action for damages would lie but not a prosecution under this section.

time of the marriage, she could, on attaining puberty, exercise her option of repudiating that marriage under the Mahomedan law provided no circumstance be present which would disentitle her to the exercise of that right.²¹ It is not necessary for repudiation by a Muhammadan minor girl, of her marriage, which has not been consummated, and which has not been performed by her father, on her attaining puberty, that the repudiation should be something akin to oral repudiation before witnesses. Marrying some other man, on attaining puberty, is enough to constitute repudiation.²²

Marriage during iddat.—In a Bombay Sessions case it was held that a Mahomedan woman marrying again during the lifetime of a husband who had divorced her but within the period of *iddat* was not guilty of bigamy.²³ The Calcutta High Court holds the same view. It has laid down that under Mahomedan law the marriage of a man, who subsequently embraces Christianity, becomes *ipso facto* void, notwithstanding his reconversion to Islam during the period of *iddat*; and the wife, in contracting a second marriage during such period, does not commit bigamy under this section. A second marriage contracted by the wife during the period of her *iddat* is not void by reason of its taking place during the life of the first husband but by reason of a special doctrine of the Mahomedan law with which the Penal Code has nothing to do.²⁴ The former Chief Court of the Punjab had decided that a second marriage contracted with a woman whose husband was dead and who was in the stage of observing her *iddat* being unlawful under the Mahomedan law, no conviction under this section was sustainable.²⁵

Divorce.—Divorce dissolves a valid marriage, and the parties obtaining such dissolution can remarry. Divorce is unknown to Hindu law though it is customary amongst lower classes of the Hindus. But recently in the Province of Bombay the Bombay Hindu Divorce Act (Bom. Act XXII of 1947) has been promulgated to provide for a right of divorce among all communities of Hindus in certain circumstances. Divorce is allowed amongst the Mahomedans, the Parsis,¹ and the Native Christians.²

2. 'Marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife'.—Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to, and recognized by, the law as capable of producing a valid marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case.³ It is immaterial even if the second marriage is void on another ground besides that of its being bigamous.⁴

The word 'marry' implies going through a form of marriage whether the same is in fact valid or not.⁵ The accused, a married man, accompanied a woman to Scotland and there in the presence of witnesses they declared themselves to be man and wife. Such a marriage by declaration is only valid in Scotland if one of the parties has been resident there for a period of twenty-one days, which condition was not fulfilled by the accused. The accused contended that the second marriage ceremony being invalid, the offence of bigamy had not been committed. It was held that the validity of the second marriage was immaterial, and the accused was guilty of bigamy.⁶ Under the provisions of the Indian Christian Marriage Act (XV of 1872), the first accused who was a Roman Catholic Indian Christian married the complainant who was a Protestant, in a Protestant Church, the ceremony being performed by a Protestant pastor, and subsequently, after obtaining a release deed from her, he married the second accused in a

²¹ *Jay Gunnessa Bibi v. Mahammad Ali Baswas*, [1938] 1 Cal. 139.

²² *Shafi-ullah*, [1934] A. L. J. R. 387, 35 Cr. L. J. 1053, [1934] AIR (A) 589.

²³ *Sabiha*, (1907) 9 Bom. L. R. J. 207.

²⁴ *Abdul Ghani v. Azizul Huq*, (1911) 39 Cal. 409.

²⁵ *Musst. Bibi*, (1882) P. R. No. 43 of 1882.

¹ The Parsi Marriage and Divorce Act, III of 1936.

² The Native Converts' Marriage Dissolution Act, XXI of 1866.

³ *Allen*, (1872) L. R. 1 C. C. R. 387; *Brawn*,

(1848) 1 C. & K. 144. This view is not adopted in the Irish case of *Fanning*, (1866) 10 Cox 411, where it is said that English cases are distinguishable as the bigamous marriages in them were void for consanguinity and not for fornication.

⁴ *Gurbaksh Singh v. Shama Singh*, (1876) P. R. No. 19 of 1876.

⁵ *Sant Ram*, (1929) 11 Lah. 178; *Local Government v. Soni*, (1935) 37 Cr. L. J. 161, [1936] AIR (N) 13.

⁶ *Robinson*, (1888) 26 Cr. App. R. 129, [1938] 1 A. E. R. 301.

Roman Catholic church, the ceremony being performed by a Roman Catholic priest. It was held that the first accused had committed an offence of bigamy punishable under this section. The release deed executed by the complainant did not operate as a dissolution of the marriage between the first accused and herself. The marriage between the first accused and the complainant was a legal and valid marriage and, as it was subsisting when the first accused married the second accused, the marriage of the first accused with the second accused was void by reason of its taking place during the life of the complainant.⁷ Even where divorce and remarriage are recognized by the caste custom, a second marriage of a Hindu woman during the lifetime of her first husband without the first marriage being annulled by divorce or in some formal manner recognized by the caste usage as equivalent to divorce amounts to this offence. If the second marriage was an offence at the time it was performed, that offence cannot be obliterated by a subsequent divorce from the husband or by a settlement with him even though such may be the caste usage.⁸

The word 'void' is not used in the technical sense in which it is used in Mahomedan law. The Code makes no distinction between a void and an invalid marriage and the term 'void' as used in this section covers marriages of both classes.⁹

It is immaterial whether the ceremony of the second marriage takes place within or beyond the King's dominions.¹⁰

Good faith and mistake of law are no defences to a charge of bigamy.¹¹ It is no defence in law to an indictment for bigamy that the accused, at the time of the alleged bigamous marriage, believed, in good faith and on reasonable grounds, that he had been divorced from the bond of his first marriage, if in fact he had not been divorced.¹²

Publication of banns of marriage.—The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry. Where, therefore, a man having a wife living, caused the banns of marriage between him and a woman to be published, it was held that he could not be punished for an attempt to marry again during the lifetime of his wife.¹³

Whether custom good defence to prosecution.—The Bombay High Court has ruled that Courts will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to remarry. Bona fide belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge of marrying again during the lifetime of the first husband.¹⁴ A custom of the Talapada Koli caste, that a woman could be permitted to leave the husband to whom she has been first married, and to contract a second marriage (*natra*) with another man during the lifetime of her first husband, and without his consent, was held to be invalid, as being entirely opposed to the spirit of the Hindu law; and that such marriage was "void by reason of its taking place during the lifetime of such husband", and therefore punishable, as regards the woman, under this section.¹⁵ Accused No. 1 was married to the complainant but the marriage was not consummated. Some time after the marriage, the complainant went to South Africa, and during his absence there he did not write to his wife, nor did he furnish her with maintenance. The accused obtained, according to the custom of her caste, a release dissolving the marriage (*fargati*) from her caste people and married accused No. 2. It was held that the release was inoperative and that both the accused were guilty of bigamy.¹⁶

The Calcutta High Court has, however, upheld a caste custom which allowed a wife to undergo a *nikah* or *sagai* marriage after she was relinquished by her husband.¹⁷ Strict proof of such custom is essential.¹⁸ According to the Madras High Court evidence

⁷ *Gnanasoundari v. Nallathambi*, [1946] Mad, 367.

⁸ *Gedalu Narayana*, (1932) 36 L. W. 237, [1932] M. W. N. 1082, 38 Cr. L. J. 647.

⁹ *Allah Di*, (1928) 29 P. L. R. 533, 29 Cr. L. J. 701, [1928] AIR (L) 844; *Hamad*, (1931) 32 Cr. L. J. 1210, [1931] AIR (L) 194.

¹⁰ *The Trial of Earl Russell*, [1901] A. C. 446.

¹¹ *Narantakath Avullah v. Parakkal Mammu*, (1922) 45 Mad. 986.

¹² *Thomas Wheat*, [1921] 2 K. B. 119.

¹³ *Peterson*, (1876) 1 All. 316.

¹⁴ *Sambhu Raghu*, (1876) 1 Bom. 347. See *Sankaralingam Chetti v. Subban Chetti*, (1894)

17 Mad. 479, where it is decided that there is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expense of the latter's original marriage.

¹⁵ *Karsan Goja*, (1864) 2 B. H. C. 117; *Keshav v. Bai Gandhi*, (1915) 17 Bom. L. R. 534, 39 Bom. 538.

¹⁶ *Bai Ganga*, (1916) 19 Bom. L. R. 56, 18 Cr. L. J. 468, [1916] AIR (B) 97.

¹⁷ *Jukni*, (1892) 19 Cal. 627.

¹⁸ *Fagu Tanti v. Chotelal Tanti*, (1925) 7 P. L. T. 448, 27 Cr. L. J. 867, [1926] AIR (P) 846.

of any such custom should be allowed by Courts.¹⁹ A communal custom permitting divorce on the ground of disagreement between the spouses is valid if such divorce is to be effected on the consent of both the parties and is not forced by one on the other.²⁰ In *Empress v. Umi*,²¹ the Bombay High Court did give countenance to the custom of a caste which allowed a husband for a sufficient reason to divorce his wife. In this case a member of the Ajanya Rajput Guzars caste executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved; that in that caste a husband was, for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under this section.

Conversion from Hinduism.—According to Hindu law an apostate is not absolved from all civil obligations, the matrimonial bond remaining indissoluble. A non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity.²² Hindu law does not recognize polygamy on the part of a woman. A Hindu married woman who having a Hindu husband living marries a Mahomedan²³ or a Christian²⁴ even after becoming a Mahomedan or Christian, as the case may be, commits bigamy. The Calcutta High Court held in a case that a Hindu married woman can after adopting Mahomedanism ask her Hindu husband to become Mahomedan or apply to a competent Court for dissolution of her marriage. If this is done she can marry without being guilty of any offence.²⁵ This view was subsequently dissented from in another case in which it held that a marriage solemnized in India according to personal law could be dissolved according to another personal law, simply because one of the parties had changed his or her religion.¹ A Special Bench of the Calcutta High Court after reviewing all the authorities has held that the rule of Mahomedan law that if one of the married parties adopts Mussalman faith in a foreign country, the marriage is automatically dissolved if the other spouse does not also adopt the same faith before the completion of three menstrual periods, does not apply to the case of non-Muslim nationals of a country whose state religion is not Islam, e.g., India. A Hindu wife who has embraced Islam since her marriage but whose husband has not done so although three menstrual periods have elapsed since the conversion is not entitled to a declaration that in the circumstances the marriage stands dissolved under the Mahomedan law. Under Hindu law, the apostasy of one of the spouses does not dissolve the marriage.²

The Lahore High Court has held that the nature and incidents of a vedic marriage bond, between the parties is not in any way affected by the conversion to Christianity of one of them and the bond will retain all the characteristics of a Hindu marriage notwithstanding such conversion unless there shall follow upon the conversion of one party, repudiation or desertion by the other, and unless consequential legal proceedings are taken and a decree is made as provided by the Native Converts Marriage Dissolution Act.³ The Nagpur High Court has also held that the conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve her marriage with her husband; she cannot, during his life-time, enter into a valid contract of marriage with another person. Hence a person having sexual intercourse with a Hindu wife converted to Islam, knowing that she was a married woman, commits adultery whether it was with or without her consent.⁴

Conversion from Christianity.—The Madras High Court once held that a Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman can-

¹⁹ *Tholasingham*, (1896) 1 Weir 568.

²⁰ *Thangammal v. Genguyammal*, (1945) 58 L. W. 239.

²¹ (1882) 6 Bom. 126.

²² *Ram Kumari*, (1891) 18 Cal. 264; *Mussamat Gholam Fatima*, (1870) P. R. No. 32 of 1870.

²³ *The Government of Bombay v. Ganga*, (1880) 4 Bom. 330; *Budamsa Rauther v. Fatema Bi*, [1914] M. W. N. 278, 26 M. L. J. 260; *Mst. Nandi*, (1919) 1 Lah. 440. See *Jamna Devi v. Mul Raj*, (1907) P. R. No. 49 of 1907.

²⁴ *Millard*, (1887) 10 Mad. 218; *Gobardhan Dass v. Jasadamoni Dass*, (1891) 18 Cal. 252. Such a marriage can only be dissolved under the provisions of the Indian Divorce Act (IV

of 1869).

²⁵ *Ram Kumari*, (1891) 18 Cal. 264; *Mst. Nandi*, (1819) 1 Lah. 443; *Musst. Ayesha Bibi v. Bireswar Ghosh*, (1929) 33 C. W. N. clxxix; *Ayesha Bibi v. Subodh Ch. Chakravarty*, (1945) 49 C. W. N. 439. See an article on the same subject in 33 C. W. N. clxxxvii.

¹ *Sayed Khatoon v. M. Obaidiah*, (1945) 49 C. W. N. 745.

² *Rakya Bibi v. Anil Kumar*, (1947) 52 C. W. N. 142.

³ *Amar Nath v. Mrs. Amarnath*, (1946) 49 P. L. R. 147, F.B.

⁴ *Gul Mahomed*, [1947] Nag. 205.

not be convicted of bigamy on the ground that he has another wife living whom he married while a professed Christian.⁵ It was so held on the ground that the Hindu law allowed polygamy on the part of a husband. The same High Court doubted the correctness of this ruling in a subsequent case in which a Native Christian, having a Christian wife living, married a Hindu woman according to Hindu rites without renouncing his religion. The Court held that he was guilty of bigamy and expressed an opinion that it would have made no difference even if he had renounced the Christian religion before contracting the second marriage.⁶ But in a later case the former ruling is followed and the latter dissented from. In the later case a Hindu convert had married a Christian woman according to the rites of the Roman Catholic religion. Subsequently, and during the lifetime of his Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged. It was held that he was not guilty of bigamy.⁷

A Christian cannot by embracing Mahomedanism marry a second time during the lifetime of his first wife.⁸ The Calcutta High Court has held that in that case there was some doubt whether the parties were really converted to Mahomedanism or merely pretended to be so in order that they might take advantage of the Mahomedan law. A married Christian domiciled in India, after his conversion to Islam, is governed by Mahomedan law, and is entitled, during the subsistence of his marriage with his former Christian wife, to contract a valid marriage with another woman according to Mahomedan rites.⁹ The accused, a Christian woman, who had married a Christian according to Christian rites and during the lifetime of her husband had become a Mahomedan and married a Mahomedan according to Mahomedan rites was guilty of an offence under this section, notwithstanding the provisions of the Mahomedan law.¹⁰ Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce is a question of importance, and of nicety not decided as yet.¹¹

If one of the parties to a marriage becomes Christian he or she must get his or her marriage dissolved under the Native Converts' Marriage Dissolution Act (XXI of 1866) before marrying again.

Conversion from Mahomedanism.—A Mahomedan who becomes an Ahmediyan (a sect of Mahomedans) does not become an apostate and his wife is guilty of bigamy if she marries another during his lifetime.¹² A Mahomedan marriage was immediately dissolved on one of the parties to that marriage renouncing the faith of Islam.¹³ But under the Dissolution of Muslim Marriage Act (VIII of 1939) the renunciation of Islam by a born Muslim married woman or her conversion to a faith other than Islam does not dissolve her marriage (s. 4). She can, however, obtain a decree for the dissolution of her marriage on any of the grounds mentioned in s. 2.

Conversion from Zoroastrianism.—Conversion from Zoroastrianism does not dissolve the marriage tie.¹⁴ Conversion of one of the parties, who were married according to the Zoroastrian rites, to the Islamic faith does not dissolve the marriage.¹⁵

Conversion after marriage under Special Marriage Act.—Where a marriage is solemnized under the Special Marriage Act and both husband and wife subsequently become converted to Islam, the marriage not being one in the Mahomedan sense cannot be dissolved in the Mahomedan manner. It can only be dissolved under the provisions of the Indian Divorce Act. The same principle applies even when one of the parties alone becomes a convert to Islam.¹⁶

⁵ (1866) 3 M. H. C. (Appx.) 7; *Michael*, (1866) 1 Weir 563.

⁶ *Lazar*, (1907) 30 Mad. 550.

⁷ *Antony*, (1910) 33 Mad. 371.

⁸ *Skinner v. Orde*, (1871) 14 M. I. A. 309, 324.

⁹ *John Jiban Chandra Datta v. Abinash Chandra Sen*, [1939] 2 Cal. 12.

¹⁰ *Mussamat Ruri*, (1918) P. R. No. 5 of 1919, 20 Cr. L. J. 3.

¹¹ *Robert Skinner v. Charlotte Skinner*, (1897) 25 Cal. 537, 546. See *Noor Jehan v. Eugene Tiscenko*, (1941) 45 C. W. N. 1047, on appeal

(1941) 46 C. W. N. 465.

¹² *Narantakath Avullah v. Parakkal Mammu*, (1922) 45 Mad. 986.

¹³ *Karan Singh*, [1933] A. L. J. R. 733, 34 Cr. L. J. 869, [1933] AIR (A) 433.

¹⁴ The Parsi Marriage and Divorce Act, III of 1936, s. 52 (2).

¹⁵ *Robasa Khanum v. Khodadad Irani*, (1946) 48 Bom. L. R. 864.

¹⁶ *Andal Vaidyanathan v. Abdul Allam Vaidya*, [1947] Mad. 175.

Exception.—The Exception speaks of (1) the first marriage having been declared void by a Court; and (2) seven years' absence on the part of a spouse in a manner not heard of by the other party. Under the English law there is a third element, viz. bona fide belief in the spouse's death,¹⁷ which is not adopted in this Exception. The proviso to this exception confines its application to cases in which the accused before the second marriage discloses the real state of the case, and such knowledge as he or she may have concerning the circumstances, to the person about to be married.

If the accused bona fide believed that the earlier marriage was set aside by the Court he would not be guilty.¹⁸

If it is proved that the accused and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to show that during that time he was aware of her existence; and, in the absence of such proof, the accused is entitled to be acquitted.¹⁹ Even where the absence is the result of wilful desertion, it lies on the prosecution to show, not merely that the person charged had the means of knowledge, but the person knew that the first consort was living.²⁰ But it has been held in two Indian cases that a woman, who, having the means of acquiring knowledge of the death of her first husband, does not choose to make use of them, and marries, commits bigamy.²¹

The doctrine of a certain school of Mahomedan divines in regard to the competency of a woman to marry again after the absence of her husband for four years does not entitle a woman so remarrying to the benefit of the Exception.²²

Under this Exception it is incumbent on the person contracting the second marriage, if it is contracted within seven years, to inform the other party about the first marriage.²³

Bona fide belief as to earlier marriage being void.—A certain girl was married by her grandfather to one B. On attaining puberty she brought a suit to have the marriage declared void, as she wished to repudiate it, and obtained an *ex parte* decree which was, however, set aside and later on the suit was withdrawn. Some time after she went through a form of marriage with K, who was charged with having committed an offence under this section and s. 114. It was found that at the time of the marriage K did not know that the *ex parte* decree had been set aside and believed that it held good. It was held that inasmuch as by reason of a mistake of fact K thought that the previous marriage had been declared void by a Court of competent jurisdiction, he had not committed any offence.²⁴

Absence for seven years.—Where the accused's first wife had left him for sixteen years and it was proved by the second wife that she had known him for nine years, living as a single man, and that she had never heard of the first wife, who, it appeared, had been living seventeen miles from where the accused resided, it was held that the accused ought to be acquitted.²⁵ The accused's first husband had been continually absent from her for seven years next preceding the second marriage, on which occasion she represented herself as a single woman, and was married by her maiden name. The jury found that they had no evidence that, at the time of her second marriage, she knew that he was alive, but that she had means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that on that finding the conviction could not be supported.¹ Where it was proved that the accused had married W in 1865, and lived with her after the marriage, but for how long was not known; that in 1882 W being still alive, he had gone through the form of marriage with another woman, but there was no evidence as to the accused and W having ever separated or as to when, if separated, they last saw each other, it was held that the accused was rightly convicted.² Lord Coleridge, C. J., said: "There is proof of the existence of a state of things and no evidence of the cessation of that state of things, consequently, the presumption is that the existing state continued."

¹⁷ *Tolson*, (1880) 23 Q. B. D. 168.

¹⁸ *Karim Bakhsh*, (1918) 19 Cr. L. J. 680, [1918] AIR (L) 217.

¹⁹ *Curgerwen*, (1865) L. R. 1 C. C. R. 1; *Heaton*, (1863) 3 F. & F. 819.

²⁰ *Faulkes*, (1903) 19 T. L. R. 250.

²¹ *Enai Beebe*, (1865) 4 W. R. (Cr.) 25; *Must. Muhammad Nissa*, (1899) P. R. No. 1 of 1900.

²² *Alam Shah v. Jewan*, (1878) P. R. No. 27 of 1878.

²³ *Enai Beebe*, (1865) 4 W. R. (Cr.) 25.

²⁴ *Karim Bakhsh*, (1918) 19 Cr. L. J. 680, [1918] AIR (L) 217.

²⁵ *Thomas Jones*, (1842) Car. & Mar. 614.

¹ *Mary Briggs*, (1856) 26 L. J. (M. C.) 7.

² *Jones*, (1888) 11 Q. B. D. 118, 119.

In 1864 W married A. In 1868 he was charged with bigamy in marrying B, his wife A being then alive, and was convicted. In 1879 he married C and in 1880, C being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D, C being then alive, W was convicted, it being held by the presiding Judge that there was no evidence that A was alive when W married C, or that the marriage with C was invalid by reason of A being then alive. It was held that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A was alive or not when W married C.³

Persons present at bigamous marriage.—Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage.⁴

Abetment.—A man may be guilty of abetment although the girl herself may be, from want of intelligence or knowledge, incapable of committing this offence.⁵ For abetment there must be evidence that the person accused of abetting knew that the person he married was the wife of another man.⁶ In order that there may be a conviction of abetment of the offence under this section it must be found as a fact that the convicted person abetted the woman intentionally.⁷ The wife of the first accused having left his house with her minor daughter performed the marriage of the daughter with a boy. The first accused hearing of this applied to a Magistrate for a warrant under s. 100, Criminal Procedure Code, and thereupon the girl was handed over to him, and a few months later she was married by him to the second accused. Both the accused were then prosecuted for abetting the offence of bigamy. It was held that although a Hindu father was the proper person to give his daughter in marriage, the rule was firmly established that a marriage, which was duly solemnised and was otherwise valid, was not rendered void because it was brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court; that even if the marriage was brought about by fraud and might on that account be declared invalid, it was not a nullity and was binding until it was set aside by a competent Court, and that unless it was declared to be invalid it could sustain an indictment for bigamy.⁸ Where a Mahomedan guardian of a married female infant, while her husband was living, caused a marriage ceremony to be gone through in her name with another man, but without her taking any part in the transaction, it was held that he did not commit the offence of abetment under s. 109 and this section.⁹ This case does not seem to lay down sound law.

Priest officiating at bigamous marriage.—The priest who officiates at a bigamous marriage is an abettor under this section and s. 109.¹⁰

Statutes relating to marriage and divorce.—Act III of 1936 (Parsis); Act XXI of 1866 (Act to legalize the dissolution of marriages of Native Converts to Christianity); Act IV of 1869 (Act to amend the law relating to Divorce and Matrimonial Causes); Act III of 1872 (Special form of Marriages) as amended by Act XXX of 1923; Act XV of 1872 (Christians); Act VII of 1909 (Sikhs); Muslim Marriages Dissolution Act (VIII of 1939), (Mahomedans); Bombay Prevention of Hindu Bigamous Marriage Act (Bom. XXV of 1946, amended by Bom. XXXVIII of 1948); Bombay Hindu Divorce Act (Bom. Act XXII of 1947) (Hindus).

PRACTICE.

Evidence.—Prove the following facts:—

(1) That the accused had already been married to some person.¹¹

The provision of s. 50 of the Indian Evidence Act shows that where marriage is an ingredient of an offence, the fact of the marriage must be strictly proved.¹² Proof of actual marriage is always necessary; proof of marriage by cohabitation, reputation

³ *Willshire*, (1881) 6 Q. B. D. 306.

⁴ *Umi*, (1882) 6 Bom. 126.

⁵ *Nand Lal Singh*, (1902) 6 C. W. N. 343;
Hub Ali, (1923) 21 A. L. J. R. 187.

⁶ *Hamad*, (1931) 32 Cr. L. J. 1210, [1931] AIR (L) 194.

⁷ *Talep Ali v. Sabdar Khan*, (1940) 45 C. W. N. 84.

⁸ *Gajja Nand*, (1921) 2 Lah. 288.

⁹ *Abdool Kureem*, (1878) 4 Cal. 10.

¹⁰ *Umi*, (1882) 6 Bom. 126; *Millard*, (1887) 10 Mad. 218.

¹¹ *Birbul v. Sawan*, (1874) P. R. No. 4 of 1874; *Alam Shah v. Jewan*, (1878) P. R. No. 27 of 1878; *Makandi v. Mohri*, (1893) P. R. No. 17 of 1893.

¹² *Pitambur Singh*, (1879) 5 Cal. 566, F.B., overruling *Wazira*, (1872) 8 Beng. L. R. (Appx.) 68, 17 W. R. (Cr.) 5; *Shivana*, (1883) Unrep. Cr. C. 190; *Kalku*, (1882) 5 All. 288.

and other circumstances from which a marriage may be inferred is not sufficient.¹³ An admission by the accused that he married the woman or the statement of a witness that he was present at the marriage does not prove formal marriage so as to warrant a conviction under this section read with s. 109.¹⁴ A mere statement on the part of the accused that he had committed bigamy is not sufficient.¹⁵ The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.¹⁶ The Madras High Court has expressed its opinion that a husband or wife is not precluded from proving his or her marriage. Where, therefore, the complainant, a woman, and her mother swore to the fact of the marriage, it was held that the marriage was sufficiently proved.¹⁷ A marriage may be established by preponderating repute and by conduct, even though the repute may be divided.¹⁸ Where there is *prima facie* evidence of cohabitation as man and wife, and a long course of treatment of the woman as wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. Much weight must be attached to reputation among the relations on both sides, among all the friends and among all the acquaintances in the locality where the parties resided. The evidence of resemblance of a child to the putative father is admissible.¹⁹

Evidence of the identity of the accused on the occasions both of the first and of the second marriage is necessary. On an indictment for bigamy, a photographic likeness of the first husband was allowed to be shown to the witnesses present at the first marriage, in order to prove his identity with the person mentioned in the marriage certificate.²⁰ But, except under very special circumstances, the Court will not act upon identification by a photograph only.²¹

It is also incumbent upon the prosecution to prove the validity of the first marriage.²² A civil marriage between persons professing the Roman Catholic faith is valid.²³

Where the first marriage took place not within any part of the British dominions but in a foreign country, and there is a question concerning the validity of such marriage, the law of the foreign country must be ascertained. On an indictment for bigamy the validity of a foreign marriage must be proved by the evidence of a professional lawyer or of a person who is to be deemed by reason of his office to be skilled in the law of the country where it was celebrated.²⁴ The general principle with regard to marriage contracted in a foreign country is, that between persons of full age, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. If invalid there, it is equally invalid everywhere. But there are exceptions to this rule. On the one hand a Christian country would not recognize, as lawful, polygamy or some incestuous marriages contracted by Christians while residing in Mahomedan or other countries. On the other hand, where there is a local necessity from the absence of laws or the presence of prohibitions or obstructions not binding upon other countries, or from peculiarities of religious opinions, or conscientious scruples or from circumstances of exemption from local jurisdiction, marriages will be allowed to be valid according to the law of the native country. Thus, persons residing in factories, in conquered places and in desert or barbarous countries, or in countries of an opposite religion, are allowed to contract a marriage there according to the laws of their country.²⁵

If a marriage is performed in British India and has come before the British Courts, its validity is to be determined by the law prevailing in British India.¹

Proof of marriage amongst English.—To constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in holy orders; the fact that the bridegroom is himself a clergyman in holy orders there being

¹³ *Morris v. Miller*, (1767) 4 Burr. 2057, 2059.

¹⁴ *Talep Ali v. Sabdur Khan*, (1940) 45 C. W. N. 84.

¹⁵ *Flaherty*, (1847) 2 C. & K. 782; *Lindsay*, (1902) 18 T. L. R. 761. Contra, *Newton*, (1843) 2 M. & Rob. 503.

¹⁶ *Dal Singh*, (1897) 20 All. 166.

¹⁷ *Subbarayan*, (1885) 9 Mad. 9, 11.

¹⁸ *Lyle v. Ellwood*, (1874) L. R. 19 Eq. 98; *Sastry Velalader Aronegary v. Sembecutty Vagale*, (1881) 8 App. Cas. 364.

¹⁹ *Imambandi v. Molasuddi*, (1911) 15 C. L.

J. 621.

²⁰ *Tolson*, (1864) 4 F. & F. 103.

²¹ *Frith v. Frith*, [1896] P. 74.

²² *Kay*, (1887) 16 Cox 292.

²³ *Saldanha v. Saldanha*, (1929) 32 Bom. L. R. 17; *Saldana*, (1929) Criminal Appeal No. 32 of 1929, decided by Blackwell and K. Kemp, JJ., on September 19, 1929 (Unrep. Bom.).

²⁴ *Moscovich*, (1927) 44 T. L. R. 4.

²⁵ *M. & M.* 433.

¹ *Budamsa Routhier v. Fatema Bi*, [1914] M. W. N. 278, 26 M. L. J. 260.

no other clergyman present, will not make the marriage valid.² In English Courts a marriage is usually proved by the production of the parish or other register, or a certified extract therefrom, but, if celebrated abroad, it may be proved by any person who was present at it, though circumstances should also be proved, from which the Court may presume that it was a valid marriage according to the law of the country in which it was celebrated. If the marriage is proved by a person present at it, it is not necessary to prove the registration, or license, or banns.³

Proof of marriage amongst Hindus.—There is no statutory marriage law for the Hindus, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong.⁴

A marriage between a Sikh and a Hindu woman according to Hindu rites is valid, provided that both parties belong to the same caste.⁵

Proof of marriage amongst Mahomedans.—At a marriage between Mahomedans, a Mullah, with the necessary witnesses and vakils, is always present to read the *sigha*. He should, therefore, be called as a witness. The *sigha* recited at the marriage of minors is different from that recited at the marriage of adults. There should be evidence to show that *akd* was performed.⁶ Where, however, the father of a minor girl is present at her marriage and is a consenting party no special recitations are necessary to make a valid marriage under the *Hanafi* law.⁷

Proof of marriage amongst Parsis.—This can be proved by the production of the certificate given under s. 6 of the Parsi Marriage and Divorce Act (III of 1936) or a certified extract from the register of marriages under s. 7 of the Act.

Proof of marriage amongst Native Christians.—This can be proved by a certified copy of any entry of a marriage in the Marriage Register under s. 80 of the Indian Christian Marriage Act.⁸

Proof of marriage amongst Jews.—In order to prove a Jewish marriage it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract (*katuba*) between the parties being essential to the validity of the marriage, production and proof of the execution of such document is necessary.⁹ Jews domiciled in England cannot validly contract a marriage within the degrees prohibited by English law.¹⁰

(2) That the person to whom he had married was still living. The prosecution must prove to the satisfaction of the Court that the husband or wife, as the case may be, was alive at the date of the second marriage. This is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the Court would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, the Court would probably decline to draw that inference. The law makes no presumption either way. The Legislature sanctions a presumption that a person who has not been heard of for seven years is dead;¹¹ but this affords no ground for the converse proposition, viz. that when a party has been seen or heard of within seven years, a presumption arises that he is still living.¹²

Whether evidence is necessary, on the part of the prosecution, to show that the accused married, knowing his second wife to be alive, depends upon the particular facts of each case.¹³ Positive proof that at the time of his second marriage the accused knew that his first wife was alive is not absolutely necessary.¹⁴

(3) That the accused married another person.

² *Beamish v. Beamish*, (1859) 9 H. L. C. 274.

³ *Allison's Case*, (1806) Russ. & Ry. 109.

⁴ *Subbarayan*, (1895) 9 Mad. 9.

⁵ *Inder Singh v. Sadhu Singh*, (1943) 47 C. W. N. 669, 77 C. L. J. 327, 44 Cr. L. J. 643, [1943] AIR (C) 479.

⁶ *Badal Aurat*, (1891) 19 Cal. 79.

⁷ *Sheikh Alimuddin*, (1906) C. W. N. 982, 4 Cr. L. J. 152.

⁸ Act XV of 1872.

⁹ *Althausen*, (1893) 17 Cox 630. See *Nathan v. Wolf*, (1890) 16 T. L. R. 250; *Benjamin v. Benjamin*, (1925) 50 Bom. 369, 28 Bom. L. R. 328.

¹⁰ *De Wilton: De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Benjamin v. Benjamin*, *supra*.

¹¹ See the Indian Evidence Act, s. 108.

¹² *Lumley*, (1869) L. R. 1 C. C. R. 196, 198.

¹³ *Ellis*, (1858) 1 F. & F. 309.

¹⁴ *Jones*, (1869) 11 Cox 358.

The celebration of the second marriage is proved in the same manner as that of the first.

(4) That the second marriage was void by reason of its taking place during the life of the first spouse.¹⁵

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Complaint by person aggrieved necessary.—Under s. 198 of the Code of Criminal Procedure no Court shall take cognizance of an offence falling under this section except upon a complaint made by some person aggrieved by such offence. This section is intended to prevent Magistrates from inquiring into cases coming under ss. 493 to 496, unless the husband or some person aggrieved lodges a complaint. It is not necessary, however, that a complainant should state precisely the section of the Code under which the accused shall be charged. It is sufficient if the complainant lays before the Magistrate matters which, if proved, would be sufficient to warrant a commitment under this section.¹⁶

The brother of a lunatic husband is not a 'person aggrieved' by the wife's bigamy, and he is not competent to complain.¹⁷ Similarly, the brother of the second (bigamous) husband¹⁸ or the father of the first husband¹⁹ of the accused is not a 'person aggrieved.' The person aggrieved is either the first husband or the second.²⁰

Venue.—The proper Court to try a charge under this section is the Court which has territorial jurisdiction at the place where the offence was committed. Persons accused of abetting the commission of the offence are triable by the Court within whose territorial jurisdiction the abetment takes place.²¹

Charge.—I (*name and office of Magistrate, etc.*) her eby charge you (*name o accused*) as follows :—

That you, on or about the——day of——, at——, having a wife [*or husband*] to wit——, living, married again AB, and such marriage being void by reason of its taking place during the lifetime of the said wife [*or husband*], and that you thereby committed an offence punishable under s. 494 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [*by the said Court (if the case is tried by Magistrate omit these words)*] on the said charge.²²

Punishment.—Where a woman who has been left largely to her fate by her husband and has been living in adultery with a paramour, marries that paramour, she is guilty only of a technical offence and deserves only nominal punishment.²³ As to the Frontier District, see the Frontier Crimes Regulation, 1901, ss. 11 (3) (d) and 12 (2).

495. Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.

COMMENT.

Object.—This section provides a higher penalty when the fact of the former marriage is concealed from the person with whom the subsequent marriage is contracted.

The authors of the Code say : " The act which in the English law is designated as bigamy is always an immoral act. But it may be one of the most serious crimes

¹⁵ *Musst. Bibi*, (1882) P. R. No. 43 of 1882; (1870) 1 Weir 565, F.B.

¹⁶ *Ali*, (1902) 25 All. 209; *Ujja Bewa*, (1878) 1 C. L. R. 523.

¹⁷ *Bai Rukshmoni*, (1886) 10 Bom. 340.

¹⁸ *Imtiazan*, (1902) 25 All. 132.

¹⁹ *Lala*, (1909) 32 All. 78.

²⁰ *The Deputy Legal Remembrancer v. Sarna*

Kahmi, (1899) 26 Cal 336; *Lala*, (1909) 32 All. 78; *Banamali Tripathi*, (1942) 22 Pat. 268.

²¹ *Mussammat Bhagwati*, (1924) 3 Pat. 417; *Goverdhan Riddharan*, (1928) 30 Bom. L. R. 887 29 Cr. L. J. 538, [1928] AIR (B) 140.

²² (1876) 8. W.R. (Cr. L.) 9.

²³ *Ritha*, (1925) 8 N. L. J. 178, 27 Cr. L. J. 74, [1926] AIR (N) 127.

that can be committed. It may be attended with circumstances which may excuse though they cannot justify it.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity..

"But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married, she shall be an outcaste from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage.

"It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case the man can hardly be said to have injured any individual in such a manner as calls for legal punishment. For what individual has he injured? His second wife? He has acted by her consent, and at her solicitation. His first wife? He has certainly been unfaithful to his first wife. But we have no punishment for mere conjugal infidelity. He will often have injured his first wife no more than he would have done by keeping a mistress calling that mistress by his own name, introducing her into every society as his wife, and procuring for her the consideration of a wife from all his acquaintances. The legal rights of the first wife and of her children remain unaltered. She is the wife; the second is the concubine. But suppose that the first wife has herself left her husband, and is living in adultery with another man. No individual can then be said to be injured by this second invalid marriage. The only party injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public.

"The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than for the purpose of preventing the profanation of a religious ceremony. It therefore makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals and bigamy which produces no suffering to individuals, at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so, and induces her, under that persuasion, to cohabit with him, should be punished with great severity.

"There are reasons similar, but not exactly the same, for punishing a woman who deceives a man into contracting with her a marriage which she knows to be invalid. For this offence we propose a punishment which, for reasons too obvious to require explanation, is much less severe than that which we have provided for a similar deception practised by a man on a woman."²⁴

The authors of the Code intended to punish with greater severity only the man who deceived a woman. But the section as it stands applies to either party.

CASES.

Concealment of fact of first marriage when contracting second.—A woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage within sixteen months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under this section.²⁵

²⁴ Note Q, pp. 171; 172.

²⁵ *Enai Bébec*, (1865) 4 W. R. (Cr.) 25.

Infant marriage.—Where a child of ten years was married again during the lifetime of her husband, the marriage being negotiated and caused to be performed by the mother of the accused, it was held that the child had not attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage.¹

PRACTICE.

Evidence.—Prove the same points (1) to (4) as those for s. 494; and further—(5) That the accused, when marrying the second person, concealed from such person the fact of the former marriage.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint by person aggrieved necessary.—See s. 493, *supra*.²

496. Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married,¹ knowing that he is not thereby lawfully married,² shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Ingredients.—The section requires two essentials:—

1. Dishonestly or with a fraudulent intention going through the ceremony of marriage.

2. Knowledge on the part of the person going through the ceremony that he is not thereby lawfully married.

1. ‘Dishonestly or with a fraudulent intention, goes through the ceremony of being married’.—The essence of this offence is that the marriage ceremony should be fraudulently gone through and that there should be no lawful marriage.

See s. 24 as to the meaning of ‘dishonestly’, and s. 25, as to that of ‘fraudulent intention’.

2. ‘Knowing that he is not thereby lawfully married’.—The accused must have the knowledge that there is no marriage. A case of bigamy is not contemplated by this section. Where it is intended that there should be a valid marriage and that there should be only a show of marriage for some ulterior and fraudulent purpose, the case does not come under this section.³ The section punishes mock marriages. It applies to cases in which a ceremony is gone through which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose. Where the ceremony gone through does, but for the previous marriage, constitute a valid marriage, and both parties are aware of the circumstances of the previous marriage, s. 494 applies.⁴ The accused, who wanted to marry a girl but was rejected, waylaid her and pushed her down and tied a *tali* round her neck. He was convicted of an offence under this section. On a perusal of the calendar of the High Court, it was held that the act of the accused in tying the *tali* round the neck of the girl in the circumstances did not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married within the meaning of this section and hence the conviction should be set aside. Moreover the accused must be presumed to have known full well that according to the custom of the community that act did not constitute a ceremony of being married.⁵

An abuse of marriage ceremony where no deceit is practised on the woman and no dishonest or fraudulent intent is proved, is not an offence under this section.

¹ *Godi*, (1896) Cr. R. No. 55 of 1896, Unrep. Cr. C. 876.

² Criminal Procedure Code, s. 198.

³ *Sheikh Alimuddin*, (1907) 10 C. W. N. 982, 4 Cr. L. J. 152.

⁴ *Rama Sona*, (1873) Cr. R. July 1873, Unrep. Cr. C. 77.

⁵ *Vellai Mudali*, [1946] 2 M. L. J. 428, [1946] M. W. N. 762, 48 Cr. L. J. 842.

Section 493 and 496.—The two sections are somewhat alike; the difference appears to be that under s. 493 deception is requisite on the part of the man, and cohabitation or sexual intercourse consequent on such deception. The offence under s. 496 requires no deception, cohabitation, or sexual intercourse as a *sine qua non*, but a dishonest or fraudulent abuse of the marriage ceremony. In the latter case the offence can be committed by a man or a woman, in the former, only by a man.

Abetment.—The mere act of allowing the marriage to take place at one's house does not amount to an abetment of illegal marriage.⁶

PRACTICE.

Evidence.—Prove (1) that the accused went through the ceremony of marriage.

(2) That when he went through such ceremony he knew that he was not thereby lawfully married to the complainant.

(3) That he did as in (1) dishonestly or with a fraudulent intention.⁷

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary.—See s. 493, *supra*.⁸

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly (*or fraudulently*) went through the ceremony of being married to AB, knowing that you were not thereby lawfully married, and that you thereby committed an offence punishable under s. 496 of the Indian Penal Code, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried [by the said Court] on the said charge.

497. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man,¹ without the consent or connivance of that man,² such sexual intercourse not amounting to the offence of rape,³ is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

COMMENT.

The framers of the Code did not make adultery an offence punishable under the Code. But the Second Law Commission, after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code. Adultery figures in the penal law of many nations and some of the most celebrated English lawyers have considered its omission from the English law as a defect.

This section applies to Europeans who are in British India.⁴

Ingredients.—The section requires the following essentials:—

1. Sexual intercourse by a man with a woman who is and whom he knows or has reason to believe to be the wife of another man.

2. Such sexual intercourse must be without the consent or connivance of the husband.

3. Such sexual intercourse must not amount to rape.

1. 'Sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man'.—The Law Commissioners have limited the cognizance of this offence to adultery committed with a married woman, and the male offender alone has been made liable to punishment. Thus, under the Code, adultery is an offence committed by a third person against a husband in respect

⁶ *Kudum*, (1864) W. R. (Gap No.) (Cr.) 13.

⁷ *Kudum*, (1864) W. R. (Gap No.) (Cr.) 13.

⁸ Criminal Procedure Code, s. 198.

⁹ *E. G. Hunter*, (1920) 22 Cr. L. J. 382.

of his wife. It is not committed by a man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it. In s. 483 of the Code of Criminal Procedure the word 'adultery' is used in the wide and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse. It is used in the popular sense of the term, viz. a breach of the matrimonial tie by either party.¹⁰

Why wife not punished as abettor.—The authors of the Code say: "Though we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law."¹¹

The reasons given above for not punishing a wife as an abettor seem neither convincing nor satisfactory. It would be more consonant with Indian ideas, if the woman also were punished for adultery. Manu has provided punishment for her, and in France and in China she is punished.

In the Punjab Frontier Districts, in the North West Frontier Province and in Baluchistan, a married woman is punishable for adultery.¹²

'Reason to believe to be the wife of another man'.—See s. 26, *supra*, as to the meaning of the expression 'reason to believe'. Where a prisoner accused of adultery set up in defence a *natra*, contracted with the woman with whom he was alleged to have committed adultery, in accordance with the custom of his caste, it was held that the question the Court had to determine was, whether or not the accused honestly believed, at the time of contracting the *natra*, that the woman was the wife of another man.¹³ Where the accused, after abducting the wife of another, lived with her in adultery and, subsequently, remarried her in the *nikah* form with her consent, it was held that the accused was guilty of offences under this section and s. 109 read with s. 494.¹⁴

It is not necessary that the adulterer should know whose wife the woman is, provided he knew she was a married woman.¹⁵ A *nekai* wife is a wife within the meaning of this and the following section.¹⁶

2. 'Without the consent or connivance of that man'.—'Consent' here is a permission to the paramour on the part of the husband to have connection with his wife.

'Connivance' is the willing consent to a conjugal offence, or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed.¹⁷ Connivance is an act of the mind, it implies knowledge and acquiescence. As a legal doctrine, connivance has its source and its limits in the principle, *volenti non fit injuria*, a willing mind, this is all that is necessary.¹⁸ To constitute 'connivance' there "must be something more than mere negligence; than mere inattention; than over-confidence; than dullness of apprehension; than mere indifference: It must be intentional concur-

¹⁰ *Gantapalli Appalamma v. Gantapalli Yella-yya*, (1897) 20 Mad. 470, F.B.

¹¹ Note Q, p. 175. See *Khark Singh*, (1881) P. R. No. 36 of 1881.

¹² See Frontier Crimes Regulation, III of 1901, ss. 12 and 30.

¹³ *Manohar Raiji*, (1898) 5 B. II. C. (Cr. C.) 17.

¹⁴ *Munir*, (1925) 24 A. L. J. R. 155, 27 Cr. L. J. 101, [1926] AIR (A) 189.

¹⁵ *Madhub Chunder Giri Mohanti*, (1873) 21 W. R. (Cr.) 13.

¹⁶ (1865) 4 W. R. (Cr. L.) 1.

¹⁷ *Stroud's Judicial Dictionary*, Vol. I, p. 374.

¹⁸ *Boulting v. Boulting*, (1864) 33 L. J. (P. M. & A.) 81.

rence".¹⁹ Connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, or something which is known to be going on without any protest or desire to disturb or interfere with it.²⁰ "To establish connivance it is requisite, not that the party conniving should be actually an accessory before the fact, so as to have taken any active measure to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to."²¹ The mere fact that the husband, on being informed by the police that his wife had been discovered at a certain place, expressed his unwillingness to take her back on the ground that she had lost her religion, was not evidence of the husband having connived at her living a life of adultery with the accused.²²

3. 'Such sexual intercourse not amounting to the offence of rape'.—In rape the consent of the woman is wanting. Under this section the offence is committed even though the woman is a consenting party. In rape the woman may be a married woman or not, under this section the woman must be the wife of another man. Rape may be committed even by a husband when the wife is under thirteen years of age.

See s. 375, *supra*.

Attempt.—Adultery being an act which requires the consent of both the parties, it appears that for a man to be guilty of an attempt it is not sufficient that he was found in a place in which adultery might have been committed and that he was minded to commit it.²³ Where a married woman went to visit a man, but before adultery was committed, she was taken away by her husband, it was held that the man could not be convicted of an attempt to commit adultery.²⁴

PRACTICE.

Evidence.—Prove (1) that the accused had sexual intercourse with the woman in question.

The sexual intercourse required for adultery being the same identical thing as the sexual intercourse required for rape, the evidence of sexual intercourse on a charge of adultery must not be stronger than that in a suit for divorce. The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained and of familiarities which point strongly to an inference of guilt, are sufficient to establish the fact of sexual intercourse.²⁵

Evidence of having lived with the wife of an absent person for several weeks and moreover of having slept in the same bed for a number of days and of considerable attachment between the accused and the woman where there is no allegation that the accused is impotent, is, although circumstantial, sufficient evidence to prove sexual intercourse between them.¹

(2) That she was then the wife of another man.

Strict proof is necessary of the marriage of the woman.² The actual fact of the marriage between the complainant and the woman must be proved in some way or another.³ Any inference of tacit admission on the part of the accused will not avail the prosecution if they fail to prove that relationship strictly. In India where no registration prevails, it is necessary to set out the facts and circumstances surrounding the alleged ceremony of the marriage in order to enable the Court to determine the

¹⁹ Per Sir John Nicholl in *Rogers v. Rogers*, (1880) 3 Hagg. Eco. 57, 59; *Phillips v. Phillips*, (1844) 1 Rob. 144; *Allen v. Allen*, (1859) 30 L. J. (P. M. & A.) 2.

²⁰ *Gipps v. Gipps*, (1864) 11 H. L. C. 1; *Munir*, (1925) 24 A. L. J. R. 155, 27 Cr. L. J. 101, [1926] AIR (A) 189.

²¹ *Glennie v. Glennie*, (1862) 32 L. J. (P. M. & A.) 17, 20.

²² *Munir*, (1925) 24 A. L. J. R. 155, 27 Cr. L. J. 101, [1926] AIR (A) 189.

²³ *Basava Chary*, (1889) 1 Weir 569.

²⁴ *Ghulam Mahomed*, (1879) P. R. No. 13 of 1879; *Patra Ram*, (1902) P. R. No. 25 of 1902.

²⁵ *Madhub Chunder Giri Mohunt*, (1873) 21

W. R. (Cr.) 13; *E. G. Hunter*, (1920) 22 Cr. L. J. 382.

¹ *E. G. Hunter*, *ibid*.

² *G. R. Smith*, (1865) 4 W. R. (Cr.) 31; (1865) 4 W. R. (Cr. L.) 10; *Pitambar Singh*, (1879) 5 Cal. 536, F.B.; *Danesh Sheikh v. Tajfir Mandal*, (1902) 7 C. W. N. 143; *Akbar Khan*, (1882) P. R. No. 40 of 1882; *Gopal*, (1925) 27 Cr. L. J. 651, [1925] AIR (R) 328; *Raghupat Singh*, (1927) 4 O. W. N. 172, 28 Cr. L. J. 311, [1927] AIR (O) 140; *Aziz Khan*, (1936) 18 P. L. T. 166, [1936] P. W. N. 865, 38 Cr. L. J. 213, AIR (P) 219.

³ *Bhagu Dhondi*, (1914) 17 Bom. L. R. 57, 16 Cr. L. J. 213, [1915] AIR (B) 294.

question whether the marriage in fact took place and whether the relationship of husband and wife in fact existed at the time of the prosecution.⁴

(3) That the accused knew, or had reason to believe, that she was the wife of another man.

The question the Court has to determine is, whether or not the accused honestly believed that the woman was the wife of another man.⁵

(4) That such man did not consent to, or connive at, such intercourse.

A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf.⁶

The admission of a man and a woman coupled with the evidence of the witnesses to the effect that the two lived together as man and wife leads to the inevitable presumption that acts of adultery must have been committed.⁷ Adultery need not and generally speaking cannot be proved by direct evidence.⁸

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Death of husband does not end prosecution.—The death of the husband does not necessarily put an end to a prosecution under this section.⁹ This relates to the death during the pendency of the case and not before its institution.

Complaint by person aggrieved necessary.—No Court shall take cognizance of the offence except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.¹⁰ The words “the husband of the woman” in s. 199 of the Criminal Procedure Code are simply intended to point to the particular person who has the right to start proceedings in respect of such offences mentioned in the section, and a man does not cease to be “the husband of the woman” within the meaning of this section merely because the marriage tie has been dissolved subsequent to the commission of the offence complained of. In other words, the dissolution of the marriage tie does not take away from the complainant the right to lodge a complaint in respect of an offence committed before the marriage tie was dissolved.¹¹

Although a man cannot be charged with adultery except by the husband of the woman with whom he commits it, yet he may be charged with and convicted of house-trespass with intent to commit adultery, without the husband himself making the charge, if there is no consent or connivance on the part of the latter.¹² In a case the accused was found in the complainant's house by night, and he stated that he was there for the purpose of carrying on an intrigue with the complainant's wife. The complainant refused to lay a complaint of house-trespass with intent to commit adultery. It was held that the Magistrate was right in refusing to convict him of a charge which the husband refused to make.¹³ Where an accused person was committed to the Sessions Court to stand his trial on a charge preferred by a husband under s. 376, and the Sessions Judge at the trial added a charge of adultery under this section and acquitted the accused under s. 376, but convicted him under this section, it was held that the Sessions Judge had acted without jurisdiction.¹⁴ The Court of Session may add charges under this section and s. 498, in the manner indicated in s. 226 and the sections following of the Code of Criminal Procedure, when the complaint of the husband was not merely of offences involving the use of force but was also a specific complaint of the offence punishable under the aforesaid sections.¹⁵ Where in a prosecution under s. 366 the

⁴ *Ganga Patra*, (1928) 29 Cr. L. J. 1045, [1928] AIR (P) 481.

⁵ *Manohar Raiji*, (1868) 5 B. H. C. (Cr. C.) 17.

⁶ *Sheikh Bechoo*, (1866) 6 W. R. (Cr.) 92.

⁷ *Kallychurn Potial*, (1867) 7 W. R. (Cr.) 50.

⁸ *Sita Devi v. Gopal Saran Narayan Singh*, (1928) 9 P. L. T. 397.

⁹ (1869) 4 M. H. C. (Appx.) 55, 2 Weir 235; *Mauj Din*, (1922) 4 Lah. 7; *Nur Mahomed*, (1907) 1 S. L. R. 72, 8 Cr. L. J. 190.

¹⁰ Criminal Procedure Code, s. 199. See *Luckhy Narain Nagory*, (1875) 24 W. R. (Cr.) 18; *Fiaz Ahmed*, (1878) P. R. No. 5 of 1879; *Hashmat*, (1882) P. R. No. 19 of 1882; *Kahmatulla*, (1888) P. R. No. 10 of 1888; *Jit Mal*, (1887) P. R.

No. 4 of 1888; *Piran Ditta*, (1895) P. R. No. 23 of 1895; *Kallu*, (1882) 5 All. 238; *Nga Po Thaw*, (1912) U. B. R. 155, 14 Cr. L. J. 284.

¹¹ *Dhanna Singh*, (1922) 23 Cr. L. J. 402, [1922] AIR (L) 477; *W. J. Phillips*, [1935] O. W. N. 1015, 36 Cr. L. J. 1298. The brother of a married woman, who is discarded by her husband, is not a proper complainant: *Raminarayan Kapur*, (1936) 39 Bom. L. R. 61, [1937] Bom. 244.

¹² (1868) 3 Mad. Jur. 285.

¹³ (1869) 5 M. H. C. (Appx.) 5, 1 Weir 532.

¹⁴ *Chemoni Garo*, (1902) 29 Cal. 415.

¹⁵ *Rajani Kuntia Shahu v. Idris Thakur*, (1921) 48 Cal. 1105.

husband of the woman appeared as a witness and asked the Magistrate to drop the proceedings under s. 366 as he intended to prosecute the accused under s. 498, it was held that the statement made by the husband, as a witness, fell within the definition of complaint as defined in s. 4, cl. (h), of the Code of Criminal Procedure, and therefore a conviction under s. 498, treating the statement made by the husband as a complaint, was legal.¹⁶

Withdrawal of charge.—Where the husband of a woman, with whom the accused was alleged to have committed adultery, professed himself unwilling to proceed with the prosecution, and the Judge thereupon ordered the accused to be discharged, the High Court, in the exercise of its discretion, declined to interfere.¹⁷ But in an Allahabad case it has been ruled that a charge of adultery cannot be withdrawn by a complainant with the Magistrate's consent.¹⁸

Order for re-trial.—In an inquiry into a case of alleged adultery and enticing away a married woman for illicit purposes, the complainant refused to examine his wife as to the marriage. The Deputy Magistrate declined to frame a charge and discharged the accused. The Sessions Judge directed a re-trial to be held by another Deputy Magistrate and ordered that the evidence of the wife should be taken as to the marriage. It was held that the Sessions Judge in ordering a re-trial had not exercised a proper discretion, he having admitted that the prosecution had failed to prove the marriage, and it not being alleged that any evidence was tendered by the prosecution and not taken by the Deputy Magistrate.¹⁹

Conviction for every fresh act.—Where a man who has been convicted of adultery with another man's wife, continues his adulterous intercourse, he will be liable to a second conviction and punishment for the fresh act, notwithstanding that the woman has not returned to the protection of her husband after the conviction of her paramour.²⁰ The offence of adultery is not a continuing offence. Every act of sexual intercourse amounts to an offence of adultery.²¹ The Nagpur High Court has accepted this view. But it has opined that it is undesirable that there should be successive prosecutions against the accused for an offence under this section. Successive prosecutions should not be encouraged.²²

Mayne is of opinion that a man cannot be convicted of adultery a second time in respect of the same woman, if she has not been taken back by her husband. But there is nothing in the section to support this view.

Charge.—A charge of adultery, alleging commission of offences between two dates, is legal where it is impossible, in the circumstances of the case, to assign particular dates on which sexual intercourse took place.²³

It should run thus—

I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed adultery with AB, knowing or having reason to believe her to be the wife of CD, and without the consent or connivance of the said CD; and that you thereby committed an offence punishable under s. 497 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*if the case is tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation, 1901, ss. 11 (3) (d), and 12 (2).

498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man,¹ from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with

Enticing or taking away or detaining with criminal intent a married woman.

¹⁶ *Bhawani Dat*, (1916) 38 All. 276.

¹⁷ *Ramlo Jerio*, (1868) 5 B. H. C. (Cr. C.) 27.

¹⁸ *Gumbheer*, (1870) 2 N. W. P. 234.

¹⁹ *Chunder Nath Ghose v. Nundololl Chatterji*, (1884) 11 Cal. 81.

²⁰ *Emaji*, (1880) Cr. R. October 28, 1880,

Unrep. Cr. C. 150.

²¹ *Shanker Tulshiram*, (1928) 30 Bom. L. R. 1435, 1436, 53 Bom. 69.

²² *Rewa*, [1941] N. L. J. 606.

²³ *Bhola Nath Mitter*, (1924) 51 Cal. 468.

any person,² or conceals or detains with that intent any such woman,³ shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section and the preceding one are evidently intended for the protection of husbands, who alone can institute prosecutions for offences under them. The gist of the offence under this section consists in depriving the husband of his proper control over his wife for the purpose of illicit intercourse. Any disposition or consent or willingness on the part of the wife is perfectly immaterial to the guilt of the accused.²⁴

Sections 361 and 366 may be compared with this section which comes into operation when the two former sections fail to apply.

Ingredients.—The section requires three things:—

1. Taking or enticing away or concealing or detaining the wife of another man from (a) that man, or (b) any person having the care of her on behalf of that man.
2. Knowledge or reason to believe that she is a wife.
3. Such taking, enticing, concealing or detaining must be with intent that she may have illicit intercourse with any person.²⁵

1. ‘Takes or entices away any woman who is and whom he knows...to be the wife of any other man’.—The expression “takes or entices away” does not include the taking of a woman with the consent of the person who has the care of her.¹ “Taking” does not mean taking by force and means something different from enticing.² If the accused personally and actively assists the wife to get away from her husband’s house or from the custody of any person who was taking care of her on behalf of the husband, this would amount to taking.³ There must be some influence emanating from the accused and operating on the woman or co-operating with her inclination—some act or assistance—in order to constitute taking.⁴ ‘Taking away’ of a married woman implies that there is some influence, physical or moral, brought to bear by the accused to induce the wife to leave her husband. There must be some influence operating on the woman, or co-operating with her inclination at the time the final step is taken which causes a severance of the woman from her husband, for the purpose of causing such step to be taken.⁵ ‘Enticing’ implies some blandishment or coaxing. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. It is none the less taking, although the advances and solicitations proceeded from the woman and the accused had for some time refused to yield to her request.⁶ The fact that the woman accompanied the accused of her own free-will does not diminish the criminality of the act.⁷ If in point of fact the husband had, previously to the accused’s alleged act of taking or enticing away the woman, turned his wife out of his house, it cannot be said that, under such circumstances, she was taken from her husband within the meaning of the section, which evidently contemplates that the woman should be at the time living under the protection of her husband or of someone acting on his behalf.⁸

It is the enticement or taking away from the husband and not the enticement to any person which constitutes the offence. If, therefore, it is clearly proved that a man has enticed the woman away from her husband’s control with intent that she may have illicit intercourse with any person, and she has actually left her husband’s control without any definite intention to return or with the intention to remain away from her husband’s protection indefinitely, the offence is complete as regards the person who has so enticed the woman, who may, as a matter of fact, not be her paramour

²⁴ *Hossaini Methor*, (1937) 41 C. W. N. 931, 65 C. L. J. 421, 38 Cr. L. J. 986, [1937] AIR (C) 460.

²⁵ *Ganesh Ram v. Gyan Chand*, (1919) 21 Cr. L. J. 139, [1920] AIR (P) 522.

¹ *Abdul Rahman*, (1935) 39 C. W. N. 1055, 37 Cr. L. J. 1155.

² *Jnanendra Nath Dey v. Khitish Chandra Dey*, (1935) 39 C. W. N. 1280, 37 Cr. L. J. 28.

³ *Ibid.*

⁴ *Hossaini Methor*, (1937) 41 C. W. N. 931,

65 C. L. J. 421, 38 Cr. L. J. 986, [1937] AIR (C) 460.

⁵ *Mahadeo Rama*, (1942) 45 Bom. L. R. 295, 44 Cr. L. J. 584, [1943] AIR (B) 179.

⁶ *Kumarasami*, (1865) 2 M. H. C. 381, 1 Weir 569.

⁷ *Jan Mahomed*, (1902) 4 Bom. L. R. 435; *Jnanendra Nath Dey v. Khitish Chandra Dey*, (1935) 39 C. W. N. 1280, 37 Cr. L. J. 28.

⁸ *Mihan Singh*, (1888) P. R. No. 15 of 1888 at p. 26.

at all, but some third person, even though the woman and her paramour should never meet at all.⁹ For the purposes of a conviction under this section there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him, or an intention that she should remain away indefinitely.¹⁰

'Whom he knows or has reason to believe to be the wife of another man'.—The woman must be the wife of another man. If the marriage is voidable then this section does not apply.¹¹

If a particular union between two persons is recognised as marriage, then the taking or enticing away the woman from a party to such union will amount to an offence under this section.¹² Where the accused enticed away a woman, who was the illegitimate daughter of a Brahmin father and Bania mother and who had married a Bania, it was held that the accused was guilty as such a marriage was recognized by the caste to which the husband belonged and was not invalid according to Hindu law.¹³ Where by custom a marriage with a widow is valid and the accused abducted a woman so married with knowledge of the marriage, it was held that he was guilty of an offence under this section.¹⁴

Mahomedan law.—According to Mahomedan law if a woman marries before the expiry of *iddat* the marriage is null and void. Where a woman had married her husband's brother during her *iddat* and subsequently married the accused, it was held that the accused had committed no offence under this section.¹⁵

The complainant, a Mahomedan, alleged that he had been married six times; that all the wives were living, but that he kept two of the first four partially divorced, (i.e. by pronouncing the words of divorce only once or twice and not thrice) in order to legalize his marriage with the fifth and the sixth, and so kept within the law which permitted him to have four wives. The accused was charged with abducting or committing adultery with the sixth wife. It was held that the woman in question was not the wife of the complainant.¹⁶

A Mahomedan marriage was considered to have been dissolved on one of the parties to that marriage renouncing the faith of Islam. Where the wife of a Mahomedan, who had neglected and abandoned her, after renouncing her religion and accepting the faith of the accused, left her father's house accompanied by the accused and began to live with him, it was held that as the woman had ceased to be the wife of the Mahomedan, the accused was at liberty to take her away from the house of her father without committing an offence under this section.¹⁷ Under the Dissolution of Muslim Marriage Act (VII of 1939) the renunciation of Islam by a married Muslim woman does not dissolve her marriage (s. 4.).

Where a wife, who was deserted by her husband, went of her own free will, to live with another man, a conviction under this section was set aside, as there was no enticing or taking away.¹⁸

'Woman'.—See s. 10, *supra*.

'Reason to believe'.—See s. 26, *supra*.

2. 'With intent that she may have illicit intercourse with any person'.—

Intention is the gist of this offence. The intention must be that the woman should have unlawful intercourse with a person.

A person who entices away a married woman from her husband's house with intent that he may dispose of her in marriage to some one else commits an offence under this section, because sexual intercourse between the woman and any other person to whom she has thus been given in marriage, during the lifetime of her husband, would be illicit intercourse within the meaning of this section.¹⁹ Though according to the

⁹ *Gaman*, (1899) P. R. No. 9 of 1899.

¹⁰ *Ahmad*, (1917) 18 P. L. R. 402, 19 Cr. L. J. 441, [1918] AIR (L) 346.

¹¹ *Bulunda*, (1910) 11 Cr. L. J. 664.

¹² *Aslop*, [1930] A. L. J. R. 1492, 82 Cr. L. J. 315, [1930] AIR (A) 884.

¹³ *Madan Gopal*, (1912) 34 All. 589; *Anandaw*, (1927) 28 Cr. L. J. 868, [1927] AIR (R) 261.

¹⁴ *Gobindu*, (1918) P. R. No. 10 of 1919, 20 Cr. L. J. 554.

¹⁵ *Isa v. Ranon*, (1911) 13 P. L. R. 258, 13

Cr. L. J. 136.

¹⁶ *Rab Nawaz Khan*, (1874) P. R. No. 1 of 1875.

¹⁷ *Karan Singh*, [1933] A. L. J. R. 733, 34 Cr. L. J. 869, [1933] AIR (A) 433.

¹⁸ *Pochun Chung*, (1865) 2 W. R. (Cr.) 35; *Pahlwan*, (1914) 16 P. L. R. 340, 16 Cr. L. J. 216, [1915] AIR (L) 461.

¹⁹ *Naurang*, (1915) 18 A. L. J. R. 251, 16 Cr. L. J. 815, [1915] AIR (A) 120.

Mahomedan law the remarriage of a married woman is only invalid and not void, yet as that woman does not become the wife of the person she remarries, any intercourse between the remarried woman and the person she remarries is illicit and as the intention of the person enticing away the woman is to remarry her the intent would, therefore, be that she should have illicit intercourse.²⁰

Where a procuress induced a married woman of twenty to leave her husband, and the fact showed that the wife had made her deliberate choice and was determined, of her own free-will, to leave her husband and become a prostitute in Calcutta, the High Court held that the procuress could not be convicted of kidnapping under s. 366, but was guilty of enticing away a married woman under this section, for, whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the accused interposed.²¹ The complainant alleged that his father-in-law had detained his wife, and that with the help of his father-in-law the accused married his wife who was since then kept in the accused's house. The accused was convicted under this section. It was held that the conviction was bad inasmuch as there was no evidence whatever to show that the accused enticed away the complainant's wife from her husband's or her father's house with intent to have illicit intercourse with her.²²

3. 'Or conceals or detains with that intent any such woman'.—The word "detains" in this section means, by derivation and according to the ordinary use of language, "keeps back". The keeping back need not necessarily be by physical force; it may be by persuasion or by allurements and blandishments. The use of the word requires that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman. To constitute detention, proof of some kind of persuasion is necessary.²³ It cannot properly be said that a man detains a woman if she has no desire to leave and on the contrary wishes to stay with him.²⁴ The word 'detention' is *ejusdem generis* with enticement and concealment. It does not imply that the woman is being kept against her will but there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her husband.²⁵ The words 'conceals or detains' are intended to be applied to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife, for the purpose of illicit intercourse, is the gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments.¹ Detention does not necessarily imply that it is against the consent of the person detained. Where a married woman left her husband's house and went to another man's and lived with him as his wife, it was held that the man with whom she lived had committed an offence under this section.² If a man keeps the wife of another under his protection in a house he detains her within the meaning of this section.³ But there can be no detention where the woman is living with a man of her own free-will and refuses to go back with her husband,⁴ or if she is an absolutely free agent to go away from the person with whom she is living whenever she likes.⁵ A married woman was taken by her brother from the house of her husband during his absence, and was given away in *natra* marriage to the accused who lived in another village. The woman lived in the accused's house openly and freely as his wife. The accused having been charged with detaining a married woman, it was held that he had

²⁰ *Hamad*, (1931) 32 Cr. L. J. 1210, [1931] AIR (L) 194.

²¹ *Srimottee Poddee*, (1864) 1 W. R. (Cr.) 45.

²² *Jasimuddin Sheikh v. Ichohak Mistri*, (1897) 1 C. W. N. 498.

²³ *Mahiji Fula*, (1933) 35 Bom. L. R. 1046, 58 Bom. 88; *Harnam Singh*, (1938) 41 P. L. R. 487, 40 Cr. L. J. 760, [1939] AIR (L) 295; *Bipad Bhanjan Sarkar*, [1940] 2 Cal. 98.

²⁴ *Ramnarayan Kapur*, (1936) 39 Bom. L. R. 61, 68, [1937] Bom. 244.

²⁵ *Prithi Missir v. Harak Nath Singh*, [1937] 1 Cal. 166.

¹ *Sundara Dass Tevan*, (1868) 4 M. H. C. 20, 1 Weir 571; *Mohammad Aslam Khan*, (1936) 39 P. L. R. 488, 38 Cr. L. J. 576, [1937] AIR (L) 617.

² (1872) 7 Mad. Jur. 138.

³ *Bansi Lal*, (1913) 14 P. L. R. 1067, 16 Cr. L. J. 595; *Ganesh Prasad v. Tulshi Ram*, (1933) 10 O. W. N. 784, 34 Cr. L. J. 729; *Banarsi Raut*, (1937) 19 P. L. T. 795, [1938] P. W. N. 817, 39 Cr. L. J. 952, [1938] AIR (P) 432.

⁴ *Lachman Chamar*, (1920) 18 A. L. J. R. 311, 21 Cr. L. J. 417, [1920] AIR (A) 43; *Ochachal Ahir*, (1927) 26 A. L. J. R. 403, 29 Cr. L. J. 273, [1928] AIR (A) 194; *Mohammad Husain Khan v. Lekhai*, (1934) 11 O. W. N. 672, 35 Cr. L. J. 932, [1934] AIR (O) 258; *Abdul Wahid Khan*, (1927) 28 Cr. L. J. 703; *Mahiji Fula*, (1933) 35 Bom. L. R. 1046, 58 Bom. 88; *Ramnarayan Kapur*, (1936) 39 Bom. L. R. 61, 68, [1937] Bom. 244.

⁵ *Mabarakh Sheikh*, (1939) 43 C. W. N. 980

not committed any offence.⁶ A married young woman, who was discarded by her husband, lived with her father and brother in Madras. She became intimate with the accused who was her next door neighbour. The two ran away from Madras in a motor car, flew to Bangalore in an aeroplane, and eventually settled in Bombay. The woman's brother filed a complaint against the accused in Bombay, charging him with an offence under this section. The Magistrate convicted the accused of the offence charged as well as of the offence of adultery (s. 497 of the Code). The High Court on appeal held that the conviction of the offence under this section could not be sustained in the absence of evidence that the woman had been taken or enticed from a person having the care of her on behalf of her husband, and that it could not be said that the woman was kept back or "detained" by the accused either from her husband or from the complainant, for she was a free agent and stayed with the accused because she wished to do so; and that as to the charge of adultery there was no legal complaint of the offence, and that in the absence of necessary averments no offence could be alleged against the accused.⁷

The words 'such woman' do not mean such woman as has been so enticed away as mentioned in the section, but means such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under the section.⁸ In an earlier case the same High Court had expressed the opinion, though the point had not been specifically discussed, that a person could not be convicted of detaining an enticed woman until the enticing had been proved.⁹ This interpretation gives the go-bye to the latter part of the section which makes concealment or detention of such woman punishable and is not followed by Straight, J., in *Niadar's* case above referred to.

"A wife living in her husband's house, or in a house hired by him for her occupation, and at his expense, is, during his temporary absence, living under his protection so as to bring the case within the meaning of s. 498—provided, of course, that ...he knew, or had reason to know, that she was the wife of the man from whose protection he took her, or on whose behalf the person from whom he took her had charge of her, and also provided that he took her with the intent specified in the Act. To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code".¹⁰ The mere fact that the woman was seen outside the accused's house is not sufficient.¹¹

Sections 366 and 498.—For an offence under s. 366 there must be kidnapping or abduction as defined in s. 362. For an offence under s. 498 there need be no compulsion or deceit. Section 366 applies to cases where, at the time of the abduction, the woman has no intention of marriage or illicit intercourse at the time when the abduction takes place, but it is the intention of the person abducting her to compel her afterwards to marry any person against her will, or to force or seduce her afterwards to illicit intercourse. Section 498 applies to cases where the object of the taking or enticing is that the woman may have illicit intercourse with some other person, even though, as it generally happens, she is quite aware of the purpose for which she is quitting her husband, and is an assenting party to it.

Again, an offence punishable under s. 498 is a minor offence as compared with an offence punishable under s. 366.¹²

Wife cannot be punished as abettor.—In the case of adultery it is distinctly enacted that the wife is not punishable as an abettor; it is, therefore, inconsistent to punish her as an abettor of the minor offence mentioned in this section.¹³ It has been left an open question whether a woman can be convicted of abetting the 'taking away' of herself within the meaning of this section.¹⁴ Enticement denotes a state of passivity

⁶ *Mahiji Fula*, (1933) 35 Bom. L. R. 1046, 58 Bom. 88.

⁷ *Ramnarayan Kapur*, (1936) 39 Bom. L. R. 61, 68, [1937] Bom. 244.

⁸ *Niadar*, (1888) 10 All. 580; *Ala Bakhsh*, (1891) P. R. No. 61 of 1891; *Jagannath*, [1937] A. L. J. R. 547, 38 Cr. L. J. 621, [1937] AIR (A) 353; *Bipad Bhanjan Sarkar*, [1940] 3 Cal. 93.

⁹ *Tika Singh*, (1880) 3 All. 251.

¹⁰ Per Jackson and Glover, JJ., in *Mutty Khan v. Mungloo Khansama*, (1866) 5 W. R.

(Cr) 50.

¹¹ *Deonandan*, (1920) 21 Cr. L. J. 383, [1920] AIR (A) 83.

¹² *Jatra Shekh v. Reazat Shekh*, (1892) 20 Cal. 483.

¹³ *Phalla v. Jivan Singh*, (1871) P. R. No. 6 of 1871; *Mohun v. Gunsham*, (1871) P. R. No. 8 of 1871, overruling *Syul Al mud*, (1868) P. R. No. 17 of 1868.

¹⁴ *Balambal*, (1902) 26 Mad. 463.

on the part of the woman, and hence does not come within the three clauses of s. 107 which imply a certain degree of activity in the abettor. If a woman requested a man to take her away her act would probably be covered by s. 107, cl. (1).

Alyasantana law.—The cohabitation of man and woman under the Alyasantana system is not considered to be a marriage so as to render punishable a person who entices away the woman with the intent specified in the section.¹⁵

PRACTICE.

Evidence.—Prove (1) that the woman in question is the wife of another man.

The provisions of s. 50 of the Indian Evidence Act show that where marriage is an ingredient in an offence the fact of the marriage must be strictly proved.¹⁶ It is not sufficient for the prosecution to prove that the complainant and the woman in respect of whom the charge is made lived together as man and wife.¹⁷ Strict proof of marriage is necessary;¹⁸ it cannot be presumed.¹⁹ Long cohabitation may raise a presumption of marriage but a conviction cannot be based on such presumption.²⁰ The admission by the accused that the woman is the wife of the prosecutor is not enough.²¹ The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.²² The Madras High Court has, however, held that the evidence of the husband and wife is sufficient to prove the marriage.²³ So had formerly the Chief Court of the Punjab.²⁴ Although in some cases there may be danger in relying solely upon the interested evidence of a spouse, nevertheless a conviction based upon the evidence of a spouse is not illegal.²⁵ The fact and the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman and must be proved as strictly as any other material facts, but it is not necessary that they should be proved in any particular way.¹ There must be proof that the marriage had been celebrated strictly in accordance with the requirements of custom and law applicable to the parties. Mere presumption that the accused must have known that the woman was married without proof of such knowledge is not enough.² The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and at the time of the commencement of cohabitation a marriage between them was possible. This presumption of law can be repelled only by strong, distinct and conclusive evidence, and the mere fact that the direct evidence of the marriage which took place many years ago is unsatisfactory cannot displace this presumption. Marriage is evidence, not constituted, by habit and repute, and in a case where no valid marriage is possible no amount of evidence as to habit and repute can establish it.³

The fact that the marriage of the enticed woman with the complainant was voidable at her option is not a defence unless it is shown that that option was exercised before the enticement.⁴

(2) That she was under the care of her husband, or of some one on his behalf.

(3) That the accused took or enticed her away from her husband⁵ or that other person, or concealed, or detained her.

¹⁵ *Koraga*, (1883) 6 Mad. 374.

¹⁶ *Pitambur Singh*, (1879) 5 Cal. 506, F.B.

¹⁷ *Arshed Ali*, (1883) 13 C. L. R. 125.

¹⁸ *Sobrat v. Jungli*, (1898) 2 C. W. N. 245; *Raghupat Singh*, (1927) 4 O. W. N. 172, 28 Cr. L. J. 311, [1927] AIR (O) 140; *M. Peters*, (1908) 2 S. L. R. 22, 10 Cr. L. J. 235; *Bechar*, (1911) 5 S. L. R. 270, 13 Cr. L. J. 541; *Ramanathan*, (1926) 28 Cr. L. J. 268; *Prahlad Barman*, (1929) 34 C. W. N. 227, 31 Cr. L. J. 1091. An Arora Hindu cannot contract a valid marriage with his maternal aunt. Marriage by *Chadar Andazi* is not recognized by Hindu law as a valid marriage: *Saudagar*, (1927) 29 Cr. L. J. 210, [1928] AIR (L) 165; *Ramdhani Gope*, (1941) 42 Cr. L. J. 553, [1941] AIR (P) 526.

¹⁹ *Mokandi v. Mohri*, (1893) P. R. No. 17 of 1893.

²⁰ *Vir Singh*, (1920) 30 P. L. R. 643, 30 Cr. L. J. 1051, [1930] AIR (L) 230.

²¹ *Phikku*, (1925) 2 O. W. N. 586, 26 Cr. L. J.

1376, [1925] AIR (O) 701.

²² *Dal Singh*, (1897) 20 All. 166; *Kallu*, (1882) 5 All. 233; *Santok Singh*, (1898) 18 A. W. N. 186; *Padam Singh*, (1906) 3 A. L. J. R. 224a; *Budhu*, (1920) 42 All. 401; *Pirithi*, (1900) 3 O. C. 342; *Phikku*, (1925) 2 O. W. N. 586, 26 Cr. L. J. 1376, [1930] AIR (O) 701.

²³ *Subharayan*, (1885) 9 Mad. 9.

²⁴ *Wadhwa*, (1893) P. R. No. 5 of 1893.

²⁵ *Syed Munir*, (1917) 14 N. L. R. 28, 18 Cr. L. J. 1016, [1917] AIR (N) 76.

¹ *Nazir Khan*, (1913) 36 All. 1.

² *Akshay Kumar Maiti*, (1933) 38 C. W. N. 113, 115, 34 Cr. L. J. 1092, [1933] AIR (C) 880.

³ *Indar Singh v. Thakar Singh*, (1921) 22 P. L. R. 322.

⁴ *Fazal Dad*, (1928) 29 Cr. L. J. 762, [1928] AIR (L) 898.

⁵ *Norman O'Connor*, (1935) 37 Cr. L. J. 73, [1935] AIR (C) 345.

It is not enough to show that the woman left her husband's house or that she was afterwards seen passing along with the accused. It must be shown that she left by reason of some act or assistance proceeding from the accused.⁶

(4) That the accused knew, or had reason to believe, that she was the wife of another man.

There must be evidence of some kind from which the inference could be drawn that the accused knew the woman to be a married woman: mere presumption that he must have known it is not sufficient.⁷ The omission to state in the charge that the accused had the knowledge or reason to believe is not by itself fatal to the charge.⁸

(5) That the accused did as above with intent that she might have illicit intercourse with some person.

The Code does not exonerate a man merely because there is connivance by the husband.⁹

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Complaint by aggrieved person necessary.—No Court shall take cognizance of this offence unless upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman.¹⁰ A complaint by a man who has purchased a married woman is not competent.¹¹ A Mahomedan husband cannot file a complaint after divorcing his wife.¹²

The intention of the law is to prevent Magistrates inquiring, of their own motion, into cases connected with marriage unless the husband or other person authorized moves them to do so. A specific complaint under this section is necessary.¹³ Where an accused person was committed to the Sessions to stand his trial on a charge preferred by a husband under s. 376 and the Sessions Judge at the trial added a charge of adultery under s. 497 and acquitted the accused under s. 376, but convicted him under s. 497, it was held that the Sessions Judge had acted without jurisdiction.¹⁴ The accused was tried on charges under ss. 363 and 366. At the conclusion of the case, the Court added a charge under this section and convicted the accused on all the three charges. It was held that the procedure in the case was not regular; and the additional charge framed at the stage it was framed was prejudicial to the accused. The Court set aside the conviction under this section and ordered an inquiry into the remaining charges.¹⁵ Where, in a case in which the complaint was of the offences of kidnapping a minor girl and theft of her jewels, there was no allegation even in the sworn statement of the complainant that the accused's purpose was to have illicit intercourse with her daughter, and there was not even a statement as to puberty; it was held that there was no complaint of an offence under this section, so as to give the Magistrate jurisdiction to try and convict the accused of such an offence.¹⁶ Where an accused is charged on a charge under s. 366A he cannot be convicted of an offence under this section in the absence of a complaint made by the husband under that section. The fact that the husband appeared and gave evidence for the prosecution at the trial under s. 366A cannot take the place of a complaint by the husband which is necessary.¹⁷ In a later case the same High Court has held that if a petition contains an allegation of facts which, if proved by evidence, would constitute an offence under this section, such petition is clearly a complaint by the husband of an offence under this section, for which he desires the

⁶ *Hossaini Methor*, (1937) 41 C. W. N. 931, 65 C. L. J. 421, 38 Cr. L. J. 986, [1937] AIR (C) 460.

⁷ *Batiram Koet v. Bhandaram Koet*, (1920) 22 Cr. L. J. 412, [1920] AIR (C) 979.

⁸ *Allah Din*, (1927) 28 Cr. L. J. 419, [1927] AIR (L) 432.

⁹ *Ganesh Ram v. Gyan Chand*, (1919) 21 Cr. L. J. 139, [1920] AIR (P) 522.

¹⁰ Criminal Procedure Code, s. 199; *Nihala*, (1909) 11 P. L. R. 28, 11 Cr. L. J. 155; *Ram-narayan Kapur*, (1936) 39 Bom. L. R. 61, [1937] Bom. 244; *Ishwar Din*, [1942] O. W. N. 431, (1942) 43 Cr. L. J. 643, [1942] AIR (O) 434; *Banamali Tripathy*, (1942) 22 Pat. 263.

¹¹ *Mughlu*, (1925) 26 P. L. R. 382.

¹² *Hukam Din*, (1879) P. R. No. 27 of 1879.

¹³ *Chemon Garo*, (1902) 29 Cal. 415; *Tara*

Prosad Laha, (1903) 30 Cal. 910, F.B.; *Isap Mahmad*, (1906) 9 Bom. L. R. 148, 31 Bom. 218; *Kallu*, (1882) 5 All. 233; *Jagdamba Prasad*, (1933) 55 All. 871; *Bangaru Asari*, (1903) 27 Mad. 61; *Bhana*, (1910) P. R. No. 32 of 1910, 12 Cr. L. J. 50; *Roda Singh*, (1917) P. R. No. 2 of 1918, 19 Cr. L. J. 300, [1918] AIR (L) 385; *Mahandi*, (1933) 36 Cr. L. J. 423, [1934] AIR (L) 122; *Khusal Singh*, (1904) 17 C. P. L. R. 105, 1 Cr. L. J. 763. *Contra Bhawani Dat*, (1916) 38 All. 276.

¹⁴ *Chemon Garo*, (1902) 29 Cal. 415.

¹⁵ *Isap Mahmad*, *supra*.

¹⁶ *Arunachalam Chetty*, (1928) 45 M. L. J. 548, [1928] M. W. N. 876, 24 Cr. L. J. 837, [1924] AIR (M) 323.

¹⁷ *Jagdamba Prasad*, (1933) 55 All. 871; *Haidar Ali*, [1940] A. L. J. R. 97, (1940) 41 Cr. L. J. 409, [1940] AIR (A) 201.

accused named by him to be prosecuted. The fact that there are other allegations in the petition which, by themselves or in conjunction with those relating to an offence under this section, constitute a more serious offence, such as one under s. 366, will not make the complaint any the less a complaint under this section.¹⁸ Though a person having the care of a woman on behalf of her husband can lodge a complaint he cannot compound the offence and an acquittal based on such a compounding is erroneous.¹⁹

A prosecution under this section does not abate merely on account of the death of the injured party.²⁰

Detention of a married woman is a continuing offence and a person committing such an offence is always liable to prosecution except for any period in respect of which he has been found innocent. Acquittals in respect of previous detentions are no bar to a fresh charge for a subsequent detention.²¹

A person who is prosecuted under ss. 366 and 376 cannot be held to be guilty of having committed an offence under this section, if the offences with which he was charged are not established.²²

Sections 497 and 498.—A person convicted of adultery under s. 497 of the Code need not be convicted also under this section.²³

Finding.—A finding exactly in the words of this section—that the accused took or enticed away a married woman from her husband, or some person having the care of her on his behalf, with intent that she may have illicit intercourse with any person, or concealed or detained such woman with a like intent—though not actually illegal, when it is doubtful which of the several offences has been committed, is a finding which ought not to be resorted to if it can be avoided, and it can be determined under which part of the section the accused is guilty.²⁴

Place of trial.—A complaint under this section for detaining a woman for the purpose of illicit intercourse can be inquired into only in the district where such detention occurs.²⁵

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, took away (*or enticed away, or concealed, or detained*) a certain woman, to wit AB, whom you knew or had reason to believe to be the wife of CD, from the said CD, [*or from EF who had the care of the said AB on behalf of CD*], with intent that the said AB might have illicit intercourse with some person; and that you thereby committed an offence punishable under s. 498 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—Where the accused was convicted of an offence under this section and it appeared that the woman being not on good terms with her husband went to the accused of her own accord, a sentence of one year's rigorous imprisonment was considered to be too severe.¹ A light sentence is sufficient to meet the ends of justice when the abducted woman is an active abettor,² or where the husband did not care much about his wife and did not take any action against the accused for a number of months after her abduction.³

¹⁸ *Mohan Singh*, (1933) 36 Cr. L. J. 404, [1934] AIR (A) 472.

¹⁹ *Fateh Muhammad*, (1919) 4 L. L. J. 448; *Mir Alam*, (1922) 23 Cr. L. J. 690.

²⁰ *Mauj Din*, (1922) 4 Lah. 7; *Nur Mahomed wd. Kadan*, (1907) 1 S. L. R. 72, 8 Cr. L. J. 190.

²¹ *Nadar*, (1920) 24 Cr. L. J. 636, [1921] AIR (L) 186.

²² *Haider Ali*, [1940] A. L. J. R. 97, (1940) 41 Cr. L. J. 409, [1940] AIR (A) 201.

²³ *Pochun Chung*, (1865) 2 W. R. (Cr.) 85.

²⁴ *Mothoora Nath Roy*, (1874) 22 W. R. (Cr.)

72.

²⁵ *Jaswant Singh*, (1916) 19 P. L. R. 188, 19 Cr. L. J. 438, [1918] AIR (A) 357.

¹ *Rasul Khan*, (1910) 11 P. L. R. 72, 11 Cr. L. J. 597.

² *Lal Khan*, (1914) 15 P. L. R. 403, 15 Cr. L. J. 524, [1914] AIR (L) 101; *Chandgi*, (1926) 27 P. L. R. 642, 28 Cr. L. J. 52, [1927] AIR (L) 91.

³ *Gahra*, (1925) 26 P. L. R. 429, 27 Cr. L. J. 192, [1926] AIR (L) 176; *Ram Chand*, (1911) P. L. R. No. 224 of 1911, 12 Cr. L. J. 500.

CHAPTER XXI.

OF DEFAMATION.

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations,¹ makes or publishes any imputation concerning any person² intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person,³ is said, except in the cases hereinafter excepted, to defame that person.

Defamation.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

ILLUSTRATIONS.

(a) A says—"Z is an honest man; he never stole B's watch": intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the Exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the Exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the Exceptions.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Imputation of truth which public good requires to be made or published.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Public conduct of public servants.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

ILLUSTRATION.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

ILLUSTRATIONS.

(a) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(b) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity". A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

ILLUSTRATIONS.

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind". A is within this Exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(e) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine". A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not found on Z's book.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Censure passed in good faith by person having lawful authority over another.

ILLUSTRATION.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eight Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Accusation preferred in good faith to authorized person.

ILLUSTRATION.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Imputation made in good faith by person for protection of his or other's interests.

ILLUSTRATIONS.

(a) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the Exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Caution intended for good of person to whom conveyed or for public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Punishment for defamation.

COMMENT.

In the words of the authors of the Code, "the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed."¹

The criminal law of this country with regard to defamation depends on the construction of s. 499, not on what may be the English law on the same subject.² According to the theory of the criminal law of England the essence of the crime of private libel consists in its tendency to provoke a breach of the peace. Under the Penal Code, defamation has been made an offence without any reference to its tendency to cause acts of illegal violence. The authors of the Code observe: "It appears to us evident that between the offence of defaming and the offence of provoking to a breach of the peace, there is a distinction as broad as that which separates theft and murder. Defamatory imputations of the worst kind may have no tendency to cause acts of violence. Words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the defamation, considered as defamation, is by no means proportioned to its tendency to cause such acts: nay, circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence, considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace."³

Ingredients.—The section requires three essentials:—

1. Making or publishing any imputation concerning any person.
2. Such imputation must have been made
 - (i) by words, either spoken or intended to be read; or
 - (ii) by signs; or
 - (iii) by visible representations.
3. Such imputation must have been made with the intention of harming, or with knowledge or reason to believe that it will harm the reputation of the person concerning whom it is made.

1. 'Makes or publishes any imputation concerning any person'.—Every one who composes, dictates, writes or in any way contributes to the making of a libel, is the maker of a libel. "If one dictates, and another writes, both are guilty of making it, for he shews his approbation of what he writes. So, if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel may be compared to murdering a man's person, in which all who are present and encourage the act are guilty, though the wound was given by one only."⁴ Where a person merely describes the thumb impressions of signatories by writing their names opposite their thumb-impressions on a defamatory petition, he cannot be said to have made it.⁵

¹ Note R, p. 175.

² *Greene v. Delaney*, (1870) 14 W. R. (Cr.) 27; *Isuri Prasad Singh v. Umrao Singh*, (1900) 22 All. 234; *Ganga Prasad*, (1907) 29 All. 685; *Champa Devi v. Pirbhu Lal*, (1925) 24 A. L. J. R. 329; 27 Cr. L. J. 253, [1926] AIR (A) 287; *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal. 388, F.B.; *Nagarji Trikamji*, (1894) 19 Bom. 340; *Abdul Hakim v. Tej Chandar Mukarji*, (1881) 3 All. 815; *Tiruveng*

gadu Mudali v. Tripurasundari Ammal, (1926) 49 Mad. 728, F.B.

³ Note R, pp. 175, 176.

⁴ Bacon's Abrid., Vol. IV, p. 457; *Paine*, (1696) 5 Mod. 163, 165.

⁵ *Lingangaudu Basangaudu Patil*, Criminal Appeal No. 173 of 1927, decided by Patkar and Baker, JJ., on September 22, 1927 (Unrep. Bom.).

'Publishes.'—The making known the defamatory matter after it has been written to some person other than the person of whom it is written, is publication in its legal sense. The defamatory matter must be published, that is, communicated to some person other than the person to whom it is addressed.⁶ Communicating defamatory matter to the person defamed only is not publication.⁷ But when it is proved that the writer knew that the person defamed could not read when he sent the letter and the person defamed gets it read by a third person, it must be held that there is evidence of a publication to a third person, for, in such a case the writer must have known that the letter would be read to the person defamed by some third person.⁸ It is sufficient if the accused intentionally does an act which has the quality of communicating to a third person or persons generally the alleged libel. It is not necessary for the prosecution either to allege or to prove that the act of the accused was directed at communicating the libel to any specified person or persons or that the libel, as a matter of fact, was brought to the notice of such person or persons.⁹ A notice under s. 185 of the Municipalities Act was issued by the President of a Notified Area to a certain person, who sent a reply containing defamatory allegations against the President. This reply was put on the official file by the President and it was read by the members of the Notified Area Committee. It was held that there was publication of the defamation. The placing of the reply on the official file was not a gratuitous or voluntary act on the part of the President but it was his duty to do so, and the accused knew or must have known that the contents of his reply would be necessarily communicated to the persons connected with the office of the Notified Area.¹⁰ The action of a person who sent to a public-officer by post, in a closed cover, a notice containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was held to be not such a 'making' or 'publishing' of the matter complained of as to constitute this offence.¹¹ Where a number of persons meet and resolve not to associate with a person for good reasons there is no defamation, nor does the sending a copy of the resolution to the person in question make it defamation. But it would be a different matter if a copy of the resolution is published.¹² If A and B conspire to draw up a document defaming Z and leave it with B there is no publication.¹³

According to the English law, defamatory matter, even if published only to the person defamed, will support an indictment, provided it is likely to provoke a breach of the peace.¹⁴ This view of the English law is met by s. 504.

It is immaterial whether the person publishing the defamatory statement intended to publish it or not, provided he did so publish it in fact.¹⁵ "Everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been".¹⁶ Defamatory matter written on a post-card,¹⁷ or transmitted in a telegram,¹⁸ or printed on papers distributed broadcast¹⁹ constitutes publication. So are filing in Court a petition containing defamatory matter concerning a person with the intention that it should be read by other persons,²⁰ and swearing of an affidavit containing defama-

⁶ *Varnakote Illath v. Kotalmana Keshavan*, (1900) 1 Weir 579; *Khima Nand*, [1937] A. L. J. R. 128, 38 Cr. L. J. 806.

⁷ *Mohamed Ismail Khan v. Mahomed Tahir*, (1873) 6 N. W. P. 38; *Taki Husain*, (1884) 7 All. 205, F.B.; *Bishwa Nath Das v. Keshab Gandhabanik*, (1902) 30 Cal. 402; *Komul Chunder Bose v. Nobin Chunder Ghose*, (1868) 10 W. R. 184; *Jalishen Das v. Sher Singh*, (1910) P. R. No. 10 of 1910, 11 Cr. L. J. 281; *Burke v. Skipp*, (1928) 45 M. L. J. 754, 18 L. W. 718, [1923] M. W. N. 913, 25 Cr. L. J. 641, [1924] AIR (M) 840; *Nga On Thin*, (1921) 23 Cr. L. J. 240, [1921] AIR (R) 16; *Sadashiv Atmaram*, (1893) 18 Bom. 205; *Abdul Aziz*, (1935) 61 C. L. J. 205, 37 Cr. L. J. 133, [1935] AIR (C) 736.

⁸ *Kundanmal*, (1943) 45 Cr. L. J. 105, [1943] AIR (S) 196.

⁹ *Bhikhchand*, (1926) 21 S. L. R. 130, 27 Cr. L. J. 1276, [1927] AIR (S) 54.

¹⁰ *Sukhdeo*, (1932) 55 All. 253.

¹¹ *Taki Husain*, (1884) 7 All. 205, F.B. The

learned dissenting judgment of Duthoit, J., may be read with great interest.

¹² *Nga On Thin*, (1921) 23 Cr. L. J. 240, [1921] AIR (R) 16.

¹³ *Doraiswami Naidu v. Kannappa Chetty*, [1931] M. W. N. 366, 32 Cr. L. J. 767, [1931] AIR (M) 487.

¹⁴ *Adams*, (1888) 22 Q. B. D. 66.

¹⁵ *Periyasami Kotasawmi Tever*, (1866) 1 Weir 580.

¹⁶ Per Parke, B., in *O'Brien v. Clement*, (1846) 15 M. & W. 435, 437.

¹⁷ *Sankara Narasimha Bharathi*, (1883) 6 Mad. 381; *Robinson v. Jones*, (1879) L. R. 4 Ir. 391.

¹⁸ *Whitfield v. South Eastern Railway Company*, (1858) El. Bl. & El. 115.

¹⁹ *Thiagaraya v. Krishnasami*, (1892) 15 Mad. 214.

²⁰ *Greene v. Delanney*, (1870) 14 W. R. (Cr.) 27; *Abdul Hakim v. Tej Chandar Mukarji*, (1881) 3 All. 815.

tory words before a Court Commissioner and using it in Courts.²¹ Where a person presents a defamatory petition to a superior public officer, who, in the ordinary course of official routine, sends it to some subordinate officer for inquiry, there is a publication of the latter at the place where he may receive it, and a publication for which the original writer may *prima facie* be held responsible, whether or not he expressly asks for an inquiry.²² Communication to a husband or wife of a charge against the wife or husband is a publication,²³ but uttering of a libel by a husband to his wife is not.²⁴

Where there is a duty which forms the ground of privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of business. A solicitor, acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office and was copied into the letter-book by another clerk. In an action against the solicitor for libel it was held that the publication to his clerks was necessary and usual in the discharge of his duty to his client.²⁵ But when there is no such duty the act of dictating a letter even to a shorthand writer will amount to publication.¹

The accused in reply to a notice from the complainant's pleader calling upon him to pay money lent to him by the complainant wrote a letter to the pleader containing defamatory statements about the complainant. The complainant thereupon charged the accused with defamation. The lower Courts held that the letter having been sent to the complainant's pleader must be considered to have been addressed to the complainant himself and therefore there was no publication to a third person. On revision the former Chief Court of the Punjab had held that as the defamatory statements contained in the accused's letter to the complainant's pleader were wholly irrelevant to, and unconnected with, the question of the alleged loan mentioned in the pleader's letter, the pleader must be held to be a third person as far as those statements were concerned, and that, therefore, there had been publication within the purview of this section.²

Where a libel is printed, the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy will be no bar to an indictment for publishing another copy.³

The person who publishes the imputation need not necessarily be the author of the imputation. The person who publishes, and the person who makes, an imputation are alike guilty.⁴ It is not necessary that the accused himself must actually utter the words; it is enough if somebody else utters the words and the accused by his conduct and by words adopts as his own the words reported by the other.⁵ "In considering whether there has been publication of it by him [the person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken a subordinate part in disseminating it], the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the before-

²¹ *Bhikhchand*, (1926) 21 S. L. R. 130, 27 Cr. L. J. 1276, [1927] AIR (S) 54.

²² *Raja Shah*, (1889) P. R. No. 14 of 1889.

²³ *Wenman v. Ash*, (1853) 13 C. B. 836, 839; *Shoobhagee Koeri v. Bokhori Ram*, (1906) 4 C. L. J. 390.

²⁴ *Wennhak v. Morgan*, (1888) 20 Q. B. D. 635; *Jaikishen Das v. Sher Singh*, (1910) P. R. No. 10 of 1910, 11 Cr. L. J. 281.

²⁵ *Boxsius v. Goblet Freres*, [1894] 1 Q. B. 842. See, to the same effect, *Edmondson v. Birch & Co., Limited*, [1907] 1 K. B. 371.

¹ *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524.

² *Jaikishen Das v. Sher Singh*, (1910) P. R. No. 10 of 1910, 11 Cr. L. J. 281.

³ *Pundit Mokand Ram*, (1883) P. R. No. 12 of 1883.

⁴ *Janardhan Damodhar Dikshit*, (1894) 19 Bom. 703; *Leandro Mascarenhas*, (1895) Cr. R. No. 34 of 1895, Unrep. Cr. C. 769.

⁵ *Appanna v. Akkanna*, (1924) 20 L. W. 921, 47 M. L. J. 746, 26 Cr. L. J. 521, [1925] AIR (M) 320.

mentioned facts, be held not to have published it".⁶ An accidental publication is no publication at all.⁷

Repetition.—The Code makes no exception in favour of a second or third publication as compared with the first. If a complaint is properly laid in respect of a publication which is *prima facie* defamatory, the Magistrate is bound to take cognizance of the complaint, and deal with it according to law.⁸ Repetition of rumours, however prevalent, is not an excuse.⁹

The doctrine of merger has no place in criminal law, and the circumstance that a person has in the first instance made a defamatory statement out of Court and has afterwards, by repeating such defamatory statement, when examined as a witness in Court, committed the offence of perjury, can be no bar to a prosecution for defamation in respect of the defamatory statement made out of Court.¹⁰ The accused made certain defamatory statements about an officer in a memorial to the Lieutenant-Governor of the United Provinces who ordered an inquiry. The accused was called by two officers, one after another, who were appointed to inquire into the truth of the allegations and repeated the statements. It was held that the conviction of the accused on three separate charges for making and publishing the statement was good.¹¹

Publication of defamatory matter in newspaper.—The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not.¹² The editor of a journal is in no better position than an ordinary subject with regard to his liability for libel. He is bound to take due care and caution before he makes a libellous statement.¹³ It would be sufficient answer to a charge of defamation against the editor of a newspaper if he proved that the libel was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of the paper during his absence to a competent person.¹⁴ But he is bound to give evidence as to who the actual printer of the paper in his absence was.¹⁵ Under the common law of England the proprietor of a newspaper was criminally responsible for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge. Statute 6 & 7 Vic., c. 96, was, therefore, passed to mitigate the rigour of the common law, and to give the proprietor the benefit of the presumption that when one person employs another to do a lawful act, he is to be taken to authorize him to do it in a lawful and not in an unlawful manner, and that the statute declared for the purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent or knowledge, and that the publication did not arise from want of due care or caution on his part.¹⁶

The publication of a notice in a newspaper conveying an imputation that the complainant is dishonest in the management of the affairs of a company and tries to conceal the dishonesty by methods that are themselves dishonest, is defamation.¹⁷

The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is publication of such defamatory matter at Allahabad.¹⁸ To prove the publication of libel through newspaper it is sufficient to prove that the newspaper was delivered within the postal area over which the Court had jurisdiction and it is not necessary to go further and show that the article was read by some particular person since a newspaper is a commodity printed for the purpose of being read and it must be assumed that it was so read.¹⁹

⁶ Per Romer, L. J., in *Vizetelly v. Mudie's Select Library Limited*, [1900] 2 Q. B. 170, 180.

⁷ Per Wills, J., in *Munslow*, [1895] 1 Q. B. 758, 765; *Emmens v. Pottle*, (1885) 16 B. Q. D. 354.

⁸ *Howard*, (1887) 12 Bom. 167.

⁹ *Waithman v. Weaver*, (1822) 11 Price 257n.

¹⁰ *Periyasami Kotasami Tevar*, (1886) 1 Weir 580.

¹¹ *Jai Debi*, (1915) 18 A. L. J. R. 681, 16 Cr. L. J. 482, [1915] AIR (A) 162.

¹² *McLeod*, (1890) 3 All. 342.

¹³ *Balasubramania Mudaliar v. Rajagopalachariar*, (1944) 46 Cr. L. J. 71, [1944] M. W. N.

322, [1944] AIR (M) 484.

¹⁴ *Ramasami v. Lokanadu*, (1886) 9 Mad. 387; *Pundit Mokand Ram*, (1883) P. R. No. 12 of 1883.

¹⁵ *Har Swarup v. Muhammad Siraj*, (1928) 50 All. 806.

¹⁶ *Holbrook*, (1878) 4 Q. B. D. 42.

¹⁷ *Madhorao Gangadhar Chitnavis v. Narayan Bhaskar Khare*, (1926) 27 Cr. L. J. 1119, [1927] AIR (N) 17.

¹⁸ *McLeod*, (1880) 3 All. 342; *Girjashankar Kashiram*, (1890) 15 Bom. 286; *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 120; *Kally Doss Mitter*, (1866) 5 W. R. (Cr.) 44.

¹⁹ *Jhabbar Mal*, (1927) 26 A. L. J. R. 196, 207, 30 Cr. L. J. 530, [1928] AIR (A) 222.

'Imputation concerning any person.'—An imputation ordinarily implies an accusation, or something more than an expression of a suspicion. It is, however, rather difficult to draw the line. An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is communicated as an accusation would have.²⁰ Where the accused made a report at the police-station that some property of his had been stolen from his threshing floor, and that he suspected the complainant and two others, and the complainant prosecuted the accused for defamation in respect of that report, it was held that an expression of suspicion might have the same effect on the mind of the person to whom the suspicion was communicated as an accusation would have, and as in this case the suspicion resulted in the police searching the complainant's house, the accused was guilty of defamation.²¹ To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation.²²

The words complained of must contain an imputation concerning some particular person or persons whose identity can be established. If the words complained of contain no reflection upon a particular individual or individuals, but may equally apply to others although belonging to the same class, an action will not lie. Where the accused published in his paper an account of an outrage on a woman alleged to have been perpetrated by two constables within the jurisdiction of the Begunia *thana*, in which four constables were stationed, it was held that, in the absence of proof that it was intended to charge any particular and identifiable constables with the alleged offence, the accused was not guilty of defamation.²³

The Rangoon High Court has held that a newspaper does not come within the term 'person' and therefore, it is not a criminal offence to defame a newspaper. Defamation of a newspaper may in certain cases involve defamation of those responsible for its publication. It might, for instance, amount to defamation of the person responsible for a newspaper to say that its policy was influenced or dictated by a particular person, if that person was disreputable.²⁴

It is immaterial whether the libel imputes crime, etc., to the prosecutor, in a direct manner, or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published. And so also where the imputation is conveyed obliquely, or indirectly, or by way of question, conjecture, or exclamation, or by irony,²⁵ or by feigned names.¹ An imputation, even if it be true, is not by itself good ground for making it.²

The words "a coward, dishonest man, and something worse than either",³ or the words to the effect that the complainant and others were preparing to bring false charges against the accused,⁴ or words imputing insolvency against a person in the way of his trade⁵ are held to be defamatory. Where a newspaper wrote that the conduct of the complainant on the question of the acceptance of a ministerial office was inconsistent and topsyturvy it was held that the use of the expression topsyturvy was defamatory.⁶ It is not open to one member of a caste to call another an outcaste.⁷ Words which impute unworthiness to remain a member of the caste are defamatory.⁸ To say at a caste meeting that the complainant's wife had been married before to another person would amount to defamation.⁹

It may amount to defamation to impute anything to a deceased person if the imputation would harm the reputation of that person if living, and is hurtful to the feelings of his family (Explan. 1); or to make an imputation concerning a company

²⁰ *Thambu*, (1926) 27 P. L. R. 171, 27 Cr. L. J. 899, [1926] AIR (L) 278.

²¹ *Ibid.*

²² *Kashi Ram*, [1930] A. L. J. R. 1121, 23 Cr. L. J. 435, [1930] AIR (A) 493.

²³ *Government Advocate, B. & O. v. Gopabandhu Das*, (1922) 1 Pat. 414; *Pratap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 42 C. L. J. 178, 26 Cr. L. J. 1530, [1925] AIR (C) 1121.

²⁴ *Maung Sein*, (1926) 4 Ran. 462.

²⁵ See for authorities Archbold, 30th Edn., pp. 1273-74.

¹ *William Tayler*, (1869) 26 C. L. J. 345.

² *Gopalsao v. Mt. Piari Bi*, (1882) 5 C. P. L. R. (Cr.) 55.

³ *McCarthy*, (1887) 9 All. 420.

⁴ *Shibo Prosad Pandah*, (1878) 4 Cal. 124.

⁵ *Bhikhchand*, (1926) 21 S. L. R. 130, 27 Cr. L. J. 1276, [1927] AIR (S) 54; *Robinson v. Merchant*, (1845) 7 Q. B. 918.

⁶ *U Po Hnyin v. U Tun Than*, (1930) 41 Cr. L. J. 271, [1940] AIR (R) 21.

⁷ *Babulal v. Tundilal*, (1931) 28 N. L. R. 106, 33 Cr. L. J. 835, [1932] AIR (N) 97; *Bhanwar Singh v. Sukhram Singh*, [1940] N. L. J. 410, (1940) 41 Cr. L. J. 585, [1940] AIR (N) 283.

⁸ *Coopposami Chetty v. Duraisami Chetty*, (1909) 33 Mad. 67. See *Venkayya v. Venkatarajah*, (1914) 2 L. W. 446, 28 M. L. J. 58.

⁹ *Hari Pada Baidya*, (1930) 34 C. W. N. 580, 31 Cr. L. J. 1225.

or an association or collection of persons as such (Explan. 2). Ironical expressions may amount to defamation (Explan. 3).

Imputation against dead person.—It has been held, with regard to libels on the memory of persons deceased, that a writing reflecting on the memory of a dead person not alleged to be published with a design to bring a scandal or contempt on the family of the deceased, is not punishable as a libel. (See Explanation 1). “Now to say, in general, that the conduct of a dead person can at no time be canvassed: to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And, therefore, it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, . . . then it becomes illegal”.¹⁰

Where the defamation consists in imputing matters concerning a deceased person, “the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed.”¹¹

A prosecution may be maintained for defamation of a deceased person, but no suit for damage will lie in such a case. Where, therefore, a suit was brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, and alleged to have caused damage to the plaintiff as a member of the same family, it was held that the suit was not maintainable.¹²

Imputation against combination of persons.—Explanation 2 includes “a company or an association or collection of persons as such within the word ‘person’ as used in the definition so that the latter should not be limited to individuals.”¹³ Explanation 2 which finds a parallel in the English law gives a legal remedy to a combination of persons, when, by defamation of that combination, many individual persons might be injured.¹⁴

It has been held in a series of cases that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business.¹⁵ The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.¹⁶ A corporation cannot bring a prosecution for words which merely affect its honour or dignity or reputation. A corporation has no reputation apart from its property or trade.¹⁷

In a case in which the Explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this Explanation justify a charge of defaming an individual and a charge cannot combine the Explanation with the definition for such a purpose.¹⁸ It is doubtful if the police force at a particular place is such an association or collection of persons as is contemplated in Explanation 2.¹⁹

Where a collection of persons is defamed the defamatory words must apply to all the class. The libel need not name the class as such: it is sufficient if the words can only be interpreted in such a way as to reflect on all the members of that class.²⁰ “If a man wrote that all lawyers were thieves, no particular lawyer could sue him

¹⁰ Per Lord Kenyon in *E. Topham*, (1791) 4 T. R. 126, 129. See *Labouchere*, (1884) 12 Q. B. D. 320.

¹¹ Note R, p. 175, quoted in *Parwari*, (1919) 41 All. 311, 314.

¹² *Luckumsey Rowji v. Hurbun Nursey*, (1881) 5 Bom. 580.

¹³ Per Buckland, J., in *Pratap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 917, 42 C. L. J. 178, 194, 26 Cr. L. J. 1539, 1548, [1925] AIR (C) 1121.

¹⁴ See *Williams*, (1882) 5 B. & Ald. 595.

¹⁵ *South Hetton Coal Company v. North Eastern News Association*, [1894] 1 Q. B. 133.

¹⁶ Per Lopes, L. J., in *ibid.*, p. 141; *Maung Chit Tay v. Maung Tun Nyun*, (1935) 13 Ran. 297.

¹⁷ *Maung Chit Tay v. Maung Tun Nyun*, *ibid.*

¹⁸ *Pratap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 42 C. L. J. 178, 26 Cr. L. J. 1539, [1925] AIR (C) 1121.

¹⁹ *Ibid.*

²⁰ See *Mahim Chandra Roy v. A. H. Watson*, (1928) 55 Cal. 1280.

unless there is something to point to the particular individual".²¹ Where a writing inveighs against mankind in general, or against a particular order of men, as, for instance, men of the gown, it is no libel, but it must descend to particulars and individuals to make it a libel,²² e.g. the religious society called the S. Nunnery²³ "or certain persons lately arrived from Portugal and living near Broad Street".²⁴ The imputation must be capable of being brought home to a particular individual or collection of individuals as such.²⁵ Where a defamatory matter appears only to apply to a class of individuals, if the description in such matters is capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained.¹ Where a defamatory article implied that the girls of a college were habitually guilty of the misbehaviour described in the article, it was held that all the girls in the college collectively and each girl individually must suffer in reputation and the writer was guilty of defamation.² If a well-defined class is defamed each and every member of that class can file a complaint. In other cases the defamatory words must refer to some ascertained and ascertainable person and that person must be the complainant.³

Ironical expressions.—Explanation 3 which finds a corresponding parallel in the English law makes ironical expressions, if defamatory, punishable. Where it has been sarcastically said of a lawyer, with intent to convey an entirely opposite idea as that "he is an *honest* lawyer", this Explanation will apply.

Imputation concerning caste.—The accused, who were members of the Reddi caste, convened a meeting of their caste in the village and stated at such meeting to the members of the caste that the members of another caste in the village, viz., the Baliyas, were inferior to their caste, that they (the Reddies) should have no intercourse with the Baliyas, and that the village servants should not serve the latter. The village servants consequently refused to serve the Baliyas, and the Reddies abstained from associating with them. It was held that the acts of the accused did not amount to such an imputation on the complainant, who was a member of the Baliya caste, as would warrant a conviction for defamation. The Court said: "No conduct affecting the complainant's status as a member of the Baliya caste or involving in it a transgression of the rules of his caste and tending to lower his reputation as a Baliya among his castemen or the general public, appears to have been imputed".⁴

2. 'Words either spoken or intended to be read, or by signs or by visible representations'.—An essential difference between the Indian and the English law is that the former recognizes 'words, spoken as a mode of defamation' and the latter does not. By the English law, defamation is a crime only when it is committed by writing, printing, engraving or some similar process. Spoken words reflecting on private character, however atrocious may be the imputations which these words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action.⁵ Under the English law "no indictment will lie for words spoken and not reduced into writing. . . unless they are seditious, blasphemous, grossly immoral or obscene or uttered to a magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge".⁶ The Penal Code makes no distinction between written and spoken defamation.⁷ In it the term 'defamation' is used to embrace both libel and slander. The authors of the Code say: "Herein the English law is scarcely consistent with itself. For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree. A person who reads in a pamphlet a calumnious reflection on himself, or on some one for whom he is interested, is less likely to take a violent revenge than a person who hears the same

²¹ Per Willes, J., in *Eastwood v. Holmes*, (1858) 1 F. & F. 347, 349; *Osborn*, (1732) 2 Barnard (K. B.) 138, 166.

²² *Alme*, (1690) 3 Salk. 224.

²³ *Gathercole's Case*, (1838) 2 Lew. 237.

²⁴ *Osborn*, (1732) 2 Barnard (K. B.) 138, 166, Kel. (J.) Pl. 183, 230.

²⁵ *Government Advocate, B. & O. v. Gopabandhu Das*, (1922) 1 Pat. 414.

¹ *Pratap Chandra Guha Ray*, (1925) 29 C. W. N. 904, 42 C. L. J. 178, 26 Cr. L. J. 1539,

[1925] AIR (C) 1121.

² *Wahid Ullah*, (1935) 57 All. 1012.

³ *Ankaran Subharaya*, [1937] A. L. J. R. 781, 38 Cr. L. J. 1086, [1937] AIR (A) 677.

⁴ *Venkata Reddi*, (1885) 1 Weir 575, 576.

⁵ Note R, p. 176.

⁶ See Archbold, 30th Edn., p. 1272.

⁷ *Parvathi v. Mannar*, (1884) 8 Mad. 175; *Mohunt Pursoram Doss*, (1865) 2 W. R. (Cr.) 36.

calumnious reflection uttered. Public men who have, by long habit, become callous to slander and abuse in a printed form, often show acute sensibility to imputations thrown on them to their faces. Indeed, defamatory words, spoken in the presence of the person who is the object of them, necessarily have more of the character of a personal affront, and are, therefore, more likely to cause breach of the peace than any printed libel.

"The distinction which the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread and to be more permanent than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may be contained in a letter intended for a single eye. Spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it should be penal to say, in a private letter, that a man is dissipated, and not penal to stand up at the town hall, and there, before the whole society of Calcutta, falsely to accuse him, of poisoning his father.

"In the second place, it is not necessarily the fact that the harm caused by defamation is proportioned to the extent to which the defamation is circulated. Some slanders,—and those slanders of a most malignant kind,—can produce harm only while confined to a very small circle, and would be at once refuted if they were published. A malignant whisper addressed to a single hearer, and meant to go no further, may indicate greater depravity, may cause more intense misery, and may deserve more severe punishment than a satire which has run through twenty editions. A person, for example, who, in private conversation, should infuse into the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than one who should insert the lady's name in a printed lampoon.

"It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation. But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in a printed form, than from a shifting rumour, which nobody repeats exactly as he heard it. In general, we believe, a man would rather see in a newspaper a story discreditable to him which he had the means of refuting, than know that such a story, though not published, was current in society".⁸

'Intended to be read'.—"Where the words containing the imputation are in writing, it is necessary, . . . that the maker of the imputation shall intend that the words shall be read, that is, read by some other person than the person defamed, or in other words, that they shall be made public, for the essence of the offence . . . is the intention to harm reputation, and that unnecessarily requires publicity to be given to the imputation".⁹

'By signs or by visible representations'.—This is a class of defamation likely to do as much mischief as any written production, and it has always been considered by the English law to be a serious offence. Anything published of a man which renders him ridiculous or contemptible, is as much a libel as serious charges are, and very often has a wider effect. The words 'visible representations' will include every possible form of defamation which ingenuity can devise. "For instance, a statute, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel".¹⁰

3. 'Intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person'.—It is not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation alleged: it is sufficient to show that the accused intended or knew, or had reason to believe, that the imputation made by him would harm the reputation of the complainant,¹¹ irrespective of whether harm is actually caused or not.¹² No intent to

⁸ Note R, pp. 176, 177.

⁹ Per Oldfield, J., in *Taki Husain*, (1884) 7 All. 205, 222, B.F.

¹⁰ Per Lopes, L. J., in *Monson v. Tussauds, Limited*, [1894] 1 Q. B. 671, 692.

¹¹ *Thakur Dass*, (1874) 6 N. W. P. 86; *Gobinda Persad Pandey v. Garth*, (1900) 28 Cal.

63; (1883) 1 Weir 575; *V. Madanjit*, (1910) 12 Cr. L. J. 129; *Alex Pimento*, (1920) 22 Bom. L. R. 1224, 22 Cr. L. J. 58, [1920] AIR (B) 339.

¹² *Ram Narain*, (1924) 22 A. L. J. R. 630, 26 Cr. L. J. 23, [1924] AIR (A) 566; *Bhikshchand*, (1926) 21 S. L. R. 130, 27 Cr. 868, [1926] AIR (S) 258.

defame is necessary.¹³ It is not necessary that there should be an intention to harm the reputation, it is sufficient if there was reason to believe that the imputation made would harm the reputation.¹⁴ If the words are not likely to harm the reputation no prosecution would lie.¹⁵ If a person is asked by the police if he had heard anything relating to a matter and he in good faith states what he had heard it will not amount to defamation.¹⁶

An imputation against another person, although made in the absence of actual ill-will, is not on that account to be accepted as being made bona fide. Conscious violation of law to another's prejudice is sufficient, though there may be no malice in fact.¹⁷ Where defamatory words, *prima facie* libellous, were used in a street quarrel and were mere vulgar abuse, it was held that in the circumstances there was no deliberate intention to harm the reputation of the person defamed.¹⁸

'Harm the reputation'.—"The meaning which should be attached to 'harm' is not the ordinary sense in which the word is used...by 'harm' is meant imputations on a man's character made and expressed to *others*, so as to lower him in their estimation, and that anything which lowers him merely in *his own* estimation, certainly does not constitute defamation".¹⁹ To impute dishonesty to a company doing business would amount to defamation.²⁰ A person who commits defamation is not to be excused from the penalties attached to the offence merely because he has comported himself in respect of the mode of giving expression to the defamatory matter in such a way that the little real injury results from the offence.²¹ The word 'harm' is used in the definition of 'injury' (s 44).

A man's reputation is his property, and if possible of more value than other property. But a man's opinion of himself cannot be called his 'reputation'.²² A man has no 'reputation' to himself and therefore communication of defamatory matter to the person defamed is no publication. It is no defence to say that the reputation of the complainant is so good or that of the accused is so bad that serious injury to the reputation was not in fact caused.²³

The use of common abuses cannot be regarded as conveying any such imputation as can in any way harm the reputation of the person towards whom it is used and it therefore does not constitute this offence.²⁴ But if obscene and insulting words are used regarding any person after an altercation with him is over, the person using such words would be guilty of defamation.²⁵

Explanation 4 specifies the various ways in which the reputation of a person may be harmed. It says that the imputation must directly or indirectly lower the moral or intellectual character of the person defamed. "The words '*directly*' or '*indirectly*'...mean that the person defamed must either be abused in express terms, or the wording of the communication must convey such imputations as any person reading it must understand to impute misconduct or bad character. The words cannot...be understood to mean that the person libelled should himself be the direct means of publishing the libel to others".¹ This Explanation does not apply where the words used, and forming the basis for a charge, are *per se* defamatory; though when the meaning of words spoken or written is doubtful and evidence is necessary to determine the effect of such words and whether they are calculated to harm a particular person's reputation, it is possible that the principle enunciated in the Explanation might and

¹³ *U Aung Pe*, [1938] Ran. 404, F.B.

¹⁴ *Kewala Nandgir*, (1913) 14 P. L. R. 1062, 14 Cr. L. J. 606.

¹⁵ *Genda Ram*, [1936] A. L. J. R. 66, 37 Cr. L. J. 258, [1936] AIR (A) 143.

¹⁶ *Jainarain*, [1940] P. W. N. 684, (1940) 41 Cr. L. J. 814, [1941] AIR (P) 9.

¹⁷ *Palani Asari*, (1882) 1 Weir 613.

¹⁸ *Anthony Rodgers*, (1887) 1 Weir 607.

¹⁹ *Per Mahmood, J.*, in *Taki Husain*, (1884) 7 All. 205, 220, 221, F.B.

²⁰ *Narayanan Chettyar*, (1935) 37 Cr. L. J. 328, [1935] AIR (R) 509.

²¹ *Senthinathaiyar v. Gnanamuthu Nadan*, (1884) 1 Weir 594.

²² *Taki Husain*, (1884) 7 All. 205, 221, F.B.

²³ *Ram Narain*, (1924) 22 A. L. J. R. 639, 26 Cr. L. J. 23, [1924] AIR (A) 566.

²⁴ *Behari*, (1883) 3 A. W. N. 30; *Amir Hasan*, (1883) 3 A. W. N. 107.

²⁵ *Raja Ram Singh*, (1918) 16 A. L. J. R. 408, 19 Cr. L. J. 669; *Inayat Shah*, (1928) 30 Cr. L. J. 4.

¹ *Per Mahmood, J.*, in *Taki Husain*, (1884) 7 All. 205, 221, F.B.

would with propriety be applied.² The complainant, one Scott, was a Chairman of a Municipal Board. At a meeting of the Board, which was presided over by the complainant, a resolution was passed calling on the accused to pay certain taxes due by her to the Municipality and was signed by the complainant. A copy of the resolution, signed by the Secretary, was sent to the accused, who returned it after writing upon it the words, "Mrs. MacCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either". It was held that the accused was guilty of defamation. The Court said: "In this case there is no question as to the significance or meaning of the words written. They are distinctly defamatory within the meaning of s. 499, and, as such, whether they were written in haste or in anger, the respondent is clearly responsible."³ The wording of this Explanation is very loose. Anything calculated to lower the reputation of a person may come under this provision. Thus, an accusation of anonymous letter-writing may amount to defamation.⁴ An imputation that a Mahomedan had killed a cow in his compound is not one which can be said to harm his reputation.⁵ In reply to a book written by the complainant attacking Vaishnavism and its founders, the accused retorted by a similar publication and both books dealt with highly controversial religious matters. Very violent language was used in the latter about the complainant. It was held that it did not amount to defamation, as the personal character or respectability of the complainant was not in any way assailed.⁶ Where the complainant was invited by the accused to a feast at the latter's house along with a large number of other people and when he sat down to dinner he was asked by the accused to leave the place without giving any reason or making any imputation whatever, it was held that as there was no imputation calculated to harm the reputation of the complainant the charge of defamation could not be established.⁷ But where a Hindu lodged a complaint of defamation alleging that at the time of the feast of the brotherhood the accused declared that he had been outcasted and was not fit to sit down at the feast and proved that the allegation was false and had operated to his prejudice, it was held that the accused was guilty of defamation.⁸ Where the accused referred to the complainant, who was *Parsutia Kaisth*, as a *Kori Chamar* with the result that none of the priests attended the religious ceremony which had to be performed at the complainant's house, it was held that the accused were guilty of defamation.⁹ Where a complainant was described as a man with whom not even Turks, let alone Brahmins, could associate and the wedding of his daughter was characterised as a sinful carnival worthy of perdition—a moral end involving a disgrace, degradation and degeneration—it was held that the language used was unrestrained, the object of the writer being to hold the complainant up to public execration.¹⁰ In the course of an election contest, the accused issued and published a poster against the complainant, his rival candidate, who was a Barrister, saying "The hallowness of Mr.—'s capacity as a Barrister has been exposed". It was held that the accused was guilty of defamation as the imputation was calculated to lower in the estimation of others the intellectual qualities and the aptitude for his profession of the complainant as a Barrister.¹¹ Accused sent a petition to the Forest authorities saying that the village Munsif was a very rich man and that he had won over the Range Officer to his side and had been illicitly grazing goats in the reserve, and urging an enquiry by some officer, other than the Range Officer. It was held that the accused was guilty of the offence of defamation, inasmuch as the language employed by him was calculated to harm the village Munsif and lower the Range Officer in the estimation of his subordinates and the public and that Exceptions 8 and 9 of this section could not apply to the case inasmuch as the accused had acted recklessly and without due care and caution.¹²

² *McCarthy*, (1887) 9 All. 420; *Mohan Lal v. Ram Charan*, (1928) 26 A. L. J. R. 361, 29 Cr. L. J. 451, [1928] AIR (A) 213.

³ *McCarthy*, *ibid.*, p. 426.

⁴ (1872) 7 Mad. Jur. 253.

⁵ *Sikandarkhan v. Jammu*, (1882) 5 C. P. L. R. (Cr.) 53.

⁶ *Kumaragurudasa Swamigal v. Krishna-swami Mudaliar*, (1924) 47 M. L. J. 664, [1924] M. W. N. 768, 26 Cr. L. J. 464, [1924] AIR (M) 808.

⁷ *Faqir*, (1926) 24 A. L. J. R. 893, 27 Cr. L. J. 1390, [1926] AIR (A) 711.

⁸ *Mohan Lal v. Ram Charan*, (1928) 26 A. L. J. R. 361, 29 Cr. L. J. 451, [1928] AIR (A) 213.

⁹ *Bachcha Paragwal*, (1910) 11 Cr. L. J. 413.

¹⁰ *V. Madanjit*, (1910) 12 Cr. L. J. 129.

¹¹ *Panna Lal*, (1935) 37 Cr. L. J. 1033, [1936] AIR (L) 294.

¹² *Madappa Goundan*, (1916) 19 Cr. L. J. 115, [1918] AIR (M) 343.

It is not defamation for a number of persons to meet and resolve for good reasons not to associate with a particular person. But they should not publish the resolution.¹³

Explanation 2.—An imputation affecting a body of persons may amount to defamation. Where the defamatory matter, published in a newspaper, related to the alleged habitual immoral conduct of the girls of a particular college, but no particular girl or girls were named in or identifiable from the articles, and the complaint was filed by a number of girls of the college, it was held that the author of the articles was guilty of defamation, inasmuch as the inevitable effect of the articles on the mind of the reader must be to make him believe that it was habitual with the girls of the college to misbehave in the ways mentioned, so that all the girls in the college collectively and each girl individually must suffer in reputation.¹⁴

Exceptions—There are occasions when a man is allowed to speak out or write matters about others which would ordinarily be defamatory. These occasions are reduced to the following ten Exceptions :—

1. Imputation of truth which public good requires to be made or published.
2. Public conduct of public servants.
3. Conduct of any person touching any public question.
4. Publication of reports of proceedings of Courts.
5. Merits of a case decided in Court or conduct of witnesses and others concerned.
6. Merits of a public performance.
7. Censure passed in good faith by a person having lawful authority over another.
8. Accusation preferred in good faith to an authorized person.
9. Imputation made in good faith by a person for the protection of his or other's interests.
10. Caution intended for the good of the person to whom it is conveyed or for public good.

Unlike a civil suit, in which the Court is confined more or less to the pleadings, in a criminal case, before a conviction is recorded, it has always to be seen whether the proved or admitted facts bring the case within an exception, which takes it out of the offence defined, the burden of proving such facts being on the accused.¹⁵

A defamatory statement does not fall within any of the Exceptions by reason merely of the fact that it is punishable as an offence under s. 182 or any other section of the Code.¹⁶

Exception 1.—This and Exception 4 require that the imputation should be true and be for public good. The remaining Exceptions require that the imputation should be made in good faith. "For", say the authors of the Code, "to require in these cases that the imputation should be true, would be to render these exceptions mere nullities. Whether a public functionary is or is not fit for his situation; whether a person who has bestirred himself to get up a petition in favour of a public measure ought to be considered as an enlightened and public-spirited citizen, or as a foolish meddler; whether a person who has been tried for an offence was or was not guilty; which of two witnesses who contradicted each other on a trial ought to be believed; whether a portrait is (life) like; whether a song has been well sung; whether a book is well written;—these are questions about which honest and discerning men may hold opinions diametrically opposite; and to require a man to prove to the satisfaction of a Court of law that the opinion which he has expressed on such a question is a right opinion is to prohibit all discussion on such questions. The same may be said of those private communications which we propose to allow. It is plainly desirable that a merchant should disclose to his partners his unfavourable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a Court, it is evident that the permission is worth nothing".¹⁷

¹³ *Nga On Thin*, (1921) 23 Cr. L. J. 240.

¹⁴ *Wahid Ullah Ahrari*, (1935) 57 All. 1012.

¹⁵ *Muhammad Gul v. Haji Fazli Karim*,

(1929) 56 Cal. 1013.

¹⁶ *U. Aung Pe*, [1938] Ran. 404, F.B.

¹⁷ Note R, pp. 183, 184.

'Public good'.—Public good is the good of the general public as contradistinguished from that of an individual.¹⁸ The truth of the imputation complained of shall amount to a defence if it was for the public benefit that the imputation should be published but not otherwise. The authors of the Code observe: "A person who has been guilty of gross acts of swindling at the Cape comes to Calcutta, and proposes to set up a house of agency. A person who has been forced to fly from England on account of his infamous vices repairs to India, opens a school, and exerts himself to obtain pupils. A captain of a ship induces natives to emigrate, by promising to convey them to a country where they will have large wages and little work. He takes them to a foreign colony, where they are treated like slaves, and returns to India to hold out similar temptations to others. A man introduces a common prostitute as his wife into the society of all the most respectable ladies of the presidency. A person in a high station is in the habit of encouraging ruinous play among young servants of the Company. In all these cases, and in many others which might be named, we conceive that a writer who publishes the truth renders a great service to the public, and cannot, without a violation of every sound principle, be treated as a criminal.

"There are undoubtedly many cases in which the spreading of true reports, prejudicial to the character of an individual, would hurt the feelings of that individual, without producing compensating advantage in any other quarter. The proclaiming to the world that a man keeps a mistress, that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person; the raking up of ridiculous and degrading stories about the youthful indiscretions of a man who has long lived irreproachably as a husband and a father, and who has attained some post which requires gravity and even sanctity of character, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked, and to those who are connected with him."¹⁹

The onus of proving the statement or at least of showing that he had reasonable ground for believing it to be true, and was actuated in making such statement not by malicious motives, but by an intelligent zeal for the public interest, lies on the person making the statement.²⁰

The person making the imputation cannot escape liability, if in addition to statements which would be protected, he goes further and makes false and uncalled for statements, for he cannot then be regarded as acting in good faith.²¹ Where at a public auction of Government forest produce, the officer made some statement to the effect that the contractors who did not wish to bid should go away, and the accused said in the presence of witnesses that the complainant was turned out by the officer, it was held that the words used by the accused '*nikal diya*' to the effect that the complainant was turned out, were defamatory, and justification could not be pleaded within the meaning of this Exception.²²

A Court may find that an imputation is true, and made for the public good, but on considering the manner of the publication (e.g., in a newspaper) it may hold that the particular publication is not for the public good, and is, therefore, not privileged.²³ A privilege does not justify publication in excess of the purpose or object which gives rise to it.²⁴ An editor of a newspaper does not act in good faith and for the 'public good', when he publishes every foul rumour, however ill-founded and however much pain it may give to those concerned, which comes to his ears, and he states that he does not vouch for the truth of the rumour. The discharge of journalistic duties does not justify the publication of all cases of rumours, injustice, and oppression, which may have the effect of seriously injuring the reputation of others, without the least inquiry into its truth.²⁵

¹⁸ *V. Madanjit*, (1910) 12 Cr. L. J. 129.

¹⁹ Note R, pp. 178. 179.

²⁰ *Atter Hoosein v. Tusud-dook Hoosein*, (1867)

2 Agra 87; *Jaffer Fadu*, (1910) 4 S. L. R. 67, 11 Cr. L. J. 586.

²¹ *Ramanand*, (1881) 3 All. 664.

²² *Samrathmal*, (1931) 34 Cr. L. J. 154, [1932] AIR (N) 158.

²³ *Janardhan Damodhar Dikshit*, (1894) 19 Bom. 708; *Leandro Mascarenhas*, (1895) Cr. R. No. 34 of 1895, Unrep. Cr. C. 769; *Gopalsao v.*

Mt. Piari Bi, (1882) 5 C. P. L. R. (Cr.) 55
Vinayak Almaram v. Shantaram Janardhan, (1941) 43 Bom. L. R. 737, 43 Cr. L. J. 174. [1941] AIR (B) 410.

²⁴ *Sanhara Narasimha Bharati*, (1883) 6 Mad. 311, 395.

²⁵ *Government Advocate, B. & O. v. Gopabandhu Das*, (1922) 1 Pat. 414, 420; *Purna Chandra Ghose*, (1924) 28 C. W. N. 579, 26 Cr. L. J. 71, [1924] AIR (C) 611.

Cases.—Imputation of truth which public good requires to be made.—C was put out of caste by a *panchayat* of his caste-fellows on the ground that there was an improper intimacy between him and a woman of his caste. Certain persons, members of the *panchayat*, circulated a letter to the members of their caste generally, in which, stating that C and such woman had been put out of caste, and the reason for the same, and requesting the members of the caste not to receive them into their houses, or to eat with them, they made certain statements, applying equally to C or such woman. Such statements were defamatory. It was held that, if such persons were careless enough to use language which was applicable to C, they did so at their peril and they could not escape the responsibility of having defamed C by saying that they intended such language to apply to such woman; that had such persons contented themselves with announcing the determination of the *panchayat*, and the grounds upon which such determination was based, they would have been protected; but inasmuch as they did not so content themselves, but went further and made false and uncalled for statements regarding C, they had not acted in good faith.¹ The denouncing of a Brahmin for providing alcoholic refreshment at a wedding reception for those of his guests who desired to partake of such beverages is not for the "public good".²

In discussing the claims of a councillor for a Municipal office, a person is entitled to make remarks in the interests of the public, so long as he abstains from aspersing the private character of the former.³

Exception 2.—As to 'public servant' and 'good faith' see ss. 21 and 52, respectively. "Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. A writer in a public paper has the same right as any other person, and it is his privilege, if indeed it is not his duty, to comment on the acts of public men which concern not himself only but which concern the public, and the discussion of which is for the public good. And where a person makes the public conduct of a public man the subject of comment and it is for the public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care".⁴

Men in public positions, even though official, can claim no immunity from criticisms which may be made within some limits. Similarly the press and authors and publishers of books have no special privilege and are in no better position than any other man. If the assertions as opposed to comments made are defamatory the assertions must either be justified or in the limited cases specified in Excep. 9; it must be shown that the attack on the character of another was made in good faith and for public good.⁵

If a person undertake to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded.⁶ The opinion expressed must be expressed in good faith and must not contain only the half truth. The accused, an editor of a newspaper, published an article in which the following passage, admittedly referring to the complainant, occurred:—"Has his (the complainant's) character been inquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record?" The Magistrate found that it was literally true that the complainant had been sent to be prosecuted, but that it was also true that the prosecution had, to the accused's knowledge, been ordered to be withdrawn by the District Judge. It was held that although the statement contained only the truth, it was incomplete and misleading: and that, as the accused was well aware that the prosecution referred to had been withdrawn, and did not injuriously affect the complainant's character, he could not plead that the im-

¹ *Ramanand*, (1881) 3 All. 664.

² *V. Madanjit*, (1910) 12 Cr.L. J. 129.

³ *Subroya Iyer: Moulvi Kadar v. Rowthu Abdul Kadar*, [1914] M. W. N. 351 15 Cr. L. J. 357.

⁴ Per Couch, J., in *F. I. Howard v. M. Mull*, (1866) 1 B. H. C. (Appx.) 85, 91; *Kelu Nair v. Thirumampu*, [1947] M. W. N. 607.

⁵ *Khare v. Massani*, [1948] Nag. 347.

⁶ *William Tayler*, (1869) 26 C. L. J. 345.

putation made by him on the complainant's character was made in good faith, or for the public good.⁷ The complainant stood for election to the Municipal Council. It was found that during his period as chairman, certain irregularities were committed in connection with the construction of a market and the auditor and Government had made some strong remarks thereon. They were reproduced in pamphlet form by the accused who also added "Is there a greater fraud than this", "Is any other evidence necessary as to the daylight robbery in respect of the market building. Consider whether it is just to again vote and elect (the complainant) who was the cause of all these, as councillor". Complainant charged the accused with defamation. It was held that the pamphlet was only intended to warn the voters against voting for the complainant and that the expressions were only opinions made in good faith respecting the conduct of the complainant and came within this Exception.⁸

The expression 'opinions in good faith' means that in order to express an opinion in good faith the person who holds it must have taken care and attention in forming it.⁹ In dealing with the question of good faith, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed, and had good reason, after due care and attention, to believe that such allegations were true.¹⁰ The mere absence of ill-will does not of itself prove that the imputation was made in good faith.¹¹ In determining the question of good faith the Court should have to take into account the intellectual capacity of the person, his predilections and the surrounding facts.¹²

Where the editor of a newspaper made certain allegations against the Jail Superintendent after hearing certain prisoners, but without giving the Jail Superintendent an opportunity to refute them, it was held that he could not be said to have acted with due care and attention and, therefore, in good faith so as to bring himself within this and ninth Exceptions.¹³

A member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct in relation to his office on the part of some public official acting in that constituency has sufficient interest in the subject-matter of the complaint to render the occasion of such publication an occasion of qualified privilege.¹⁴ Under the Code such a case would be covered by this Exception.

Newspaper criticism.—A newspaper has a public duty to ventilate abuses and if an official fails in his duty, a newspaper is absolutely within its rights in publishing facts derogatory to such official and making fair comment on them, but it must get hold of provable facts.¹⁵ The editor, however, should be most watchful not to publish defamatory attacks upon individuals unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information which is sent to him to be true—that proof is readily available and that in the particular circumstances his duty to the public requires him to make the facts known.¹⁶ Where imputations are made against a public officer for acts of oppression and bribery in a newspaper, it is for the Court to see, whether they are made in 'good faith' or not. The opinion of the superior officer of the public servant is not decisive on the point. The fact that the writer did not wait before publishing the article till he received a reply to his petition to the superior officer, making the same allegations, does not negative good faith.¹⁷

Exception 3.—As to the meaning of 'public', see s. 12, *supra*. The authors of the Code say: "There are public men who are not public functionaries; persons who hold no office may yet...take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. It appears clear to us that every person ought to be allowed to comment, in good faith, on the proceedings of these volunteer servants of the public, with the same freedom with which we allow

⁷ *B. Kakde*, (1880) 4 Bom. 298.

⁸ *Rangaraju v. Khan Bahadur Abdul Razack Saheb*, [1935] M. W. N. 253.

⁹ *Banks*, (1869) 26 C. L. J. 401.

¹⁰ *Shibo Prosad Pandah*, (1878) 4 Cal. 124. See s. 52.

¹¹ *Palani Asari*, (1882) 1 Weir 613.

¹² *Muhammad Gul v. Haji Fazley Karim*, (1929) 56 Cal. 1013, 1021.

¹³ *K. Rama Rao*, [1942] O. W. N. 530, (1942) 44 Cr. L. J. 33.

¹⁴ *Rule*, (1937) 30 Cox 598.

¹⁵ *Jhabbar Mal*, (1927) 26 A. L. J. R. 196, 30 Cr. L. J. 530, [1928] AIR (A) 222.

¹⁶ *Mohammad Nazir*, (1928) 26 A. L. J. R. 509, 30 Cr. L. J. 766, [1928] AIR (A) 821.

¹⁷ *Kelu Nair v. Thirumampu*, [1947] 2 M. L. J. 325, 60 L. W. 621.

him to comment on the proceedings of the official servants of the public".¹⁸ The comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation.¹⁹ A fair comment must be based upon facts and a writer is not entitled to invent facts and express his opinions upon such invented facts. Nor can the conduct of a public man or of a person in his public character be assailed as dishonest simply because the writer fancies such conduct is open to suspicion.²⁰

In *Campbell v. Spottiswoode*²¹ Cockburn, C. J., said: "It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen,—even although it be open to ridicule or disapprobation,—base, sordid, dishonest, and wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause... It has been said in argument that it is for the interest of society that a man's public conduct shall be criticised without any limit, except that which it is admitted on all hands must be imposed—namely, that the writer must only write according to what he thinks just and true. But, it seems to me that the public at large have an equal interest in the maintenance of public character, without which public affairs could never be conducted with a view to the welfare and the best interests of our country; and I think that we ought not to sanction attacks upon public men, which if allowed would be destructive of their character and honour, unless such attacks are well founded. Where the public conduct of a public man is made the subject of observation, and the writer who is commenting upon it makes imputations of motives which fairly and properly and legitimately arise out of the conduct itself, and the jury shall be of opinion, not only that the criticism was honest, but also well founded, there I should be prepared to say that the imputation so made would not be the subject of an action. But I do not think we should be laying down the law according to what has always been understood to be essential to the best interests of the community, if we were to say because a writer may fancy that the conduct of a public man is open to the suspicion of dishonesty, that therefore he is entitled to denounce that man as dishonest".

The comment should be made in 'good faith'. It is not using "due care and attention" to publish defamatory statements about a person and also to publish his denial and let the public take their choice.²²

Where in a newspaper report the main aspersion of the accused against the complainant is true, the fact that there is some exaggeration or departure from strict truth does not deprive the accused of the protection provided in this Exception. Mere exaggeration, or even gross exaggeration, does not make a comment unfair. Where the matter is of public interest, the Court ought not to weigh any comment on it in a fine scale and some allowance must be made for even intemperate language, provided, however, that the writer keeps himself within the bounds of substantial truth and does not misrepresent or suppress any fact.²³

Case.—Conduct of person touching public question.—Where M, a medical man, and the editor of a medical journal, said in such journal of an advertisement published by H, another medical man, in which H solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed:—"The advertiser is certainly entitled to be congratulated on his marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of

¹⁸ Note R, pp. 182, 183.

¹⁹ *Joynt v. Cycle Trade Publishing Company*, [1904] 2 K. B. 292, 294.

²⁰ *Appa v. Maricar*, (1917) 19 Cr. L. J. 129, [1918] AIR (LB) 26; *Bhagwan Das*, (1926) 27 Cr. L. J. 1361, [1927] AIR (A) 116.

²¹ (1863) 32 L. J. Q. B. 185, 199, 200, 3 B. &

S. 769, 776, 777.

²² *J. M. Chatterji*, [1933] A. L. J. R. 1493 34 Cr. L. J. 926, [1933] AIR (A) 434.

²³ *Murlidhar Jeramdas v. Narayendas*, (1913) 16 Cr. L. J. 141, 8 S. L. R. 143, [1914] AIR (S) 85, *Edmondson v. Birch & Co. Ltd.*, [1907] 1 K. B. 371, 380, followed.

his brother officers serving in the same province, and we have no hesitation in pronouncing his proceeding in this matter unprofessional". It was held that inasmuch as such advertisement had the effect of making such hospital a "public question" and of submitting it to the "judgment of the public", and M had expressed himself in good faith, M was within the third, sixth and ninth Exceptions.²⁴ Where the accused published a letter in a newspaper purporting to be a verbatim account of what had transpired at a meeting of the Municipal Corporation, which was admittedly true in substance, it was held that the accused was protected under this Exception.²⁵

Exception 4.—As to the definition of 'Court of Justice', see s. 20, *supra*. "Where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged."²⁶ If the proceedings are such as will result in a final decision being given, a fair and accurate report may be published before the final decision is given.² Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.³ It is immaterial whether the proceedings were *ex parte* or not,⁴ or whether the Court had jurisdiction or not.⁵ But a report of judicial proceedings cannot be published if a Court has prohibited the publication of any such proceedings,⁶ or where the subject-matter of the trial is obscene⁷ or blasphemous.⁸ In England there is an Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals.⁹

The privilege of publishing reports of judicial proceedings is not confined to newspapers only. There is no difference between the privilege of a newspaper and of a pamphlet. The privilege is the same as a matter of law for newspapers as for private individuals. In both cases a fair report of the trial is all that is necessary.¹⁰ A newspaper has not greater privilege in such a matter than any ordinary person—any person is privileged in publishing such a report if he does so merely to inform the public.¹¹

The reporter, however, who gives the account of judicial proceedings ought not to mix up with it comments of his own; and if any comments are made, they should not be made as a part of the report. The report should be confined to what takes place in Court and the two things, report and comment, should be kept separate.¹² The report must not be one-sided or highly coloured.¹³

Case.—Publication of proceedings of Courts of justice.—An accused person, who was the trustee of a temple, was convicted of defamation, the alleged defamatory statement being that the complainant, who performed the worship in a temple, had been convicted and sent to jail for the theft of idols belonging to the temple. At the time when the statement was made, an appointment was in question in connection with the temple. It was held that the accused was justified in making the statement either in the interest of the temple, or because the statement was no more than a publication of the result of proceedings in a Court of Justice.¹⁴

Exception 5.—The authors of the Code say: "We have allowed all persons freely to discuss in good faith the proceedings of courts of law, and the characters of parties, agents and witnesses as connected with those proceedings. It is almost universally acknowledged that the courts of law ought to be thrown open to the pub-

²⁴ *McLeod*, (1880) 3 All. 342. See *Subroya Iyer v. Moulvi Kadar Rowthu Abdul Kadar*, [1914] M. W. N. 351, 15 Cr. L. J. 357.

²⁵ *Murlidhar v. Naraindas*, (1914) 8 S. L. R. 143, 16 Cr. L. J. 141, [1914] AIR (S) 85.

¹ Per Lord Esher, M. R., in *Kimber v. The Press Association*, [1893] 1 Q. B. 65, 68.

² *Ibid.*, p. 71.

³ Per Lawrence, J., in *J. Wright*, (1799) 8 T. R. 298, 298.

⁴ *Kimber v. The Press Association*, [1893] 1 Q. B. 65, 68.

⁵ *Usill v. Hales*, (1878) 3 C. P. D. 319.

⁶ *Clement*, (1821) 4 B. & Ald. 218.

⁷ *Hicklin*, (1868) L. R. 3 Q. B. 360; *Steele v. Brannan*, (1872) L. R. 7 C. P. 261; "*Evening News*," (1886) 3 T. L. R. 255.

⁸ *Carlile*, (1819) 3 B. & Ald. 167.

⁹ 16 & 17 Geo. V, c. 61.

¹⁰ *Milissich v. Lloyds*, (1877) 13 Cox 575.

¹¹ *Salmon v. Isaac*, (1869) 20 L. T. 885, 886.

¹² *Andrews v. Chapman*, (1853) 3 C. & K. 286; *Fleet*, (1818) 1 B. & Ald. 379.

¹³ *Stiles v. Nokes*, (1806) 7 East 493, 497.

¹⁴ *Singaraaju Nagabhushanam*, (1902) 26 Mad. 464.

lic; but the advantage of throwing them open to the public will be small indeed, if the few who are able to press their way into a court are forbidden to report what has passed there to the vast numbers who were absent, or if those who are allowed to know what has passed are not allowed to comment on what has passed".¹⁵

"The administration of justice is matter of universal interest to the whole public. The direction of the judge, the verdict of the jury, . . . may be all made subjects of free comment. . . . But in commenting on such matters a public writer, as much as a private writer, is bound to attend to the truth, and to put forward the truth honestly and in good faith and to the best of his knowledge and ability. It is not to be expected that in discharging this duty of a public journalist he will always be infallible. His judgment may be biassed, one way or the other, without the slightest reflection upon his good faith; and, therefore, if his comments are fair, no one has a right to complain. . . it is well that the conduct of the judge or jury should, if necessary, be brought to the bar of public opinion, like all other matters of public concern. . . that the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But. . . it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember, that they are bound to exercise a fair, an honest, and an impartial judgment upon those whom they hold up to public obloquy".¹⁶ Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of the Courts of Justice, and fairly commenting on them if there is anything that calls for observation; but they should be careful, in discharging that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences.¹⁷

Exception 6.—The object of this Exception is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. All kinds of performances in public may be truly criticised, provided the comments are made in good faith. "Liberty of criticism," says Lord Ellenborough,¹⁸ "must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication therefore I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality".

"What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?"¹⁹

A fair comment upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion and does not go beyond the limits of what may fairly be called 'criticism', is no libel.²⁰ A fair comment is a comment which is true, or which, if false, expresses the real opinion of its author, such opinion having been formed with a reasonable degree

¹⁵ Note R, p. 183.

¹⁶ Per Cockburn, C. J., in *Woodgate v. Ridout*, (1865) 4 F. & F. 202, 216, 217, 223.

¹⁷ Per Cockburn, C. J., in *Tanfield*, (1878) 42 J. P. 423, 424.

¹⁸ *Tabart v. Tipper*, (1808) 1 Camp. 350, 351.

¹⁹ Per Lord Esher, M. R., in *Merivale v. Carson*, (1887) 20 Q. B. D. 275, 280, 281.

²⁰ *McQuire v. Western Morning News Company*, [1903] 2 K. B. 100.

of care and on reasonable grounds. The right of fair comment involves two essentials : first, that the imputation should be a comment on the work criticised, and, second, that it should be fair, that is to say, if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. It would be monstrous, for instance, for a critic to suggest as an inference from a mere grammatical inaccuracy in a work, that its author was a swindler or a libertine.²¹ An imputation on an author made by a critic without reference to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his intention was to base his imputation solely on the work reviewed, and that he had in his mind passages therein supporting the imputation. The responsibility of the critic is to be gauged by the effect which his comment is calculated to produce and not by what he says was his intention.²²

'Good faith' under this Exception requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal untrained to habits of precise reasoning. Good faith in the formation or expression of an opinion can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment.²³

As to the definition of 'public', see s. 12, *supra*.

Exception 7.—This exception allows "a person under whose authority others have been placed, either by their own consent or by the law, to censure, in good faith, those who are so placed under his authority, as far as regards matter to which that "authority relates".²⁴ But if his privilege is exceeded in any way the offence will be established. "A privilege does not justify publication in excess of the purpose or object which gives rise to it. A man may in good faith complain of the conduct of a servant to the master of the servant even though the complaint amounts to defamation, but he is not protected if he publishes the complaint in a newspaper. A spiritual superior, in pronouncing and publishing a sentence of excommunication, may be protected by privilege so long as the publication is not more extensive than is required to effectuate the purpose for which the privilege is conceded to him for the censure of a member of the sect in matters appertaining to religion or the communication of a sentence he is authorized to pronounce to those who are to guide themselves by it".²⁵ Caste associations are autonomous, the powers vested in their constituted heads being, subject to any custom, those necessary for the protection of the interests committed to their charge. The Court's only duty is to see that those powers are exercised in accordance with the principles of natural justice, that is, after the person to be affected by their exercise has been heard and his defence has received fair consideration.¹

Cases.—**Imputation made by person in authority.**—Where the *guru* (spiritual guide) of the caste to which K belonged, issued a letter to K's fellow villagers to the effect that as K's wife had been caught intriguing with a man of a lower caste, no one of her co-religionists should have any social intercourse with her, and that she should be outcasted, it was held that the statements contained in the letter had been made in good faith for the protection of the social and spiritual interests of the community.² The headman of a caste issued a notice to a member of that caste, intimating that a complaint had been received by the caste that his daughter had committed adultery with a certain person, and requiring him to appear before the caste with his daughter in order to clear her character. It was held that the notice did not amount to defamation.³ Where a Swami issued a temporary interdict against two members of his caste on the

²¹ *Abdool Wadood Ahmed*, (1907) 9 Bom. L. R. 230, 235, 31 Bom. 293.

²² *Ibid.*, p. 236.

²³ *Ibid.*, pp. 235, 236.

²⁴ Note R, p. 183.

²⁵ Per Turner, C. J., in *Sankara Narasimha Bharathi*, (1883) 6 Mad. 381, 395; (1871) 6 M. H. C. (Appx.) 46, 1 Weir 574; *Sahib Jotindra Nath Mukharji v. Radha Krishna Budhya*, (1934)

15 P. L. T. 507, 36 Cr. L. J. 285, [1934] AIR (P) 548.

¹ *Sukratendra Thirtha Swamiar v. Prabhu*, (1922) 17 L. W. 500, 45 M. L. J. 116, 24 Cr. L. J. 325, [1923] AIR (M) 587.

² *Basumati Adhikarini v. Budram Kolita*, (1894) 22 Cal. 46.

³ *Bhikaji*, (1888) Cr. R. No. 39 of 1888, Unrep. Cr. C. 387.

ground of their alleged inter dining with Pariahs and the interdict was issued *ex parte* in view of the apprehension that they might take part in the temple feasts coming off immediately and there was nothing to show that the Swami was not going to follow up the temporary interdict with his final decision after hearing the person affected ; it was held that the Swami was not guilty of defamation.⁴

Exception 8.—The authors of the Code observe : “We allow a person to prefer an accusation against another, in good faith, to any person who has lawful authority to restrain or punish the accused”.⁵

To obtain the protection given by this Exception (1) the accusation must be made to a person in authority over the party accused, and (2) the accusation must be preferred in good faith.⁶ This Exception does not formulate, according to the Calcutta High Court, any rule of absolute privilege.⁷ If, without express malice, a person makes a defamatory charge which he bona fide believes to be true, against one whose conduct in the respect defamed has caused him injury, to one whose duty it is to inquire into and redress such injury, the occasion is privileged, because the person making the charge has an interest in its subject-matter and the person to whom the communication is made has, on hearing it, a duty to discharge in respect of it.⁸

The accusation must be preferred in good faith—that is to say, with such reasonable care and attention on the part of the person making it, in first satisfying himself of the truth and justice of his charge, as an ordinary man should be expected to exercise.⁹ There can be no good faith where there is express malice or evidence of culpable negligence or recklessness in the dissemination of a libel.¹⁰ If an officer maliciously makes to his superior a defamatory report against any person he will be guilty.¹¹ Absence of reasonable cause for making an imputation is evidence of the absence of good faith.¹² In determining whether the accused acted in good faith, it is material to consider who he was, and whether he had any concern in the matter complained of which would justify him in making the statement.¹³ Honesty of purpose is essential to protect communications made in fulfilment of a duty. The purport of such communications must also be believed to be true.¹⁴ Complaints made to Magistrates are not protected if they are not made in good faith.¹⁵ A complaint to a police constable is not privileged.¹⁶ A letter written by a Brahman to the Brahman community of the neighbourhood, with a view to obtain their decision on a matter affecting his own religious interests, and that of the Brahman community, if written in good faith, comes under this Exception and Exception 10.¹⁷

See s. 52, *supra*, as to the meaning of ‘good faith’. In determining the question of good faith the Court should take into account the intellectual capacity of the accused, his predilections and the surrounding facts.¹⁸

Case.—Accusation preferred in good faith to authorized persons.—Where a public servant, in the course of a departmental inquiry, made a statement to the head of his department that the complainant, another public servant, borrowed moneys for his immediate superior, it was held that such statement would be defamatory, if it was untrue and if it was made under such circumstances as would lead the officer to believe

⁴ *Sukratendra Thirtha Swamiar v. Prabhu*, (1922) 17 L. W. 500, 45 M. L. J. 116, 24 Cr. L. J. 325, [1923] AIR (M) 587.

⁵ Note R, p. 183.

⁶ *Dhum Singh*, (1884) 6 All. 220; *Raghavendra v. Kashinathbhat*, (1894) 19 Bom. 717; *Anand Rao Balkrishna*, (1914) 17 Bom. L. R. 82, 16 Cr. L. J. 177; *Nobin Dome*, (1865) 2 W. R. (Cr.) 35; *Jangelal v. Dewajee Patel*, (1893) 7 C. P. L. R. (Cr.) 20.

⁷ *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal. 388, s.b.

⁸ *Poona*, (1916) 8 L. B. R. 440, 446, 17 Cr. L. J. 213; *Waring v. M'Caldin*, (1855) 25 L. J. Q. B. 25, 29.

⁹ *Dhum Singh*, (1884) 6 All. 220, 222; *Menta Kondubhothu v. Chalamcherla Subbayya*, (1891) 1 Weir 608.

¹⁰ *Lingangauda Basangauda Patil*, Crim. Appeal. No. 173 of 1927, decided on September 22, 1927. *Cor. Patkar and Baker, JJ.*, (Unrep.

Bom.).

¹¹ *Abdur Razak v. Gauri Nath*, (1909) 11 Cr. L. J. 205, *Sher Singh*, (1880) P. R. No. 23 of 1880, distinguished.

¹² (1890) 1 Weir 607.

¹³ *Venkappa Rai v. Ibrahim Beary*, (1892) 1 Weir 608.

¹⁴ *H. Grant*, (1906) 11 C. W. N. 390, 392, 5 Cr. L. J. 160.

¹⁵ *Abdul Hakim v. Tej Chandar Mukarji*, (1881) 3 All. 815; *Tiruvengada Mudali v. Tripurasundari Ammal*, (1926) 49 Mad. 728, F.B., overruling *Muthusami Naidu*, (1912) 37 Mad. 110.

¹⁶ *Kakumara Anjaneyalu*, (1916) 17 Cr. L. J. 381, [1917] AIR (M) 600.

¹⁷ *Kashinath Bachaji Bagul*, (1871) 8 B. H. C. (Cr. C.) 168. See *Venkata Reddi*, (1885) 1 Weir 575.

¹⁸ *Muhammad Gul v. Haji Fazley Karim*, (1929) 56 Cal. 1018.

that the complainant had borrowed money for his superior from persons connected with the department.¹⁹ The accused, in appealing against the levy of assessment by the complainant (a Mamlatdar) by sale of movable property, alleged that the complainant acted towards him unjustly and spitefully, that in passing the order appealed against he was actuated by personal ill-will and malice towards the accused, and had exercised his authority with a view to cause harassment and loss to the accused. It was held that the accused was protected by Exceptions 8 and 9 in making the statements as they were made in good faith.²⁰ Certain paddy traders sent to the Traffic Manager of the Burma Railways a telegram containing an allegation that a station-master was giving preferential treatment to charcoal dealers and setting forth particulars in support of their allegation. The railway authorities after an inquiry into the allegation held that it was not substantiated, and the station-master prosecuted the paddy traders for defamation. They showed that when they sent their telegram they had good reasons for supposing their allegation to be true. It was held that they were entitled to the protection of this Exception.²¹ Where the accused told his friend E and subsequently at the instance of E wrote to the superior officer of the complainant to the effect that the complainant and the wife of E had been seen behaving on a certain night in such a manner and under such circumstances as to render unavoidable the conclusion that acts of impropriety took place between them and it was found that the accused honestly believed in the truth of the statements, it was held that the accused was not guilty of defamation.²² Where a petition was presented to a Sub-Inspector of Police against the complainant alleging that he was in the habit of getting drunk and abusing people and threatening to do evil by the use of black art and praying for protection against the complainant, it was held that the persons who presented the petition were protected by this Exception as their intention in presenting the petition was to protect their own interest.²³

Where the creditors of an unadjudicated insolvent suspecting that the complainant was carrying property given to him by their debtor, accused him of being in possession of stolen property, it was held that they had not made the imputation in good faith within the meaning of either Exception 8 or 9 and were guilty of defaming the complainant.²⁴

Accusation made to unauthorized persons.—Where the right to a plot of land was in dispute between the complainant and the accused, and the latter, in a petition presented by him to the Municipal Council of his town about the land, made a statement that the complainant was convicted and sentenced to rigorous imprisonment, it was held that the statement to the Municipal Council, though true, was not privileged.²⁵

Exception 9.—The Exception relates to private communications which a person makes, in good faith, for the protection of his own interests or of any other person, or for the public good. The truth of the imputations need not be proved by an accused person claiming the privilege of the Exception.¹ There is no justification for reading the Exception as meaning that if the person making the imputation *believes* in good faith that he has been acting for the protection of the interest of himself or any other person he is not liable.² This Exception is nothing more than a reproduction of the canon or guiding principle which was stated by Lord Campbell, C. J., in *Harrison v. Bush*,³ namely, "A communication made bona fide upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contains criminary matter which, without this privilege, would be slanderous and actionable".

Any one, in the transaction of business with another, has a right to use language bona fide, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious

¹⁹ *Krishna Row v. Appaswami Aiyar*, (1891) 1 Weir 585.

²⁰ *Anand Rao Balkrishna Rangnekar*, (1914) 17 Bom. L. R. 82, 16 Cr. L. J. 177, [1915] AIR (B) 28.

²¹ *Poona*, (1916) 8 L. B. R. 440, 17 Cr. L. J. 213.

²² *H. Grant*, (1906) 11 C. W. N. 390, 5 Cr. L. J. 160.

²³ *Subba Rao v. Venkatachalanathi*, [1938] M.

W. N. 871, [1938] 2 M. L. J. 397, 48 L. W. 320.

²⁴ *Bulchand*, (1914) 8 S. L. R. 55, 15 Cr. L. J. 675.

²⁵ *Ramasami Naidu v. Ramachendrudu*, (1895) 1 Weir 612.

¹ *Kuruppanna Goundan v. Kuppuswami Mudaliar*, [1935] M. W. N. 365.

² *Col. Bholanath*, (1928) 51 All. 313, 327.

³ (1855) 5 E. & B. 344, 348.

or painful to another.⁴ The rule of public policy on which this principle is based is that honest transactions of business and of social intercourse would otherwise be deprived of the protection which they should enjoy.⁵

According to the Calcutta High Court this Exception does not formulate any rule of absolute privilege. Good faith on the part of the person who makes or publishes the imputation must be established.⁶

'Good faith' requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question.⁷ In considering whether there was 'good faith,' i.e. due care and attention, the position of the person making the imputation must be taken into consideration.⁸ The standard of care and caution required by the expression 'good faith' varies with the circumstances of each case.⁹ The plea of good faith may be negatived on the ground of recklessness indicative of want of due care and caution if the imputations in question had been made as categorical statements of facts.¹⁰ If good faith is not established it is not necessary to consider whether public good is involved.¹¹ There is no difference in principle in the question of "good faith" between Exceptions 3 and 9. Exception 3 protects, in certain circumstances, an expression of opinion concerning the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct, and Exception 9 protects, under certain circumstances, imputations concerning the character of another.¹² Where certain imputations were made by the accused only as a matter of opinion in good faith and for public good after taking due care and caution, the accused was protected by this Exception though the imputations made against the complainant (who was a prominent public man) were baseless and incorrect. A police-officer is guilty of defamation if he maliciously makes to his superior officer a defamatory report against any person unless he can show that he is protected by some special statutory privilege. No such privilege is created by the Legislature in favour of police-officers.¹⁴

This Exception includes the first Exception. It refers to any imputation made in good faith, whereas the first Exception applies only to true imputations made for the public good. It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to certain facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith.¹⁵

A person making defamatory expressions for the protection of his son's interests is not privileged, unless the imputation is made in good faith.¹⁶ Where it appeared that the accused in filing his petition of complaint containing defamatory allegations acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others, it was held that it was not defamation.¹⁷

⁴ *E. M. Slater*, (1890) 15 Bom. 351, 363; *Jaikishen Das v. Sher Singh*, (1910) P. R. No. 10 of 1910, 11 Cr. L. J. 281; *Bishunath Singh*, (1934) 11 O. W. N. 382, 35 Cr. L. J. 703, [1934] AIR (O) 169.

⁵ *Venkata Narasimha v. Kottayya*, (1889) 12 Mad. 374, 377.

⁶ *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal 388, s.b.

⁷ *Abdool Wadood*, (1907) 9 Bom. L. R. 230, 31 Bom. 293, 298; *Promotha Nath Mukhopadhyay*, (1923) 27 C. W. N. 389, 403; *Yadali v. Gaya Singh*, (1929) 57 Cal. 843, 847; *Bhagolelal*, [1940] N. L. J. 309, (1940) 41 Cr. L. J. 734, [1940] AIR (N) 240.

⁸ *Nagarji Trikamji*, (1894) 19 Bom. 340, 347; *Sealy v. Ramnarain Bose*, (1865) 4 W. R. (Cr.) 22.

⁹ *Yadali v. Gaya Singh*, (1929) 57 Cal. 843.

¹⁰ *Balasubramania Mudaliar v. Rajagopalachariar*, (1944) 40 Cr. L. J. 71, [1944] M. W. N. 322, [1947] AIR (M) 484.

¹¹ *Purna Chandra Ghose*, (1924) 28 C. W. N. 579, 26 Cr. L. J. 71, [1924] AIR (C) 611.

¹² *Abbasi*, [1941] Kar. 336.

¹⁴ *Abdur Razzak v. Gauri Nath*, (1909) P. W. R. No. 4 of 1910, 11 Cr. L. J. 205.

¹⁵ *Abdul Hakim v. Tej Chander Mukarji*, (1881) 3 All. 815, 817; *Kamayya Tripurantakum*, (1914) 1 L. W. 239, 15 Cr. L. J. 281.

¹⁶ *Pursoram Doss*, (1865) 3 W. R. (Cr.) 45; *Col. Bholanath*, (1928) 51 All. 313.

¹⁷ *Muhammad Gul v. Haji Fazley Karim*, (1929) 56 Cal. 1030.

Where the accused slandered a married woman by stating that her husband was impotent and that the child born to her was by another man, it was held that the burden was on the accused to establish a plea of justification and not on the complainant to prove that the statements were false.¹⁸

Comments.—Where a matter is of public interest, the Court ought not to weigh any comment on it in a fine scale; some allowance must be made for even intemperate language, provided, however, the writer keeps himself within the bounds of substantial truth, and does not misrepresent or suppress any facts.¹⁹ The comment must be based on admitted or proved facts. Where comment is made on allegations of facts which do not exist, the very foundation of the plea disappears.²⁰ In order that a comment may be fair (a) it must be based on facts truly stated, (b) it must not impute corrupt or dishonourable motives to the person whose conduct or work is criticised except in so far as such imputations are warranted by the facts, (c) it must be the honest expression of the writer's real opinion made in good faith, and (d) it must be for the public good. The question to be considered in such cases is: would any fair man, however prejudiced he might be, or however exaggerated or obstinate his views, have written the criticism? ²¹

Communications by member of caste.—There is a dividing line between the passing of a resolution at a caste meeting and its communication by the authorities of the caste to its members in the discharge of their social duty. If any member of a caste publish to all its members a caste resolution in such discharge of duties the law will hold the occasion of the publication to be privileged. The member who publishes it is bound to publish it and the members of the caste have an interest in hearing it. But there must be good faith on the part of the member who publishes, that is, it must be proved that the publication was made with due care and attention.²² If a person really was outcasted, a statement to the members of the brotherhood that he was outcasted is the kind of statement contemplated by the expression "public good".²³ According to the practice of a caste committee, a member who absented himself, when summoned to answer a charge, would be excommunicated and the fact reported to all other committees of the caste. Where the accused, who were members of the caste committee, so excommunicated the complainant, and reported that fact to all other committees, it was held that there was nothing to show that the accused were not acting in good faith.²⁴ Where the complainant had been put out of caste for having taken water from the hands of a certain person and the accused warned certain other members of the caste that if they took water from the hands of the complainant they would also be liable to be put out of caste, it was held that the action of the accused was protected.²⁵ The accused having suspected that the complainants were given to drinking liquor, made an application to the caste calling for an inquiry into their conduct. For this they were convicted of defamation. It was held that the accused were not guilty, for, as members of the caste, they had every right to do what they had done, so long as they acted in good faith and for the protection of the interests of the caste: and that the communication was privileged inasmuch as it was not communicated to anybody beyond the caste and all that the accused did was to complain to the caste which had jurisdiction to inquire into the complaint.¹ A communication by the *panchas* to the members of a community, incorporating the resolution of the *panchayat* excommunicating the complainant (who absented himself when summoned to answer a charge), made in good faith and without malice, was deemed to be privileged, even though the resolution was not worded in a regular and formal manner.² Where the accused were found to have told different persons of the same caste that if they associated with one M, they would refuse to smoke or drink with them as M had become a sweeper by reason of his having shaken hands and associated with sweepers in a certain procession in which various classes of persons including some sweepers had joined, it was held that

¹⁸ *Sukhdoyal v. Saraswati*, [1936] Nag. 217, dissenting from *Umed Singh*, (1924) 46 All. 64.

¹⁹ *Fernandez*, (1911) 13 Bom. L. R. 1187, 1188, 12 Cr. L. J. 595.

²⁰ *Mir Allahbux Khan*, (1929) 23 S. L. R. 216, 30 Cr. L. J. 548, [1929] AIR (S) 90.

²¹ *Khare v. Massani*, [1943] Nag. 347.

²² *Virji Bhagwan*, (1909) 11 Bom. L. R. 638, 10 Cr. L. J. 372; *Baga Mahar*, (1923) 25 Cr. L. J. 169.

²³ *Umed Singh*, (1923) 46 All. 64.

²⁴ *Ayyaswami Iyer v. Thirumala Iyer*, (1924) 19 L. W. 639, 47 M. L. J. 8, 26 Cr. L. J. 215, [1924] AIR (M) 670.

²⁵ *Umed Singh*, (1923) 46 All. 64, 67.

¹ *Padman Babul Mhatre*, (1912) 14 Bom. L. R. 585, 13 Cr. L. J. 687.

² *Dasai*, [1932] A. L. J. R. 75, 33 Cr. L. J. 472; *Bhagwant*, (1938) 10 O. W. N. 778, 35 Cr. L. J. 180, [1938] AIR (O) 377.

it could not be said that if M had joined the procession or shaken hands with the sweepers, he had thereby become a sweeper, and the effect of the imputation must, therefore, undoubtedly have been to lower his position or character in the estimation of his caste fellows. The imputation would have been privileged if a *panchayat* of the caste had been held to discuss the matter and its decision communicated to the persons interested therein. Inasmuch as no *panchayat* had been held, accused's statements could not be regarded as privileged.³ Where the accused at a caste meeting made the statement that the complainant's wife had been married before to another person, it was held that the allegation amounted to defamation.⁴ Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste, will not of itself suffice to make the communication privileged.⁵

The accused on receiving information that a theft had been committed at his house by the complainant, and, on satisfying himself about the truth of the information, communicated that information to the leaders of his caste, who called a *panchayat* and outcasted the complainant. The complainant charged the accused with defamation. It was held that although the imputation was of an offence, it would nevertheless be an imputation on the character of the complainant. If the accused believed in good faith, as he did, then there was nothing objectionable in his warning other people about the conduct of the complainant so as to put others on their guard against her.⁶

Caste is not entirely confined to Hindus. It applies to any class of persons who keep themselves socially distinct or inherit exclusive privileges. The fact that all Mahomedans belong generally to one class does not make it the less defamatory to speak of a Mahomedan as having been "outcaste".⁷

Publication in newspapers.—Where the accused was called upon by the Panjibhai Jamayat of Khojas to whom he at one time belonged, to show cause why he should not be excommunicated, and he communicated his reply by publishing it in the local papers of which he was the proprietor, in which he alleged that the Jamayat was "a dangerous society giving every encouragement to murder and assassinations" and that the object of the notice was "to incite and arouse the intolerance and murderous feelings of the ignorant, deluded and fanatic members of the society to the necessary pitch for and for the express object of taking" his life, it was held that the accused could not claim exemption under Exceptions 1 and 9 even though he may have been under a vague apprehension that the effect of his excommunication might be that an ignorant and fanatical adherent of the community might take it into his head to try and murder the accused. There was nothing to connect the community with such fanatics, and the privilege, if any, had been exceeded by its publication in the local newspapers.⁸ At a meeting of the community, to which both the complainant and the accused belonged, resolutions were passed that the complainant should not be invited to any function of the community and that if he attended any such function he should be turned out. In publishing those resolutions in a newspaper which circulated mainly among the members of the community and some outsiders also, the accused went somewhat beyond the strict limits of the resolutions. On a prosecution for defamation the accused relied on the protection afforded by Excep. 1. It was held that the Exception had no application, because assuming that the newspaper article gave a substantially correct account of the resolutions, it could not be said that their publication was for the public good. It was further held that excessive publication took the case out of the privileges conferred by Exceps. 9 and 10, for it could not be said that it was necessary for the protection of the interest of the accused or other members of the community that the resolutions should be published in a newspaper.⁹

³ *Khamani*, (1925) 24 A. L. J. R. 171, 27 Cr. L. J. 296, [1926] AIR (A) 306.

⁴ *Hari Pada Baidya*, (1980) 84 C. W. N. 540, 31 Cr. L. J. 1225, [1980] AIR (C) 645.

⁵ *Coopposami Chetty v. Duraisami Chetty*, (1909) 38 Mad. 67. See *Venkayya v. Venkataramiah*, (1914) 2 L. W. 446, 28 M. L. J. 58, [1915] AIR (M) 908; *Bishambhar Das v. Gobind Das*, (1914) 12 A. L. J. R. 552; *Komari Pothuraja Setty v. Krishnapatam Padda Poliah*, (1988) 49 L. W. 268, [1989] M. W. N. 127, [1989] 1 M.

L. J. 414, 40 Cr. L. J. 385, [1939] AIR (M) 382.

⁶ *Dularibai v. Sahul Bania*, (1935) 37 Cr. L. J. 845, 18 N. L. J. 204.

⁷ *Yusuf Beg Sahib v. Maliq Mahomed Sayed Sahib*, (1926) 25 L. W. 357, 28 Cr. L. J. 207, [1927] AIR (M) 397.

⁸ *Jaffer Fadu*, (1910) 4 S. L. R. 67, 11 Cr. L. J. 588.

⁹ *Vinayak Atmaram v. Shantaram Janardan*, (1941) 43 Bom. L. R. 787, 43 Cr. L. J. 174, [1941] AIR (B) 410.

A person who never was, or has ceased to be, a member of a caste, cannot be excommunicated from the caste for the offence of re-marrying a widow against the rules of the caste. Such an order of excommunication amounts to a defamation of the person outcasted.¹⁰

Privilege of club.—The Committee members of a social club, even if wrong, deserve and are given the protection embodied in this exception, without which it would be impossible for such a body to function. This is especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person. Honest freedom of expression must be preserved unless committees are always to have the threat of criminal proceedings hanging over them. Where the respondent, who was the wife of a member of a social club and was privileged to use the club under one of its rules, preferred a complaint against the members of the committee for defaming her in a letter addressed by them to her husband, it was held that as the committee had acted in good faith even if they were mistaken, and did not act without due care and attention, they were entitled to be acquitted.¹¹

Privileges of Judges, etc.—The privileges of Judges, parties, counsel, attorneys, pleaders, and witnesses, come under this Exception. So, also, statements made in pleadings and in reports to superior officers are protected by it. (As to civil action, see the authors' "The English and Indian Law of Torts", 14th Edn.)

In India the law regarding defamatory statement made, in the course of judicial proceedings, by judges, counsel or pleaders, witnesses, and parties is in an unsettled condition. The Madras High Court has, in earlier cases, adopted the English rule of absolute immunity in all cases. The Bombay High Court has not followed the English rule in cases of criminal prosecutions on the ground that English law could not be resorted to where it went beyond the terms of s. 499; but in civil actions it has followed the dictum of the Privy Council in *Baboo Gunnesh Datt Singh v. Mugneeram Chawdhry*.¹² The Allahabad High Court has gone a step further and held that cases of defamation under the Code as well as civil suits for damages must be decided in accordance with the provisions embodied in the Penal Code and the Indian Evidence Act. The Calcutta High Court has held that the liability of a person prosecuted for defamation must be determined by the application of the provisions of the Penal Code and not otherwise.¹³ The Patna High Court has adopted the Calcutta view.¹⁴

Judge.—Section 77, no doubt, protects Judges for acts done when acting judicially, and the illustration to Exception 7 of this section protects a Judge censuring in good faith the conduct of a witness. The existence of Exceptions to this section indicates that the provisions of s. 77 cannot by themselves cover the cases of remarks made by a Judge or Magistrate in the course, of his office so as to exempt him from any liability under this section. Where the words complained of are themselves *prima facie* defamatory and do not bear directly on the matter in hand, there is a *prima facie* case and the complaint should be admitted even if s. 77 were held to apply.¹⁵

There is no reported Indian criminal case touching the absolute immunity of Judges.

It has been the English law that a Judge can't be put to answer, "civilly or criminally, for words spoken in office".¹⁶ An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court, even though such words are alleged to be false, malicious, and without reasonable cause.¹⁷ "The ground alleged from the earliest times as that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice."¹⁸

¹⁰ *Champaklal Girdharlal Parekh v. Dipchand Permanand Desai*, Criminal Revision No. 148 of 1941, decided by Beaumont, C.J., and Sen, J., on August 7, 1941, (Unrep. Bom.).

¹¹ *Beckett v. Norris*, [1945] Mad. 749.

¹² (1872) 11 Beng. L. R. (P. C.) 321, 17 W. R. (P. C.) 283.

¹³ *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal 388, s.b.; *C. H. Crowdy v. L. O. Reilly*, (1912) 17 C. W. N. 354.

¹⁴ *Karu Singh*, (1926) 7 P. L. T. 587, 27 Cr.

L. J. 1320, [1926] AIR (P) 425.

¹⁵ *Kamla Patel v. Bhagwandas*, (1934) 30 N. L. R. 234, 236, 237, 35 Cr. L. J. 947, [1934] AIR (N) 123.

¹⁶ Per Lord Mansfield in *Skinner*, (1773) Lofft. 55, 56.

¹⁷ *Raman Nayar v. Subramanya Ayyan*, (1893) 17 Mad. 87; *Kurree v. Sandys*, (1856) Boul. 1; *Anderson v. Gorrie*, [1895] 1 Q. B. 668.

¹⁸ Per Lord Esher, M. R., in *Anderson v. Gorrie*, *ibid.*, p. 670.

This provision of the law is not intended for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges do exercise their functions with independence and without fear of consequences.¹⁹ In Madras it has been held that the English authorities on the subject apply to Judges and Courts in India.²⁰

Nor does any privilege or protection attach to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment.²¹

Counsel, pleader, etc.—According to common law no action will lie against an advocate for defamatory words spoken with reference to, and in the course of, an inquiry before a judicial tribunal, although they are uttered by the advocate maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal.²² The rule is made so wide not to protect counsel who deliberately and maliciously slander others, but in order that innocent counsel who act bona fide may not be “unrighteously harassed with suits”.

The advocate “is trusted with interests and privileges and powers, almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul...his words and acts ought to be guided by a sense of duty—that is to say, duty to his client—binding him to exert every faculty and privilege, and power in order that he may maintain that client’s right, together with duty to the Court and himself, binding him to guard against the abuse of the powers and privileges entrusted to him, by a constant recourse to his own sense of right”.²³

In *Sullivan v. Norton*,²⁴ the Madras High Court has applied the common law principle to advocates in this country. Collins, C.J., in this case said: “I think that the advocates in this country have and should have the same privileges in respect of liberty of speech (bearing always in mind the remarks of Erle, C. J., in *Kennedy v. Brown*) they have so long enjoyed in England; and that in this country it would be beyond measure embarrassing to the advocate and disastrous to the interests of the client, if the advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in Court. . .

“I disagree with the learned Acting Advocate-General that an advocate is bound to consider the position in life of the person whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privileges entrusted to him”.

Wallace, J., had doubted this full bench ruling in a case in which he laid down: “When a lawyer is acting in the course of his professional duties and is thus compelled, subject to the disciplinary action of the Court, to put forward everything which may assist his client, good faith is to be presumed, and bad faith is not to be assumed merely because the statement is *prima facie* defamatory, but that there must be some independent allegation and proof of private malice from which in the circumstances of the case the Court considers itself justified in inferring that the statement was not made because it was necessary in the interests of the client but that the occasion was wantonly seized as an opportunity to vent private malice. . .I take it that this principle implies and carries with it this other principle, that even the presence of malice will not override the presumption of good faith, where the statement made was obviously necessary in the interests of the client, and where the lawyer could not omit to make it with-

¹⁹ *Raman Nayar v. Subramanya Ayyan*, (1893) 17 Mad. 87, 88; *Scott v. Stansfield*, (1868) L. R. 3 Ex. 226; *Fray v. Blackburn*, (1863) 3 B. & S. 576.

²⁰ *Sullivan v. Norton*, (1886) 10 Mad. 28, F.B. See also the judgment in *Nagarji Trikamji*, (1894) 19 Bom. 340.

²¹ *Channing Arnold*, (1914) 41 I. A. 149, 41 Cal. 1023, 16 Bom. L. R. 544.

²² *Munster v. Lamb*, (1883) 11 Q. B. D. 588.

²³ Per Erle, C. J., in *Kennedy v. Brown*, (1863) 32 L. J. (C. P.) 137, 146, 147.

²⁴ (1886) 10 Mad. 28, 35, F.B.

out gravely imperilling the interests of his client and would in fact not be discharging his duty to his client unless he made it; that is, that, even though some private malice is gratified by the publication of the statement, if such publication was imperatively called for in the interests of his duty to his client, the presence of such malice will not negative the presumption of good faith".²⁵ Where a pleader was charged with the offence of defamation punishable under this section in that he unnecessarily in cross-examination put to the complainant, who was a witness in a criminal case, certain questions which imputed immoral character and there was no allegation, and much less proof, that the pleader in putting the questions was actuated by any motive of private malice and was not acting in the interests of his clients, it was held that the pleader was entitled to the benefit of this Exception and the charge which imputed no ill faith but merely referred to the questions as having been put unnecessarily could not stand.¹

The Bombay High Court has, however, observed that *Sullivan v. Norton* is not an interpretation of s. 499, which should be construed without reference to the English law. It has held that where express malice is absent (and it ought not to be presumed) a Court, having due regard to public policy, should be extremely cautious before it deprived the advocate of the protection of this Exception.² But, in a subsequent full bench case it has expressly laid down that in this country an advocate enjoys the same measure of license as he enjoys in England; that he cannot be punished for acting on the instructions given him when he did not and could not know that they were false; and that he has the fullest liberty of speech so long as his language is justified by his instructions, or by the evidence, or by the proceedings on the record. The mere fact that his words are defamatory, or that they are calculated to hurt the feelings of another, or that they ultimately turn out to be absolutely devoid of all solid foundation will not make him responsible nor render him liable in any civil or criminal proceeding.³ The trend of the later cases is that an advocate does not enjoy absolute privilege. When a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.⁴ An advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman, that is to say, he has to bring his case within the terms of this Exception, and under s. 105 of the Indian Evidence Act the burden of proof is normally upon him. In practice, however, an advocate is entitled to special protection, and if an advocate is called in question in respect of defamatory statements made by him in the course of his duties as an advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice. There are limits to the advocate's privilege, especially where the person against whom the imputations are made is neither a party nor a witness. If an advocate makes such an imputation on the strength of instructions from his client and the instructions turn out to be untrue, it is the duty of the advocate to withdraw the imputation.⁵

The Calcutta High Court has held that it is not defamation for a pleader to put a question in cross-examination to a witness, for the purpose of impeaching his credit, even if it appears that the question assumed a state of facts to be true, which was not really so, if it is based on facts known to the pleader, which knowledge was used in apparent good faith, entirely in the interests of his client and not for his own ends. The Court said: "It seems to us, especially in the mofussil of this country, where instructions, to the personal knowledge of one of us, are very commonly inaccurate and misleading, that a pleader would certainly be at least as much justified in acting on his own recollection as on specific instructions, and we do not think that, because he has drawn merely a wrong inference from a fact, that of itself, in the absence of any

²⁵ *Mir Anwaruddin v. Fatim Bai Abidin*, (1926) 50 Mad. 667, 670-1. See *Saukhi Gope v. Uchit Rai*, (1947) 48 Cr. L. J. 997.

¹ *Bhashyam Ayyangar v. Andal Ammal*, [1934] M. W. N. 481.

² *Nagarji Trikamji*, (1894) 19 Bom. 340, followed in *Upendra Nath Bagchi*, (1909) 36 Cal.

375.

³ *Bhaishankar v. L. M. Wadia*, (1899) 2 Bom. L. R. 3, F.B.

⁴ *Purshottamdas Ranchhodas*, (1907) 9 Bom. L. R. 1287, 6 Cr. L. J. 387.

⁵ *Tulsidas v. Billimoria*, (1932) 34 Bom. L. R. 910, 33 Cr. L. J. 740, [1932] AIR (B) 490.

malice, should take him out of the ninth Exception to s. 499".⁶ Following this case it has further held that a question put to a witness in cross-examination by a pleader making an imputation affords no ground for a criminal prosecution. A pleader is entitled to the presumption that the questions he asks in cross-examination are asked in good faith for the protection of the interest of his client. To rebut this presumption there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause. It is the duty of the pleader to present his client's case, but it is not his duty to inquire whether it is true or false, so far, at any rate, as the purposes of a prosecution for defamation are concerned. The Court said: "It is for the public good that a person charged with the responsibility of an advocate should, so far as may be, feel unfettered by any control other than that of the presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client. The provisions of the ninth Exception to s. 499... must be interpreted accordingly".⁷ A pleader must use a certain amount of common sense and caution in putting defamatory questions. There may be cases where, under proper instructions, he may ask such questions to impeach the credit of the witness, unless he knows of the latter's good character and reputation. But where the questions were put with utter recklessness, and without regard to seeing whether there was any truth in them and with absolute disregard of whether he was entitled to ask them or not, and they were not put for the good of the suit but to injure the reputation of the witness publicly, they were held to have been asked in absolutely bad faith. Where a pleader asked a witness, who was a defendant in a civil suit in the capacity of a *mukhia*, whether he was a thief and gambler and dined with prostitutes, and whether his wife was leading the life of a prostitute, it was held that the pleader, in putting the questions, had acted in bad faith, inasmuch as he had asked the witness to compromise the suit and had threatened him on his refusal; that the witness was admittedly a *mukhia*, and the question as to his wife was irrelevant; that the witness was well known in the town where the pleader resided, so that the latter must have known of his reputation and character, and that he was guilty of defamation.⁸ In a later case the Court observed: "So far as the English law is concerned, it is settled that advocates have absolute and unqualified privilege in respect of questions asked in cross-examination. So far as advocates in this country are concerned, by which expression I include vakils as well as pleaders, they have not such unqualified and absolute privilege as is accorded to their brethren in England... It is not defamatory to make imputation on the character and position in life of a witness, provided that the imputation is made in good faith and for the protection of the client, who has engaged the advocate [see s. 499, Exception 9]. The presumption, therefore, is that a question asked in cross-examination, making an imputation as regards a witness, affords no ground ordinarily for a criminal prosecution, and that it is the duty of a Court, when complaint is made against an advocate for having used defamatory words, that it should ordinarily be presumed that the remark or question objected to was made on instructions and in entire good faith. No doubt there may be circumstances which may show that the question or remark objected to was made wantonly, or from malice or from private motive, but the greatest care ought to be taken to enquire into the circumstances, and, as stated in the Rangoon case (*McDonnell v. King-Emperor*),⁹ an opportunity should be given to the party accused of such offence to offer explanations before summons is issued".¹⁰

A pleader who files a petition containing defamatory statements on behalf of his client, cannot be prosecuted where there is no allegation of any malice or absence of good faith on his part.¹¹

The Patna High Court has held that the liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of this section; the Court will presume good

⁶ *Upendra Nath Bagchi*, (1909) 36 Cal. 375, 383.

⁷ *Nikunja Behari Sen v. Harendra Chandra Sinha*, (1913) 41 Cal. 514, 517.

⁸ *Fakir Prasad Ghose v. Kripasindhu Pal Bhuti*, (1926) 54 Cal. 137.

⁹ (1925) 3 Ran. 524.

¹⁰ Per Ghose J. in *M. Banerjee v. Anukul*

Chandra Mitra, (1927) 55 Cal. 85, 89; *Nazir Ahmad v. Jogeshchandra Banerjee*, (1928) 29 Cr. L. J. 889; *Narayan Chandra Ganguli v. Harish Chandra Saha*, (1932) 34 Cr. L. J. 865, [1933] AIR (C) 185.

¹¹ *Nazir Ahmad v. Jogeshchandra Banerjee*, (1928) 29 Cr. L. J. 889.

faith unless there is cogent proof to the contrary. The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith. The common law of England, under which an advocate can claim absolute privilege for words uttered in the course of his professional duty, is not applicable to India. An advocate in this country, therefore, is not entitled to claim absolute privilege, and in cases of prosecution for defamation, his liability must be determined on reference to the provisions of this section.¹²

The Allahabad High Court has held, after reviewing the whole case-law on the subject, that on grounds of public policy, an advocate, acting professionally in a cause, is absolutely protected from a suit for defamation for words spoken or written in his professional capacity in the course of the administration of the law in respect of that cause, even though the words are uttered without justification and maliciously and are irrelevant to any issue then before the Court. And until it has been shown that what an advocate says or writes in the course of the administration of a suit is not said or written 'in reference to' that suit, and is in that broad sense 'irrelevant', it must be held that, in his client's interest rather than his own, he enjoys an absolute privilege.¹³

The Lahore High Court has held that in India counsel cannot claim an absolute privilege but is only entitled to a qualified one under this exception. It is clear that a counsel who signs a pleading containing serious allegations lays himself open to a prosecution for defamation. He cannot, however be prosecuted successfully unless it is shown that he acted in bad faith or maliciously. Counsel can rely on this exception but he loses that defence if he has abused his position and made the allegations maliciously or for his own purpose. On the other hand if the allegations are made honestly and in the discharge of his duty to his client, then it is clear that he cannot be convicted. A Court must presume that a counsel who has signed a pleading has acted bona fide and without malice and no counsel should be called upon to answer a complaint for defamation merely because he has signed a pleading which contains defamatory matter. It must be presumed that the counsel acted honestly and without malice. Further no summons should issue against him for defamation unless the Magistrate who directs the summons to issue has some facts before him which suggest that counsel has acted in bad faith or maliciously. If there are no materials except proof of the defamatory statement, then no summons should issue.¹⁴

The Rangoon High Court has held that the English law of absolute privilege does not apply to statements of advocates in judicial proceedings. Legal practitioners are subject to the criminal law of defamation in this section. When a complaint is made against an advocate or legal practitioner for defamation in respect of a statement made in the course of a judicial proceeding, it is the duty of the Court to presume that the statement was made on instruction and in good faith and for the protection of his client's interest and that unless circumstances clearly show that the statement complained of as defamatory was made wantonly or from malicious or private motive, the complaint should not be entertained.¹⁵ An advocate cannot shelter himself behind his clients, when he allows himself to be made the medium of reckless imputations on a Court of Justice.¹⁶

Liability of client.—If the publication of an imputation concerning a third person is by the lawyer, the client cannot be charged directly with the offence of defamation, because the client, at most, is an abettor. It may happen in a particular case that the lawyer has a good defence whereas the client might be still liable for abetment.¹⁷

Cross-examination.—In cross-examination questions may be asked for which there are only reasonable grounds for thinking that imputations contained in them are well-founded; it is not necessary that before the questions are put, the person putting them should be in a position to establish the truth of the imputations beyond all doubt. Something which may be permissible to be put under the Indian Evidence Act cannot be punishable under the Penal Code. Where an imputation is made in open Court, no

¹² *Nirsu Narayan Singh*, (1926) 6 Pat. 224.

¹³ *Sumat Prasad Jain v. Sheodah Sharma*, [1945] All. 702.

¹⁴ *Muhammad Taqi v. M. A. Ghani*, (1944) 47 P. L. R. 8, 46 Cr. L. J. 530, [1944] AIR (L) 97.

¹⁵ *McDonnell*, (1925) 3 Ran. 524; *U San Win v. U Hla*, (1930) 32 Cr. L. J. 934, [1931]

AIR (R) 83; *Ahmed Ali Khan v. Wali Mohamed*, (1937) 39 Cr. L. J. 229; *U Pike v. Ma Khin Thein*, (1939) 41 Cr. L. J. 480, [1940] AIR (R) 77.

¹⁶ *A. P. Pennell*, (1903) 2 L. B. R. 130, F.B.

¹⁷ *Rebecca Mondal*, (1945) 48 Cr. L. J. 15, 50 C. W. N. 545.

question of protection under s. 126 can arise. In such a case, the party at whose instance the question is put cannot be charged directly with defamation, he can at most be charged as an abettor. It may happen in a particular case that the lawyer putting the question has a good defence wherever the client may still be liable for abetment.¹⁸

Witness.—According to English law a witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness. A statement as to another matter, made to justify the witness in consequence of a question going to the witness' credit, has reference to the inquiry within the above rule.¹⁹ But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel and introduced by the witness maliciously for his own purposes, would not be privileged. An observation made by a witness while waiting about the Court, before or after he has given his evidence, is not privileged.²⁰

The High Courts in India have not adopted the English rule of absolute privilege. All the High Courts have held that a person giving evidence in a Court of law is not entitled to an absolute privilege in respect of the statements which he makes and, consequently, that he is not immune from a complaint of defamation by reason of words uttered on oath in the witness-box.

The Bombay High Court in a full bench case has laid down that relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not absolutely privileged on a prosecution for defamation, but are governed by the provisions of s. 499.²¹ Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected by the proviso to s. 132 of the Indian Evidence Act, in cases where the witness has not objected to answering the question put to him.²²

The Calcutta High Court has ruled that a witness who, being actuated by malicious motives, makes a voluntary and irrelevant statement, not elicited by any question put to him while under examination, to injure the reputation of another, commits an offence under this section.²³ If the statements are irrelevant to the issue in the case under inquiry no prosecution for defamation would lie.²⁴ Where the accused, shortly after the disposal of a criminal case against him brought by one B, stated openly in answer to a query of his pleader in that case that the origin of the criminal case was due to the fact that some one of the accused's party had said at a social gathering that B's daughter-in-law had eloped, and he was subsequently prosecuted for defamation for making a statement defamatory of B, it was held that the statement of the accused did not constitute this offence as it was not made with the intention of harming the reputation of anybody, but was made in answer to a natural question put to him by his legal adviser at a time when the relationship of legal adviser and client continued.²⁵ This principle has been extended to a person for what he states in answer to questions put to him by a police-officer conducting an investigation under the Code of Criminal Procedure.¹ Subsequently, however, the Judges felt disposed to refer the question to a full bench but it was not referred.²

The Madras High Court, following the English law, had laid down that statements of witnesses made in the witness-box were absolutely privileged. If they were false the remedy was by indictment for perjury and not for defamation.³ But the High Court has subsequently dissented from this view and held that statements made

¹⁸ *Rebecca Mondal*, [1945] 48 Cr. L. J. 15, 50 C. W. N. 545.

¹⁹ *Seaman v. Netherclift*, (1876) 1 C. P. D. 540, on appeal, 2 C. P. D. 53; *Goffin v. Donnelly*, (1881) 6 Q. B. D. 307.

²⁰ *Trotman v. Dunn*, (1815) 4 Camp. 211; *Lynnam v. Gowing*, (1880) 6 L. R. Ir. 250.

²¹ *Bai Shanta v. Umrao Amir Malik*, (1925) 50 Bom. 162, 28 Bom. L. R. 1, F.B., overruling *Babaji*, (1892) 17 Bom. 127, and *Balkrishna Vithal*, (1893) 17 Bom. 573. See *Karigowda*, (1894) 19 Bom. 51.

²² *Bai Shanta v. Umrao Amir Malik*, (1925) 50 Bom. 162, 28 Bom. L. R. 1, F.B.

²³ *Haidar Ali v. Abu Cal*, (1905) 32 Cal. 756; *Moher Sheikh*, (1893) 21 Cal. 382; *Mohunt*

Pursoram Doss, (1865) 2 W. R. (Cr.) 36; *Pursoram Doss*, (1865) 3 W. R. (Cr.) 45. See, however, *Kali Nath Gupta v. Gobinda Chandra Basu*, (1900) 5 C. W. N. 293.

²⁴ *Woolfun Bibi v. Jesarat Sheikh*, (1899) 27 Cal. 262.

²⁵ *Debendra Nath Shahu v. Bhagirath Shahu*, (1909) 13 C. W. N. 1087, 10 Cr. L. J. 475.

¹ *Methuram Dass v. Jaggannath Dass*, (1901) 28 Cal. 794. See *Gobinda Pillai*, (1892) 16 Mad. 235, to the same effect.

² *Prafulla Kumar Ghose v. Harendra Nath Chatterjee*, (1916) 44 Cal. 970.

³ *Manjaya v. Sesha Shetti*, (1888) 11 Mad. 477, 479; *Alraja Naidu*, (1906) 30 Mad. 222.

by a witness are entitled not to an absolute but only to a qualified privilege.⁴ A witness who is prosecuted for defamation in respect of statements made by him has two courses open to him. He may plead in bar of the prosecution the protection given to him under s. 132, Evidence Act. If he did not claim the protection of s. 132 when he gave his evidence he can claim only the limited privilege given by this Exception or any other Exception.⁵

The Allahabad High Court has held that if a witness whilst giving evidence makes a statement concerning any person which amounts to defamation, he may be prosecuted under this section in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the Exceptions or that he is protected from prosecution by the proviso to s. 132 of the Evidence Act. In this case one Ganga Prasad was a witness for the defence on the trial of one Birbal for theft. When put into the witness-box he was asked what he knew about Birbal's case. He replied that he knew nothing; but he added of his own accord that he knew that Birbal had stolen his watch eight years ago and that he had to give Rs. 10 to one Banke Lal, whom he pointed out as one of the persons present in the Court, before he got the watch back. He said, further, that if his house was searched, "thousands of rupees worth stolen property would be found". It was found that Banke Lal was a respectable Zemindar, and that he was a drug contractor and paid Rs. 400 as income-tax. It was held that Ganga Prasad was guilty of defamation.⁶

The Nagpur⁷ and the Rangoon⁸ High Courts have followed the Bombay, the Calcutta and the Madras rulings.

The former Chief Court of the Punjab⁹ and the former Judicial Commissioner's Court of Upper Burma¹⁰ had adopted the reasoning of the Calcutta and the Allahabad High Courts.

The former Judicial Commissioner's Court in Sind had taken the same view.¹¹

Parties.—According to English law no action can be brought for any statement made by parties during the conduct of a case.

The Bombay High Court has held that a complainant who, when asked by the Magistrate to state his grievance, deliberately makes a defamatory statement without any justification, is not protected by this Exception.¹² Whilst an application and a counter-application to prevent a breach of the peace were being investigated into by the police, the accused called the complainant a 'rogue'. It appeared that some four months previously the complainant was convicted and fined at the instance of the accused. The accused having been convicted of defamation, it was held that the accused was protected by this Exception inasmuch as the statement was made apparently for the protection of his own interests and when his application was under investigation by the police, and that the statement was made by him in good faith.¹³

The Madras High Court in a case observed: "We fully recognise the great importance of allowing the utmost freedom to counsel, parties, and witnesses during the progress of a case, and if the counsel for Mr. Hayes, or Mr. Hayes [the accused] if he had been defending himself, had asked Mr. Christian in cross-examination whether in consequence of cheating... he had not been turned out of the ministry, the question could not have been made the subject of a civil action, nor would any criminal proceeding lie for defamation".¹⁴ Where, therefore, a person who was being defended by a counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character, it was held that he was guilty of defamation.¹⁵ But where, in the course of a criminal trial, the pleader

⁴ *Peddabba Reddi v. Varada Reddi*, (1928) 52 Mad. 482; *Anthony Udayar v. Velluswami Thevar*, [1948] M. W. N. 413.

⁵ *Peddabba Reddi Varada Reddi*, *ibid.*; *Gopal Doss*, (1881) 8 Mad. 271, F.B.

⁶ *Ganga Prasad*, (1907) 29 All. 685, F.B.; *Kallu v. Sital*, (1918) 40 All. 271; *Chamap Devi v. Pirbhu Lal*, (1925) 24 A. L. J. R. 329, 27 Cr. L. J. 253, [1926] AIR (A) 287; *Mohammad Isa*, [1940] All. 31. See also *Muhammad Sher Ali Khan v. Ghasi Ram*, (1920) 22 Cr. L. J. 159.

⁷ *Chotelal v. Phulchand*, [1937] Nag. 425; *Surajmal v. Ramnath*, (1927) 28 Cr. L. J. 956, [1928] AIR (N) 58.

⁸ *Rasool Bhai v. Lall Khan*, [1939] Run. 479.

⁹ *Maya Das*, (1893) P. R. No. 14 of 1893; *Phundi Ram*, (1910) 12 Cr. L. J. 193; *Miran Shah*, (1912) P. R. No. 5 of 1913, 13 Cr. L. J. 414.

¹⁰ *Meer Birks v. Maung Hla Pe*, (1918) 3 U. B. R. 101, 20 Cr. L. J. 125, [1919] AIR (UB) 30.

¹¹ *Kakmal Gelomal v. Kismal Issardas*, [1934] 36 Cr. L. J. 881, [1935] AIR (S) 81.

¹² *Dinshaw Edalji v. Jehangir Cowasji*, (1922) 47 Bom. 15, 24 Bom. L. R. 400.

¹³ *Esufalli Abdul Hussein*, (1918) 20 Bom. L. R. 601, 19 Cr. L. J. 731, [1917] AIR (B) 192.

¹⁴ *Hayes v. Christian*, (1892) 15 Mad. 414, 415.

¹⁵ *Ibid.*

who defended the accused put a question to the complainant who was examined therein as a witness, conveying an insinuation of being implicated in a crime, it was held that the accused was not guilty of defamation.¹⁶ A statement of a defamatory character made by an accused in the course of the statement which he is invited to make under s. 342, Criminal Procedure Code, is privileged.¹⁷ In a full bench case the Madras High Court held that the statement of a person charged with an offence in answer to a question by the Court trying him, "what have you to say", is absolutely privileged and he is not liable to be punished in respect thereof for defamation under the Penal Code. The privilege is not merely a qualified privilege, i.e. it is not subject to the condition that it should be made in good faith. The Court further said that the law of defamation as laid down in the Penal Code did not exclude the application of the doctrine of absolute privilege from the law of defamation in India; and that the English rule of common law, that anything said in the course of a judicial proceeding before a Court of competent jurisdiction by counsel, witness or party was absolutely privileged, applied in India.¹⁸ This case has been considered in another full bench case and the High Court has dissented from the view expressed therein, observing: "The privilege defined by the Exceptions to s. 499... must be regarded as exhaustive as to the cases which they purport to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute".¹⁹ Where a defamatory statement is made before an officer, who is neither a judicial officer nor a Court, e.g., a registration officer, it has been held that it is not absolutely privileged.²⁰ Where the accused was charged with defamation because his vakil put a defamatory question to the complainant and the vakil gave evidence that he did so on the instructions of his client (the accused), it was held that the instructions of the accused to his vakil were inadmissible under s. 126, Indian Evidence Act, and that the accused was not guilty of defamation committed as it were by proxy through the mouth of his vakil.²¹

The Calcutta High Court has laid down that a defamatory statement, on oath or otherwise, by a party to a judicial proceeding falls within s. 499, and is not absolutely privileged. Under cl. 30 of the Letters Patent, 1865, the provisions of such Code must be followed, and the Court cannot engraft thereon exceptions derived from the common law of England or based on public policy. The civil liability for defamation does not stand on the same basis as the criminal. A suit for damages for a defamatory statement, made on oath or otherwise, by a party to a judicial proceeding, in the absence of statutory rules on the subject, is governed by the principles of justice, equity and good conscience, which, according to a large preponderance of judicial opinion, are identical with the corresponding relevant rules of English common law.²² If imputation is made by the accused against the complainant in a petition to a Magistrate in good faith with a view to protect himself by an appeal to the Magistrate, no offence is committed.²³

Where, in a prosecution for defamation in respect of statements, made by the accused as complainant in a criminal case, the accused pleaded *inter alia* his privileges as a suitor, the Allahabad High Court held that the plea was bad, inasmuch as the doctrine of absolute privilege of statements made by suitors did not apply in India to criminal proceedings for defamation under the Penal Code.²⁴

The former Chief Court of the Punjab had adopted the view of the Allahabad High Court.²⁵ The former Sind Judicial Commissioner's Court had taken the same view.¹

¹⁶ *Venkata Narasimham v. Venkatasubarayadu*, (1888) 1 Weir 587; *Pundamarazu Pantulu v. Venkataramana Aiyer*, (1908) 19 M. L. J. 217, 9 Cr. L. J. 385.

¹⁷ *Payini Chellaya*, (1909) 9 Cr. L. J. 276.

¹⁸ *Venkata Reddy*, (1912) 36 Mad. 216, 233, F.B.

¹⁹ *Tiruvengada Mudali v. Tripurasundari Ammal*, (1926) 49 Mad. 728, 737, F.B.; *Venkata Reddy*, (1912) 36 Mad. 216, overruled.

²⁰ *Krishnamal v. Krishnaiyengar*, (1912) 23 M. L. J. 50, [1912] M. W. N. 473, 13 Cr. L. J. 508, F.B.

²¹ *Palaniappa Chettiar*, [1935] M. W. N. 460.

²² *Satish Chandra Chakravarti v. Ram Doyal De*, (1920) 48 Cal. 388, S.B.; *Isuri Prasad Singh v. Umrao Singh*, (1900) 22 All. 234; *McGill v.*

Byrne, (1911) 5 S. L. R. 138, 13 Cr. L. J. 25; *Baija v. Babu*, (1918) 19 Cr. L. J. 641, [1918] AIR (N) 221.

²³ *Yadali v. Gaja Singh*, (1929) 57 Cal. 843, 848.

²⁴ *Gajadhar*, (1890) 10 A. W. N. 170; *Mohammad Samiullah Khan v. Bishu Nath*, (1927) 26 A. L. J. R. 760. But see the judgment of Subrahmanya Ayyar, J., in *Nadu Gounden v. Nadu Gounden*, (1899) 1 Weir 589.

²⁵ *Fateh Muhammad*, (1889) P. R. No. 34 of 1889; *Kirpal Singh v. Hukam Singh*, (1889) Note to P. R. No. 34 of 1899, at p. 131; *Phundi Ram*, (1911) 12 Cr. L. J. 198.

¹ *Hoondray Mithomal*, (1921) 16 S. L. R. 150, 26 Cr. L. J. 234, [1921] AIR (S) 92.

The former Chief Court of Lower Burma had laid down that the statement of a person accused of a criminal offence was not privileged. The statement in that case, however, was not a statement made by an accused person on his trial for committing an offence, but in a written statement filed in proceedings, which, though before a Magistrate, partook largely of a civil nature, by a person who was not only a competent witness, but who clearly ought to have gone into the witness-box.² The Rangoon High Court has held that a party who gives evidence on his own behalf in a judicial proceeding may be prosecuted for any defamatory statement made in the course of his evidence. He may, however, plead this Exception in defence.³

Pleadings.—Authority is strongly against the absolute immunity from prosecution for defamatory statements contained in applications, pleadings and affidavits.

The Allahabad High Court has held in a full bench case that the defamatory statements made by a party in a petition presented to a criminal Court are absolutely privileged in a civil action for damages based on libel.⁴ In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one U, in order to prejudice them in their defence in a civil suit which U had caused to be brought against them. It was held that this statement did not amount to defamation as it fell within the ninth Exception.⁵ The same High Court has subsequently held in a case in which the accused was prosecuted for making a defamatory imputation in a written statement that there is a distinction between criminal and civil liability for defamation. Civil liability is to be determined by the principles of English law but criminal liability is governed by the provisions of the Penal Code and by those provisions alone.⁶

The Calcutta High Court is of opinion that defamatory matter appearing in a plaint is not privileged. It convicted the accused in a case for describing the complainant in his plaint by a wantonly offensive designation.⁷ A person is guilty of defamation for making a defamatory statement in an affidavit if the statement is wholly irrelevant to the inquiry to which the affidavit relates.⁸ The act of filing in Court a petition containing imputations concerning a person calculated to harm his reputation amounts to making or publishing the imputation.⁹ The procedure of the Courts of Justice should not with impunity be used as the means of indulging in feelings of personal spite. Where a person, without any reasonable ground, filed a petition before a Magistrate to the effect that certain persons were preparing to bring false charges against him, he was convicted of defamation.¹⁰ It has held in a case that statements made by a complainant before a Magistrate by way of a complaint are absolutely privileged.¹¹ In a subsequent case, after distinguishing this decision on the ground that the privilege claimed there was not in a criminal prosecution but in a suit for damages, it was held that there was no absolute privilege for a defamatory statement made in bad faith in an application filed before a District Magistrate by an accused for the transfer of his case; that the question of privilege must be decided by the terms of s. 499 which was exhaustive and if a defamatory statement did not come within the exceptions, it was not privileged; and that the English common law doctrine of absolute privilege did not obtain in the mofussil in India.¹² But on similar facts another Division

² *N. S. Iyer v. T. Mudaliar*, (1917) 18 Cr. L. J. 1019.

³ *Sayed Ali*, (1925) 27 Cr. L. J. 648, [1925] AIR (R) 360.

⁴ *Chunni Lal v. Narsingh Das*, (1917) 40 All. 341, F.B., overruling *Abdul Hakim v. Tej Chandar Mukarji*, (1881) 3 All. 815. Information or a report made to the police does not come within this principle: *Majju v. Lachman Prasad*, (1924) 22 A. L. J. R. 597.

⁵ *Isuri Prasad Singh v. Umrao Singh*, (1900) 22 All. 234.

⁶ *Champa Devi v. Pirbhu Lal*, (1925) 24 A. L. J. R. 329, 27 Cr. L. J. 253, [1926] AIR (A) 287, *Ganga Prasad*, (1907) 29 All. 685, followed; *Til Kanchan Gir*, (1910) 11 Cr. L. J. 594; *Murli Pathak*, (1927) 50 All. 169.

⁷ *Kali Nath Gupta v. Gobinda Chandra Basu*, (1900) 5 C. W. N. 293; *Augada Ram Shaha v.*

Nemai Chand Shaha, (1896) 23 Cal. 867.

⁸ *Giribala Dassi v. Pran Krishna Ghosh*, (1903) 8 C. W. N. 292, 1 Cr. L. J. 122.

⁹ *Greene v. Delanney*, (1870) 14 W. R. (Cr.) 27; *Mohunt Pursoram Doss*, (1865) 2 W. R. (Cr.) 36.

¹⁰ *Shibo Proshad Pandah*, (1878) 3 C. L. R. 122.

¹¹ *Golap Jan v. Bholanath Khettry*, (1911) 38 Cal. 880. So far as civil Courts are concerned the High Court has decided that defamatory statements in pleadings are not absolutely privileged: *Augada Ram Shaha v. Nemai Chand Shaha*, (1896) 23 Cal. 867; *H. P. Sandyal v. Bhaba Sundari Devi*, (1910) 15 C. W. N. 995. These decisions do not appear to have been brought to the notice of the learned Judges who decided *Golap Jan's* case.

¹² *Kari Singh*, (1912) 40 Cal. 433.

Bench of the same High Court had previously held that a complainant making untrue statements in such an application could not be convicted of defamation.¹³

The Bombay High Court has held that relevant statements made by an accused under s. 342, Criminal Procedure Code, or contained in a written statement filed by an accused with the Court's permission, are not absolutely protected from being the subject of a prosecution under s. 500, but are governed by the provisions of s. 499.¹⁴ In a civil action it has held that statements in pleadings are not actionable.¹⁵

The Madras High Court remarked in *Hinde v. Baudry*¹⁶: "If they [defendants] were rightfully making an application in the suit, the principle of public policy which guards the statement of a party or witness against an action would protect them whether the statement was malicious or not". It is of opinion that here is no difference between evidence given in the box and the evidence on affidavits, in that they are both absolutely privileged and no suit for damages will lie in respect of evidence given therein.¹⁷ But in a full bench case it has decided that a defamatory statement in a complainant to a Magistrate is not absolutely privileged.¹⁸

The Patna High Court has held, following the Calcutta view, that a defamatory statement, whether on oath or otherwise, falls within s. 499, and is not absolutely privileged. Where in a plaint the accused described the complainant (defendant No. 3) as the "kept woman" of defendant No. 1 without any foundation, it was held that he was guilty of defamation.¹⁹

The former Chief Court of the Punjab had laid down that a person who made defamatory statements in petitions might be convicted of defamation.²⁰ The former Chief Court of lower Burma was also of the same view.²¹

The Rangoon High Court has held that in criminal prosecutions for defamation, whether a statement was made on an occasion of privilege or not is to be decided with reference to the provisions of s. 105 of the Evidence Act and s. 499.²²

According to English law no action lies for any statement made in the pleadings.²³

Report.—The report of an officer, in the execution of his duty, under his superior's orders, which contain defamatory imputations against others, but which does not appear to have been made recklessly or unjustifiably is covered by this Exception. An Inspector of Police sent to inquire whether it was true that a certain person was the leader of dacoits, reported that it was false, but the Baniyas of the village were trying to get the man punished from an ill-feeling, and added: "I learn from private enquiries that there is scarcely a woman in the house of the Baniyas who had not passed a night or two with the defendant". It was held that he was not protected by this Exception.²⁴

Press.—No kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever length the subject in general may go, so also may the journalist, but apart from statute law his privilege is no other and no higher. The responsibilities which attach to his power of dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his profession.²⁵

Cases.—Statement made to protect interest of another.—Where a man who was

¹³ *Kari Singh*, (1912) 40 Cal. 441, foot-note.

¹⁴ *Bai Shanta v. Umrao Amir*, (1925) 28 Bom. L. R. 1, 50 Bom. 162, F.B.

¹⁵ *Nathi Muleshwar v. Lalbhai Ravidat*, (1889) 14 Bom. 97.

¹⁶ (1876) 2 Mad. 13, 14.

¹⁷ *Adapala Adivaramma v. Rabula Ramachandra Reddy*, [1910] M. W. N. 155, 21 M. L. J. 85.

¹⁸ *Tiruvengada Mudali v. Tripurasundari Ammal*, (1926) 49 Mad. 728, F.B., overruling *Venkata Reddy*, (1912) 36 Mad. 216, F.B.; *Muthusami Naidu*, (1912) 37 Mad. 110.

¹⁹ *Karu Singh*, (1926) 7 P. L. T. 587, 27 Cr. L. J. 1820, [1926] AIR (P) 425, following *Kari Singh*, (1912) 40 Cal. 433.

²⁰ *Kirpa Ram*, (1887) P. R. No. 21 of 1887.

²¹ *Maung Mya Thi v. Henry Po Saw*, (1906) 3 L. B. R. 205, 5 Cr. L. J. 382.

²² *Ma Mya Shwe v. Maung Maung*, (1924) 2 Ran. 333; *Subramonia Iyer v. Thirumudi Mudaliar*, (1917) 18 Cr. L. J. 1019, [1918] AIR (LB) 116; *Mull Chand v. Buga Singh*, (1930) 8 Ran. 359.

²³ *Revis v. Smith*, (1856) 18 C. B. 126.

²⁴ *Rajnarain Sein*, (1870) 6 Beng. L. R. (Appx.) 42, 14 W. R. (Cr.) 22. See *Sher Singh*, (1880) P. R. No. 23 of 1880; *Mohammad Samiullah Khan v. Bishu Nath*, (1927) 26 A. L. J. R. 760.

²⁵ *Channing Arnold*, (1914) 41 I. A. 149, 41 Cal. 1023, 1068, 16 Bom. L. R. 544; *J. M. Chatterji*, [1933] A. L. J. R. 1493, 34 Cr. L. J. 926, [1933] AIR (A) 434.

watching a case on behalf of his partner informed the Judge, while the hearing was going on, that the complainant was tampering with the witness and asked that the complainant might be directed to sit in Court, and it appeared that there was no malice or bad faith in making the imputation, it was held that the case fell within this Exception.¹ K, a creditor of J, of the firm of J. S. & Co., found his claims against J resisted until he sued and got decrees against him. K came to know that V, a member of J's firm, had presented his petition in insolvency. K also knew that V at the time of filing his petition, had claims against J's firm. K thereupon circulated amongst persons who had dealings with the firm of J. S. & Co., a letter warning them not to make payments to the firm and containing the following statements: (1) that a member of the firm V had filed his petition under the Insolvent Debtors' Act, "the object being to collect the outstandings and defeat the creditors"; (2) that the other members were not entitled to collect the outstandings and were not in a position to give an effectual discharge to persons making payments; and (8) that K was taking steps to have all the other members declared insolvents. It was found that the firm of J. S. & Co. was without capital, and that subsequently to writing the letter K did file a petition of insolvency against the other members of the firm, though unsuccessfully. It was held that there was no defamation as the case fell under ill. (a) to this Exception.²

Statement made to protect interest of maker.—The heads of the caste, to which both the complainant and the accused belonged, prohibited the members of the caste from holding intercourse with the complainant. In ignorance of this prohibition, the complainant's niece invited the complainant to a family ceremony. The accused, observing the complainant, asserted that she had been put out of caste, and insisted that she should retire. It was held that they had made the statements in good faith to protect themselves from caste penalties, and were not guilty of defamation.³ Where a person called upon by a *panchayat*, conveyed by complainant's relatives to explain why he had applied the epithet 'pariah dog' to the complainant, made a statement by way of explanation, it was held that such statement was privileged.⁴ Where a person was charged before a *panchayat* with having beaten the complainant who also alleged that he had been molesting her for three or four years for immoral purposes and he stated that he had kept her for ten or eleven years, it was held that the statement made by him before the *panchayat* was made in good faith in order to explain his beating of the complainant and was covered by Exceptions 8 and 9.⁵

The complainant charged the accused with forgery. The accused in his statement before the Magistrate stated that the complainant was kept by him as his concubine for some years and was afterwards in the keeping of another person. It was held that the statement was privileged as it was made for the purpose of defence by way of showing the motive for the complainant and for the evidence of one of the witnesses.⁶ Where the accused, when on his trial on a criminal charge, was asked by the Magistrate if he wished to say anything with reference to the evidence that had been given against him, in reply stated that his grandfather had at one time kept the wife of the complainant as his concubine, and it was found that the statement was made by the accused for the protection of his interest but was false and not made in good faith, it was held that he was not protected under this or any other Exception.⁷ Subrahmaniam Ayyar, J., who held a contrary opinion, said: "As to... parties it must be borne in mind that there is no real difference between the case of witnesses and that of civil suitors. For neither witnesses nor suitors need say what they do not know to be true, and if they knowingly say what is not true, they are equally liable to be proceeded against for the false statements made in the evidence or in the verified pleadings. No doubt, an accused person cannot be indicted for perjury for false statements made by him in the course of defence. This immunity given in consideration of the difficult position occupied by those who are accused of crimes is surely an argument in favour of their case being viewed as entitled to a more lenient treatment than the

¹ *Purshotam Kala*, (1885) 9 Bom. 269.

² *Cassem Kurrim v. Jonas Hadjee Seedick*, (1904) 9 C. W. N. 195, 2 Cr. L. J. 47.

³ *Chalil Kothali*, (1882) 1 Weir 609; *Vinjamuri Subramania Aiyar v. Mudambi Krishnamachari*, (1900) 1 Weir 613.

⁴ *Govindappa Nayak*, (1883) 7 Mad. 36.

⁵ *Nanhey v. Pyari Bahu*, (1926) 27 Cr. L. J. 938, [1926] AIR (N) 504.

⁶ *Murugesu Pillai v. Papatli Ammal*, (1897) 1 Weir 612.

⁷ *Nadu Gounden v. Nadu Gounden*, (1899) 1 Weir 589, 592.

case of witnesses or civil suitors. It seems to me, therefore, that in principle there is no solid distinction between the respective cases of counsel, witness and party with reference to the matter under discussion". Where the complainant served a lawyer's notice on the accused who was her deceased husband's nephew charging him with theft and criminal breach of trust with regard to properties left by her husband and threatening him with civil and criminal proceedings, and the accused in reply to the notice sent a letter, also through his lawyer, alleging that the complainant was living an adulterous life, that her daughter was not born to her husband, that she had been discarded by him during his lifetime, and that she had lost all right to his property, and he relied on a will made by the deceased in his favour in which the testator had stated that there was none to protect him, it was held that the accused was protected by this Exception, as there was a matter of common interest between the complainant and the accused relating to the title to property left by the deceased giving rise to qualified privilege and there was no malice or want of bona fides or presence of improper motive in the accused.⁸ Where the accused, who was doing the same kind of business as the complainant, in a notice published by him, referred to an employee of the complainant as having no knowledge of the business from his experience about him, and stated that the business could not have improved by the employment of such a man, it was held that the notice was not defamatory of the complainant.⁹ Where the accused made a statement in answer to a requisition by an investigating officer under s. 16, Criminal Procedure Code, and for the protection of his own interest, it was held that he was protected under this Exception.¹⁰

The accused, who was an inhabitant of S and an elector, wrote to one of the members of Parliament for S with the object of inducing him to help the accused to bring certain matters, at first unspecified, to the attention of the Home Secretary of the Minister of Health. The Member of Parliament replied that it was impossible for him to ask the Home Secretary for an appointment unless he had first intimated to him what the purpose of the appointment was. The accused thereupon wrote two letters to the member of Parliament containing allegations of grave and criminal conduct against a detective sergeant of police of the S. Police force and a justice of the peace for S. The accused was charged with publishing defamatory libels and was convicted. It was held that the letters were written on a privileged occasion, and, in the absence of proof of malice, the conviction ought to be quashed.¹¹

Statement made without good faith.—The complainant desired a Magistrate to ask a witness if he had not been previously convicted. The question was objected to and, before the Magistrate had decided whether it should be put, the witness cried out: "I was convicted because I had Casim Saheb's wife in my house", and, though warned by the Magistrate not to repeat it, he did so. It was held that he was guilty of defaming Casim Sahib's wife.¹²

Imputations made by pleaders.—Where a pleader, in addressing a Mamlatdar on behalf of the accused, commented on some of the witnesses for the prosecution, and called them 'loafers', and was prosecuted for defamation, it was held that, in the absence of express malice (which was not to be presumed), the pleader was protected by this Exception, and that in considering whether there was good faith, the position of the person making the imputation must be taken into consideration.¹³ A pleader representing a complainant wrote to the trying Magistrate to inquire when the latter would take up the case for trial; and in the letter described the accused as a notorious 'wrong-doer'. On a prosecution for defamation it was held that the pleader was guilty as the libel was not uttered by him in the discharge of his duty as a pleader.¹⁴ The accused, a *mookhtiyar*, at the request of one B, drew out a petition containing certain defamatory charges against C, and declining to accept the *mookhtiyarnama* on B's behalf, gave him the petition to present it. It was held that although a *mookhtiyar* was not liable for defamation if, relying on the statements of his clients, he introduced into a pleading in good faith a defamatory averment, yet as the accused was not employed as a *mookhtiyar* in that case, and by his refusing to accept a *mookhtiyarnama*,

⁸ *Sankamma v. Govinda Chetty*, (1924) 20 L. W. 709, 26 Cr. L. J. 428, [1925] AIR (M) 246.

⁹ *Madan Singh*, (1888) 1 Weir 593.

¹⁰ *Ramaswami Mudaliar*, [1938] M. W. N. 217, 47 L. W. 186.

¹¹ *Rule*, [1937] 2 K. B. 375.

¹² *Syed Hussain*, (1881) Weir (3rd Edn.) 357.

¹³ *Nagarji Trikamji*, (1894) 19 Bom. 340.

¹⁴ *Purshottamdas Ranchhodas*, (1907) 9 Bom. L. R. 1287, 6 Cr. L. J. 387.

it was shown that the defamation of which he had been convicted was not published in the discharge of any duty, this Exception did not apply.¹⁵ Where a pleader, immediately after the close of a trial in which his client lost his case, wrote a letter to the client stating that there was a rumour prevalent that the Judge had received a bribe from the opposite party, and that the complainant, who had conveyed the bribe, had appropriated a portion of the same, it was held that, if a rumour really existed, the pleader would have been justified in communicating it with due care and attention; but that the pleader having, as it appeared, taken no pains to ascertain the truth of the rumour before repeating it, and having also taken very little pains to prevent the client, to whom the letter was addressed, from disclosing the statement to others, had not acted with the care and attention necessary to constitute good faith, and that he was not, therefore, protected by Exceptions 9 and 10.¹⁶

Exception 10.—"To bring this case within Exception X...it must be proved that the accused intended in good faith to convey a caution to one person against another, that such caution was intended for the good of the person to whom it was conveyed, or of some person in whom that person was interested, or for the public good, and that the caution should be conveyed by the proper means".¹⁷ But the conduct of the accused should not go beyond a legitimate desire to protect the interests of those to whom he made the imputation. If the accused speaks about the complainant violently and publicly he would not be protected.¹⁸

Cases.—Want of good faith.—The complainant, a Brahman, who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a *doshi*, or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice. It was held that the accused had not acted in good faith, and that the publication was not, under the circumstances, privileged and protected by this Exception.¹⁹ U, a woman, left her first husband and contracted a secret *pat* marriage with J, but the then *swami* of the community, to which the parties belonged, declared the connection as adulterous. Some years after, another *swami* of the community declared the second marriage valid. Certain members of the community, however, disapproved of this action of the *swami*, and addressed him several communications which elicited no reply from him. Thereupon, twelve of the villagers of the place published in a newspaper a notice which began by stating that "J having kept a concubine by name U has had offspring by her". It was held that they were guilty of defamation, for conceding that the allegations were made for the benefit of a portion of the public, still the accused had no privilege to disseminate them to a circle of readers wider than those who could possibly be interested in the allegations.²⁰ Where the accused published a circular purporting to say that at a *panchayat* held at a certain place it was resolved that the complainant who had been to England was not to be taken into caste and that those of their community, who associated with him, could be taken into the caste only on their undergoing a penance and on consenting to give up all connection with the complainant, and where it was found that no *panchayat* was actually held and the publication was not made in good faith, it was held that the accused was rightly convicted of the offence of defamation. The publication of the circular lowered the character of the complainant in respect of his caste as it represented the complainant to be one with whom to associate would entail excommunication on the members of his brotherhood associating with him.²¹

Caution conveyed in good faith.—The accused, with a number of other persons at a caste meeting, passed a resolution to the effect that "the Nilgiri people do not belong

¹⁵ *Chrestien*, (1870) 2 N. W. P. 473.

¹⁶ *Senthinathaiyar v. Gnanamuthu Nadan*, (1884) 1 Weir 594.

¹⁷ *Per Collins, C. J.*, in *Thiagaraya v. Krishnasami*, (1892) 15 Mad. 214, 217.

¹⁸ *Palani Asari*, (1882) 1 Weir 613.

¹⁹ *Thiagaraya v. Krishnasami*, (1892) 15 Mad. 214, 217.

²⁰ *Shiogouda*, (1901) 3 Bom. L. R. 188.

²¹ *Mukund Ram*, (1909) 6 A. L. J. R. 472, 9 Cr. L. J. 535.

to the caste" (to which the accused and the Mahrattas belonged), but that the complainant "seems to belong to the Rangari caste". It was admitted that the complainant was a Mahratta living in the Nilgiris. The members of the meeting arrived at this conclusion after making inquiries. The complainant had notice of the meeting and the resolution was recorded in a book kept by the caste *panchayat*. It was held that under the circumstances the accused were not guilty of defamation.²² A person was put out of caste by a meeting of his caste fellows for having taken water from the hands of a certain other person. The accused told some members of the caste not to take water from the hands of the person outcasted, as, if they did so, they would be liable to be excommunicated. It was held that the accused was protected by this Exception and was not guilty of defamation.²³

PRACTICE.

Evidence.—Prove (1) that the imputation in question consisted of words, spoken or intended to be read, or of signs, etc.

Although it cannot be laid down "as a universal proposition, that in no case where the actual words used have not been proved a conviction for defamation by word of mouth cannot be maintained, it must be conceded that in the majority of cases it should be so... When the question arises as to whether the words used were intended to harm or had the effect of harming the reputation, the court must be put in possession not only of the words used, but also of the context in which they were used, in order to find the intention and the effect of the words. If the court should accept, instead of the words and the context, the 'impression' (of the words used, and of the general conversation) 'left on the minds of the witnesses', it would be yielding its own duty to witnesses, with the result that the accused person will have no benefit of the opinion of the court itself".²⁴ In the same case, King, J., remarked: "It is unnecessary to prove the exact words used by the accused, for the purpose of supporting a conviction for oral defamation. It is sufficient to prove the purport or substance of the defamatory imputations. No honest witness would profess to remember the exact words used by a person who has been speaking for even 15 minutes. At the most he may remember some striking phrase or expression. But a witness's failure to recall the exact words used or the exact context in which they were spoken is immaterial, provided that he can give a sufficiently clear account of the purport of the defamatory remarks".²⁵

Where a charge of defamation is based on an answer to a question much turns upon the precise form of the question and the precise form of answer. If a Court is not satisfied on these matters, it is impossible to maintain a conviction. It is not sufficient for a Court to come to the conclusion that substantially something was said. The Court must be satisfied that certain words were used.¹

(2) That the imputation concerned the complainant.

It is not necessary that the whole world should read the subject-matter of the complaint as a libel, but the question is whether those who knew the parties, by putting a reasonable construction on the subject-matter, would consider it to refer to the complainant.²

(3) That such imputation emanated from the accused.

(4) That he made or published the same.

There must be evidence to show that the publication was made by the accused.³ The prosecution must affirmatively prove that the defendant published the libel complained of. Admissions as to publication in the written statement of the accused cannot be used to fill up the gap in the prosecution evidence.⁴ In a prosecution for libel the only evidence adduced of publication was that the particular issue of the journal containing the libel bore the statement that it was printed and published by the accused. The sworn complaint also stated that the accused published it, and the accused

²² *Salar Mannaji Row v. C. Herojee Row*, (1887) 1 Weir 614.

²³ *Umed Singh*, (1923) 46 All. 64.

²⁴ *Per Mukerji, J.*, in *Col. Bholanath*, (1928) 51 All. 313, 317.

²⁵ *Ibid.*, p. 330.

¹ *Jainarain*, (1940) P. W. N. 684, (1940) 41

Cr. L. J. 814, [1941] AIR (P) 9.

² *Kali Prasanna Kabyabisharad*, (1897) 1 C. W. N. 465.

³ *P. A. Mariano*, (1904) 10 Burma L. R. 304.

⁴ *Jeremiah v. Vas*, [1911] 2 M. W. N. 576, 22 M. L. J. 73, 12 Cr. L. J. 585.

said in the lower Court in his written statement that what was published was a substantially true report without any malicious intention and he did not deny that he published the libel. It was held that there was no legal evidence of publication.⁵

It is incumbent on the complainant to produce evidence to show that the accused made or published the imputation complained of notwithstanding the accused admits the publication when examined under s. 342 of the Code of Criminal Procedure. A Magistrate is neither empowered under that section to put questions to the accused if the prosecution has not let in evidence implicating him in the offence nor is his statement admissible in evidence to fill the gap in the absence of such evidence.⁶

On the prosecution of the editor of a newspaper for defamation by publishing a libel in his paper, an attested copy of a declaration made by the editor under s. 5 of Act XXV of 1867, to the effect that he was the printer and publisher of the newspaper was produced in evidence by the complainant. It was held that the declaration was *prima facie* proof of publication by the editor.⁷ If the manuscript of a libel be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, this is sufficient evidence to show that it was published by the accused, although there be no evidence given to show that the printing and publication were by the direction of the accused.⁸ Publication is sufficiently proved by the production of a printed copy.⁹

In the case of the editor of a paper "there is ground for the supposition that in the ordinary course he would keep in touch with what was going on in connection with this paper",¹⁰ during the temporary absence from the headquarters.

Every publication or circulation of libel constitutes a fresh and distinct act and therefore a separate offence.¹¹

(5) That he intended thereby to harm the reputation of the complainant, or that he knew or had reason to believe that it would do so. The intention of the accused must be gathered from the document complained of as a whole.¹² Intention like any other psychological fact has to be inferred from the act itself. The jury has to see whether the natural result of the act is not to harm the reputation of the persons attacked.¹³

The question of the physical and moral as distinguished from the legal character of the act of a person accused under this section is, like those which arise under other sections of the Code, one to be determined by considerations and inferences drawn from the common experience rather than from rules of legal construction.¹⁴

It is not an error in law for a Judge to require the accused to prove several distinct imputations contained in a libellous article published by him with the same strictness with which he would be required to prove them if he were the defendant in a civil action.¹⁵

Raising of inconsistent pleas.—It is open to the accused to raise different and inconsistent pleas. In a defamation case, the accused can plead that the passage was not defamatory because it bore a different significance or meaning from the one attributed to it by the complainant, and can also take the other alternative plea that it was defamatory because it bore the meaning given to it by the prosecution, it was an honest expression of opinion made in good faith and for the good of the public.¹⁶ It is open to an accused, in a case under this section, to adduce evidence and prove, even where the accused had denied having made the statement alleged to be defamatory, that the statement was true and made in good faith.¹⁷

Exceptions.—The Exceptions to the sections should be considered by the Court

⁵ *Jeremiah v. Vas*, [1911] 2 M. W. N. 576, 22 M. L. J. 73, 12 Cr. L. J. 505.

⁶ *Devi Dayal*, (1922) 4 Lah. 55.

⁷ *Ramasami v. Lokanada*, ((1886) 9 Mad. 387. See *Stanger*, (1871) L. R. 6 Q. B. 352; *Hart*, (1808) 10 East 94.

⁸ *Lovett*, (1839) 9 C. & P. 462.

⁹ *S. Soosai Naidu v. Revd. Father Darri-entort*, (1891) 1 Weir 579.

¹⁰ Per Fawcett, J., in *Manilal Harilal*, Crim. Rev. No. 160 of 1927, decided by Fawcett and Mirza, JJ., on November 14, 1927 (Unrep. Bom.).

¹¹ *Sardar Diwan Singh*, (1934) 36 Cr. L. J. 744, [1935] AIR (N) 90.

¹² *Laidman v. Hearsey*, (1885) 7 All. 906.

¹³ *Kali Prasanna Kabayabisharad*, (1897) 1 C. W. N. 465.

¹⁴ *Pitamber*, (1879) Unrep. Cr. C. 140.

¹⁵ *Kikabhai Parbhudas*, (1872) 9 B. H. C. 451.

¹⁶ *Balasubramania Mudaliar v. Rajagopalachariar*, (1944) 46 Cr. L. J. 71, [1944] M. W. N. 322, [1944] AIR (M) 484.

¹⁷ *Mohd. Husain*, [1945] A. L. J. R. 425, [1945] O. W. N. (H. C.) 334. (1), 47 Cr. L. J. 541, [1946] AIR (A) 146.

even if the accused does not specifically rely on them provided that the facts give rise to a consideration of these Exceptions.¹⁸

Truth as defence.—Where the accused intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he was not cross-examined.¹⁹ The accused is entitled to call evidence to prove that the allegations are true, even though he has denied making such allegations.²⁰

The Allahabad High Court has held that in a prosecution for defamation it is for the complainant to prove, irrespective of whether the accused has or has not specifically pleaded justification on the ground of public good, that the statement was false and that, if it was true, it was for the public good.²¹ The Nagpur High Court dissenting from this view has held that the burden is on the accused to establish a plea of justification and not on the complainant to prove that the statements complained of were false.²²

Where the accused having publicly charged a woman with being pregnant by adultery, requested the Court to have the complainant, the woman, medically examined in order that the truth or falsehood of the matter alleged might be satisfactorily established, it was held that there was no law which empowered the Courts to order such an examination in such a case.²³

Good faith.—The authors of the Code say : “Whether an imputation be or be not made in good faith is a question for the Courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case could arise respecting which a sensible and impartial judge would feel and doubt. If, for example, a public functionary were to prosecute for defamation a writer who had described him in general terms as incapable, the court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the court would, probably, be of opinion that the defendant had not written in good faith, and would convict him.

“On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the court would probably hold that the burden of proving good faith lay on the defendant. Thus if a person were to publish that a collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the courts would probably be of opinion that the imputation had not been made in good faith.

“Again, if a critic described a writer as a plagiarist, the courts would not consider this as defamation, without very strong proof of bad faith. But if it were proved that the critic had, like Lauder, interpolated passages in old books in order to bear out the charge of plagiarism, the court would doubtless be of opinion that he had not criticised in good faith, and would convict him of defamation.²⁴

Relevant facts.—A sues B for libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.²⁵

A sues B for a libel imputing disgraceful conduct to A ; B affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in

¹⁸ *Muhammad Gul v. Haji Fazley Karim*, (1929) 56 Cal. 1013.

¹⁹ *Dhum Singh*, (1884) 6 All. 220.

²⁰ *Abdul Aziz v. Fazal Rahman*, (1928) 30 Cr. L. J. 239.

²¹ *Umed Singh*, (1923) 46 All. 64.

²² *Sukhdayal v. Saraswati*, [1936] Nag. 217.

²³ *Pudmon*, (1889) Unrep. Cr. C. 474, Cr. R. No. 33 of 1889.

²⁴ Note R, p. 184.

²⁵ Indian Evidence Act, s. 6, ill. (c).

issue. The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.¹

A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B, showing ill-will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.²

Admissibility of evidence.—A sues B for libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.³

A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither. A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.⁴

Evidence of the complainant having previously acted as alleged in the libel is admissible.⁵ When defamation affects a person's general character then evidence of the general reputation of that person may be given to show that there was a reasonable ground for the imputation and thus to reduce the sentence.⁶ The accused was convicted for having defamed a public servant by publishing an imputation that the latter had compelled him to pay a bribe in order to avoid a prosecution for a certain offence. The accused wanted to produce evidence as to the complainant having taken bribes on other occasions, and general evidence as to the complainant's reputation, but this was disallowed by the trial Court. It was held that evidence as to the complainant having taken bribes on other specific occasions would be irrelevant, but that the accused was entitled to produce evidence to show that the complainant had the reputation of being a bribe-taker.⁷

Where on a charge for defamatory statements made by the accused in cross-examination, in a previous proceeding, the Courts below found that accused did utter the defamatory words which were not denied by him in his examination under s. 342, Criminal Procedure Code, it was held that the fact that the Magistrate in the previous proceeding did not record the exact question and answer relevant to the charge was immaterial.⁸

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Where a complaint shows that an imputation against the complainant's character has been made and that such imputation is *prima facie* defamatory, a Magistrate is bound to issue summons and is not at liberty to anticipate a case of privilege unless the privilege is distinctly admitted by the complainant.⁹ The examination and cross-examination of the complainant should be held in the presence of the Magistrate who has seisin of the case and passes final orders therein.¹⁰

A person who alleges that he has been defamed by a statement made on oath by a witness in a proceeding to which he has not been a party can move a Magistrate to entertain a complaint in respect of defamation without moving the Court in which the statement was made to make a complaint under s. 195 of the Criminal Procedure Code in respect of perjury committed before it. The Courts, however, should be slow to admit complaints of defamation where the circumstances are such that the accusation is really one of perjury; in such case the Court should be moved to make a complaint.¹¹

The Calcutta High Court has held that where an offence, though described as an offence under this section, still remains an offence punishable under s. 211, process should not issue under the former section on the application of a person discharged

¹ *Indian Evidence Act*, s. 9, ill. (b).

² *Ibid.*, s. 14, ill (e).

³ *Ibid.*, s. 32, ill. (n).

⁴ *Ibid.*, s. 43, ill. (a).

⁵ *Laidman v. Hearsey*, (1885) 7 All. 906.

⁶ *Chedi Lal*, (1888) 2 C. P. L. R. 198.

⁷ *Devi Dyal*, (1922) 4 Lah. 55.

⁸ *Shoo Karan Lal v. Bandi Prasad*, (1942)

21 Pat. 778.

⁹ *Periyasami Kotasami Tarre*, (1886) 1 Weir 580.

¹⁰ *Brindaban Chander Das v. Ishaquddin Chowdhry*, (1909) 13 C. W. N. 556, 16 Cr. L. J. 492.

¹¹ *Chotelal v. Phulchand*, [1937] Nag. 425.

or acquitted, when the Court has refused sanction under the latter section.¹² The Nagpur High Court has dissented from this view holding that a Court is not justified in refusing process for the offence of defamation merely because a report to the police may also disclose an offence under s. 211.¹³

Jurisdiction.—Where the publication of the defamatory matter is outside British India, the British Courts have no jurisdiction to try the offence.¹⁴ To maintain a prosecution for defamation in a particular Court, there must be a publication of the libel within the local limits of the jurisdiction of that Court. Where the alleged libel was said to be contained in a letter purporting to be written from Bangalore to England, it was held that to maintain a prosecution in the Bangalore Court, there must be evidence that the letter was handed over to somebody at Bangalore to be taken to the addressee or that it was posted at Bangalore.¹⁵ Where a defamatory letter was despatched from Hyderabad to Karachi and was received at Karachi there would be publication at Karachi and hence the Karachi Court has jurisdiction to entertain a complaint with regard to the offence of defamation.¹⁶

Complaint by aggrieved person necessary.—No Court shall take cognizance of the offence except upon a complaint made by the person aggrieved.¹⁷

A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant, is not a legal complaint made by the aggrieved person.¹⁸

The new proviso to s. 198 of the Criminal Procedure Code lays down that any person may with the leave of the Court make a complaint on behalf of a woman who ought not to be compelled to appear in public.¹⁹

Husband.—A husband is entitled to be a complainant where the alleged offence is defamation imputing unchastity to his wife.²⁰

Brother.—A brother, with whom lived his widowed sister, a Hindu lady, is entitled to complain about the defamation of his sister.²¹

Brother-in-law.—Where a person prosecuted another for defaming his sister-in-law, it was held that as there was no imputation made against the complainant there was no defamation of him, and his sister-in-law, being the person defamed, ought herself to have made the complaint.²²

President of Municipality.—The president of a Municipality is not a 'person aggrieved' within the meaning of s. 198 of the Criminal Procedure Code by the defamation of his subordinate officers.²³

Official superior.—A complaint made not by the person aggrieved but by his official superior should not be accepted.²⁴

High Priest.—The High Priest of the Borah community, if defamed, must himself file a complaint. The complaint cannot be filed by a member of the community empowered by the Priest.²⁵

Death of complainant.—Where in the course of a trial for defamation the com-

¹² *Prafulla Kumar Ghose v. Harendra Nath Chatterjee*, (1916) 44 Cal. 970.

¹³ *Mst. Pinia*, [1937] Nag. 338.

¹⁴ *Varnakole Illath Krishnan Nambudri v. Kotalmana Keshavan Embunitri*, (1900) 1 Weir 579.

¹⁵ *Burke v. Skipp*, (1923) 45 M. L. J. 754, 18 L. W. 718, [1923] M. W. N. 913, 25 Cr. L. J. 641, [1924] AIR (M) 340.

¹⁶ *Kundanmal*, (1943) 45 Cr. L. J. 105, [1943] AIR (S) 196.

¹⁷ Criminal Procedure Code, s. 198.

¹⁸ *Deokinandan*, (1887) 10 All. 39.

¹⁹ *Sheo Karan Lal v. Bandi Prasad*, (1942) 21 Pat. 778.

²⁰ *Chotalal Lallubhai v. Nathabhai Bechar*, (1900) 2 Bom. L. R. 665, 25 Bom. 151, F.B., overruling *Kustantini*, (1887) Cr. R. No. 14 of 1887, Unrep. Cr. C. 327; *Chellam Naidu v. Ramasami*, (1891) 14 Mad. 379; *Anantha Goundan*, (1904) 15 M. L. J. 224, 2 Cr. L. J.

381; *Appanna v. Akkanna*, (1924) 20 L. W. 921, 47 M. L. J. 746, 26 Cr. L. J. 521, [1925] AIR (M) 320; *Gurdit Singh*, (1924) 5 Lah. 301; *Dwijendra Nath v. Makhon Lal*, (1943) 45 Cr. L. J. 123, [1943] AIR (C) 564. In *David*, (1884) P. R. No. 22 of 1884, the husband prosecuted the accused for defaming himself though the imputation was said to have been made concerning his wife and the former Chief Court of the Punjab held that the conviction could not be sustained.

²¹ *Thakur Das Sar v. Adhar Chandra Missri*, (1904) 32 Cal. 425.

²² *Lakshman*, (1888) Unrep. Cr. C. 392, Cr. R. No. 48 of 1888.

²³ *Beauchamp v. Moore*, (1902) 26 Mad. 43.

²⁴ *Gaya Barhai*, (1922) 23 Cr. L. J. 641, [1923] AIR (O) 4.

²⁵ *Hussainbhai Ismailji*, (1934) 29 S. L. R. 39, 36 Cr. L. J. 975, [1935] AIR (S) 98.

plainant dies, the Magistrate need not discharge the accused but can continue with the trial. Such a course would ordinarily be desirable where the defamation alleged is against the complainant in his public capacity.¹

Complaint by Court.—A complaint for defamation in respect of a statement made during judicial proceedings can be made by a private person without the sanction of the Magistrate before whom the alleged defamatory statement was made. The Magistrate on his own authority cannot take any initiative under s. 198, Criminal Procedure Code.² The Madras High Court has taken the same view.³

Dismissal of complaint by Court.—A Magistrate cannot dismiss a complaint on oath on the ground that there is a possibility that the accused will be able to shelter himself behind some explanations to the section. All that the Magistrate should direct his attention to at that stage is to ascertain whether there is any reason for disbelieving the complaint on oath and not whether there is some possibility that the accused might have some defence to the complaint, if true.⁴

Sanction to prosecute Judge for words uttered on bench.—The Madras High Court has held that a complaint against a Judge, who has used defamatory language to a witness during the trial of a suit cannot be entertained by a Magistrate in the absence of sanction of Government or the High Court under s. 197 of the Criminal Procedure Code.⁵ Similarly, the former Chief Court of the Punjab had held that a charge against a Munsiff of using defamatory language while he was sitting in his Court as a Judge and the complainant's case was actually before him could not be entertained by a Magistrate, without the previous sanction of Government.⁶ The Calcutta High Court has, however, decided, where a pleader applied for sanction to prosecute a Magistrate for using defamatory language towards him in the course of a trial of a case, that no such sanction was necessary, unless the Judge or public servant committed an offence in his judicial or official capacity.⁷

Sanction.—A prosecution for defamation of the complainant in a criminal case at the instance of the accused, on the ground that the former had brought a false charge of theft against the latter of which he had been acquitted cannot be refused or quashed on the ground that it had the intention or effect of avoiding s. 195, Criminal Procedure Code, when no sanction was asked for or refused.⁸

The sanction of the Court appointing a receiver is not necessary in order to proceed against him for defamation.⁹

Sections 182 and 500.—A complaint for defamation [cannot be dismissed on the technical ground that the offence of defamation charged merged in an offence punishable under s. 182 and that no sanction was obtained for prosecution under the latter section as required by s. 195, Criminal Procedure Code.¹⁰ Such complaint can be entertained notwithstanding that the accused could have been prosecuted on the same facts under s. 182 on the complaint of a public servant.¹¹ An acquittal on a charge of giving false information to a public servant, under s. 182, on the ground that the person to whom the information was given was not a public servant, is no bar to a trial under s. 500 for defamation.¹² The refusal of an application for sanction to prosecute a party to a judicial proceeding, under ss. 182 and 193, is not a bar, under s. 403, Criminal

¹ *U Tin Maung*, [1941] Ran. 224.

² *Mohammad Isa v. Nazim Husain*, [1940] All. 314; *Chotelal v. Phulchand*, [1937] Nag. 425; *Satish Chandra Chakravarty v. Ram Doyal De*, (1920) 48 Cal. 388, s.b.

³ *Nallappa Gounden v. Chinnammal*, [1942] Mad. 158, overruling *Shanmugasundaram Pillai v. Manicka Mudaliar*, (1938) 49 L. W. 102, [1939] M. W. N. 192 (1), [1939] 1 M. L. J. 412, *Ganapathy Asari v. Kuppuswamy Asari*, [1939] 1 M. L. J. 614, [1939] M. W. N. 320, (1939) 46 L. W. 456, 40 Cr. L. J. 757, [1939] AIR (M) 493, and *Ramaswami Konar v. Nachiar Ammal*, [1940] M. W. N. 867.

⁴ *Shreedani Pathak v. Budheshwar Dubey*, (1939) 21 P. L. T. 608, 41 Cr. L. J. 504, [1940] AIR (P) 179.

⁵ *Gulam Muhammad Sharif-ud-daulah*, (1886) 9 Mad. 439.

⁶ *Amir Singh*, (1904) P. R. No. 29 of 1904, 2 Cr. L. J. 119.

⁷ *Nando Lal Basak v. Mitter*, (1899) 26 Cal. 852. See *Parshram Keshav*, (1870) 7 B. H. C. (Cr. C.) 61, and *Lakshman Sakharam*, (1877) 2 Bom. 481.

⁸ *Guru Prasad v. Rameshwar*, (1938) 42 C. W. N. 674.

⁹ *Nagendra Nath Srimoney v. Jogendra Nath Srimoney*, (1912) 13 Cr. L. J. 491.

¹⁰ *Krishna Row v. Appasaewami Aiyar*, (1891) 1 Weir 585.

¹¹ *U Aung Pe*, [1938] Ran. 404, F.B.

¹² *Ramsebak Lal v. Muneshwar Singh*, (1910) 37 Cal. 604; *U Aung Pe*, [1938] Ran. 404, F.B.

Procedure Code, to his prosecution for defamation.¹³ Section 500 is not included in the list of sections contained in s. 95 (1) (b) of the Criminal Procedure Code.¹⁴

Sections 193 and 500.—A complaint by the Court is necessary for a prosecution for an offence under s. 193 and the parties cannot be permitted to evade that provision of law by filing a complaint for defamation.¹⁵

Sections 211 and 500.—Where an offence, though described as an offence under s. 500, still remains an offence “punishable” under s. 211, process should not issue under the former section on the application of a person discharged or acquitted, when the Court has refused sanction under the latter section.¹⁶

Petition containing defamatory allegations against a Magistrate.—Where a prisoner applied to the High Court to be admitted to bail, pending the disposal of his appeal, and the petition contained defamatory allegations, consisting *inter alia* of irrelevant attacks on the trying Magistrate and other officers in the service of the Government, the Court refused to allow the petition to be filed, and ordered it to be returned.¹⁷

Charge.—In framing a charge it is not necessary to negative the Exceptions contained in this section.¹⁸ But the charge should specify directly the persons whose reputation is injuriously affected.¹⁹ It must set forth the particular occasions on which the defamation was said to have been committed, so as to give the accused an opportunity of defending himself with reference to each act alleged to have been committed by him.²⁰ Where a document alleged to contain defamatory matter contains a multitude of statements it is not correct to incorporate the whole of the document in the charge and thus to leave it to the accused to find out which exactly are the imputations that were intended or believed to cause harm to the reputation of the opposite party.²¹

It should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, defamed AB, by making or publishing to CD a certain imputation concerning the said AB, to wit (*state the defamatory matter*), by means of spoken words [*or writing or signs or visible representations*], intending to harm, or knowing or having reason to believe that such imputation would harm the reputation of the said AB; and you thereby committed an offence punishable under s. 500 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Destruction of defamatory matter.—Where certain passages in a book were charged to be defamatory and were so found, the proper order is that those passages should be destroyed and an order directing the destruction of the book cannot be sustained.²²

Punishment.—Where abusive words were used by a person about another in the heat of passion owing to a quarrel having taken place between them, the offence was held not to require a severe sentence.²³ But where there is no substantial defence, an immediate apology in the widest and most unreserved terms may fairly be presumed to lessen the punishment.²⁴

The mere circumstance that the accused is not the writer of the article or is a dummy editor is no ground by itself for reduction of the sentence. Ordinarily, a

¹³ *Satish Chandra Chakravarti v. Ram Poyal De*, (1920) 48 Cal. 388, s.b.; *Ghamandi Nath v. Babu Lal*, (1929) 51 All. 977.

¹⁴ *U Aung Pe*, [1938] Ran. 404, F.B.

¹⁵ *Kalkumatham Gurubasayya v. Sanna Setra Siddalingappa*, [1940] 1 M. L. J. 689, [1940] M. W. N. 392, [1939] 51 L. W. 401, 41 Cr. L. J. 906, [1940] AIR (M) 677.

¹⁶ *Prafulla Kumar Ghose v. Harendra Nath Chatterjee*, (1916) 44 Cal. 970.

¹⁷ *Clive Durant*, (1889) 15 Bom. 488.

¹⁸ *Kikabhat Parbhudas*, (1872) 9 B. H. C.

451.

¹⁹ Weir, 3 Edn., 357.

²⁰ *Bishwanath Das v. Keshab Gandhabnaik*, (1902) 30 Cal. 402; *Ali Mahomed*, (1929) 30 Cr. L. J. 1073, [1930] AIR (S) 62.

²¹ *Muhammad Gul v. Haji Fazley Karim*, (1929) 56 Cal. 1013.

²² *Sumitramma v. Krishnamurthi Sastri*, [1940] M. W. N. 532.

²³ *Maung Maung*, (1928) 2 B. L. J. 10.

²⁴ *Mohammad Nazir*, (1928) 26 A. L. J. R. 509, 30 Cr. L. J. 766, [1928] AIR (A) 321.

person who for monetary or other consideration allows himself to be used as a 'blind' for concealing the identity of the 'real' editor and thus assists the latter in deceiving the public and defeating the law cannot be heard to argue in mitigation of his guilt that he was a mere figure-head and must bear the full consequence of his acts.²⁵

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Printing or engraving matter known to be defamatory.

COMMENT.

This is a distinct offence from the one under s. 500.¹ The person printing or engraving defamatory matter abets the offence. This section makes such abetment a distinct offence.

Ingredients.—This section requires two things:—

1. Printing or engraving of any matter.
2. Knowledge or reason to believe that such matter is defamatory.

PRACTICE.

Evidence.—Prove (1) that the matter in question is defamatory (*vide* s. 499).

(2) That the accused printed or engraved it.

(3) That when he did so he knew or had reason to believe that such matter was defamatory.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Destruction of libellous matter.—On a conviction under this section the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.²

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, printed or engraved some matter, to wit—, knowing or having good reason to believe that the same was defamatory, and that you thereby committed an offence punishable under s. 501 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*if the case is tried by Magistrate omit these words*)] on the said charge.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sale of printed or engraved substance containing defamatory matter.

COMMENT.

This section supplements the provisions of the previous section by making the seller of defamatory matter punishable under it.

Ingredients.—This section has two essentials:—

1. Selling or offering for sale any printed or engraved substance.
2. Knowledge that such substance contains defamatory matter.

"It is, no doubt, necessary in order to substantiate a charge under s. 502 to prove that the seller of a printed substance knows its contents, which imports proof

²⁵ *Azis Ahmad*, (1928) 29 Cr. L. J. 684, [1928] AIR (L) 865.

¹ *Uma Shankar*, (1889) P. R. No. 18 of 1889.

² Criminal Procedure Code, s. 521 (1).

that he understands the language used, and to prove that its contents are defamatory, but there appears to be no need, if the contents are defamatory, to prove further that he knows them to be defamatory. In cases where it is necessary to prove against a person that he has committed defamation by publishing an imputation, when the matter published is *per se* defamatory, all that the prosecution is bound to prove, in the first instance, is the fact of publication. When the tendency of the imputation published concerning any person, is to harm the reputation of that person, a Court is fully justified in inferring from the terms of the matter itself that the publisher intended to harm or knew or had reason to believe that such imputation would harm his reputation... But is there no *mens rea* in the definition of the offence falling under s. 502? The definition requires knowledge that the printed substance sold contains defamatory matter. A person who conducts a business in the course of which he is liable to sell books or papers, or the like, which may contain matter which is injurious to the reputation of another person, and may be in fact defamatory as defined in the Penal Code, is bound by reason of the penalty imposed by this section, if not otherwise, to abstain from selling any book or the like, which to his knowledge contains matter which is defamatory. If he sells in ignorance of the contents, he is not guilty of an offence under this section. If he sells, notwithstanding knowledge of the contents, and the contents are defamatory, he is guilty. The seller in India is, if I rightly understand the English law on the subject, in a better position than persons in England, who, in the course of their business, sell books or paper containing defamatory matter, for the latter are liable criminally as well as civilly, whether or not they know the contents of the printed substance sold".³

PRACTICE.

Evidence.—Prove (1) that the matter is defamatory (*vide* s. 494).

(2) That it is printed or engraved on the substance in question.

(3) That the accused sold, or offered for sale, that substance.

(4) That he then knew that it contained such defamatory matter.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Destruction of libellous matter.—See s. 521, Criminal Procedure Code.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, sold or offered for sale any printed (*or engraved*) substance, to wit—, containing defamatory matter knowing that it contained such matter, and that you thereby committed an offence punishable under s. 502 of the Indian Penal Code and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)]*.

And I hereby direct that you be tried [by the said Court (*if the case is tried by Magistrate omit these words*)] on the said charge.

* Per Plowden, J., in *Sardar Dayal Singh*, (1891) P. R. No. 8 of 1891, at pp. 25, 26.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested,¹ with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat,² commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

ILLUSTRATION.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

COMMENT.

Criminal intimidation is closely analogous to extortion. In extortion, the immediate purpose is obtaining money or money's worth; in criminal intimidation, the immediate purpose is to induce the person threatened to do, or abstain from doing, something which he was not legally bound to do or omit.

Ingredients.—This section has the following essentials:—

1. Threatening a person with any injury
 - (i) to his person, reputation, or property; or
 - (ii) to the person or reputation of any one in whom that person is interested.
2. Threat must be with intent
 - (a) to cause alarm to that person, or
 - (b) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
 - (c) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

1. 'Whoever threatens another with any injury to his person, reputation or property, etc'.—The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened, and it is clear that before it can have any effect upon his mind it must be either made to him by the person threatening or communicated to him in some way. The threat referred to in this section must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind.¹

The question whether the threat amounts to a criminal intimidation or not, does not depend on the nerves of the individual threatened; if it is such a threat as may overcome the ordinary free will of a firm man, or whatever the nature of the threat, if it is made with the intention mentioned in the section, it is an offence.²

The threat need not be addressed to the prosecutor direct. It is sufficient if the threat, though addressed to third parties, was intended to reach the prosecutor as the party threatened,³ e.g. threat to a person's pleader.⁴ To advise others not to deal with a man is an injurious act but does not amount to a threat, and the harm

¹ *Gunga Chunder Sen v. Gour Chunder Banikya*, (1888) 15 Cal. 671, 673.

² *M. & M.* 540.

³ (1865) 1 Weir 622; *Palani Goundan*, (1892)

1 Weir 623.

⁴ *Syed Mahomed v. Sarwarkhan*, (1882) 5 C. P. L. R. (Cr.) 50.

caused thereby is not to property already possessed by that man but rather to his opportunities of future gain.⁵

A firm cannot commit this offence.⁶

'Injury'.—See s. 44, *supra*. There can be no criminal intimidation where the injury of which complaint is made is the hardship arising from a conventional punishment which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the caste, is competent to inflict.⁷ The harm threatened must be illegal.⁸ A certain President of a self-constituted Arbitration Court caused a notice to be issued over his signature to a certain person requesting the latter to be present on a given date and arrange for amicable settlement of a certain claim. The notice concluded with the statement that if the defendant did not give an answer (or file a written statement) on that date, the suit would be decreed *ex parte*. It was held that a threat of a decree is a threat of harm to an individual in his person, reputation or property. That the tribunal is incompetent to execute its decree is immaterial. This section says nothing about the capacity of the person making the threat to carry it into execution. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial. Under s. 44, injury denotes harm illegally caused. By no legal process or means could the Court make or give effect to such a decree as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it. Therefore, in that the notice threatened the complainant with such a decree, it threatened the complainant with harm to be caused illegally. The accused was, therefore, held guilty of the offence of criminal intimidation.⁹

'Person'.—That is, the individuality of a human being; individual character or station; bodily...form or substance.

A notice for service was taken to the accused by a constable and when the accused proceeded to write something on it, the constable said that nothing should be written on the back of the notice, except signature in acknowledgment of service. The accused threw away the notice and threatened the constable by saying, "go away, otherwise I shall break your hands and feet. I have seen many such notices". It was held that he was guilty of an offence under this section.¹⁰

'Reputation'.—That is, credit, honour, character, good name.¹¹

'Or to the person or reputation of any one in whom that person is interested'.—In the case of injury to a third person in whom the person threatened is interested, the injury should be to his person or reputation. Injury to the property only of the third person does not come within the purview of the section, though injury to the property of the person threatened does.

2. **'Intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act...as the means of avoiding the...threat'.**—The threat must be with intent to cause alarm to that person or to cause that person to do or omit to do any act as the means of avoiding the execution of such threat. See s. 43, *supra*, for the meaning of 'legally bound to do'.

A letter written by a firm of solicitors on behalf of a lay client, warning a person of criminal proceedings if he continued to make defamatory statements but offering not to take any action if he undertook to discontinue making such statements, does not bring the client under this section or s. 506 of the Code.¹²

Threat of vengeance.—A constable was sent to fetch to a Police Inspector some persons from whom the latter wished to make inquiries regarding an offence. While the constable was taking two persons with him, the accused came up and threatened

⁵ *Ghisa Mal*, (1888) 1 O. D. 215.

⁶ *T. G. Studdert v. J. F. Logan*, (1937) 41 C. W. N. 881, 38 Cr. L. J. 924, [1937] AIR (C) 387.

⁷ *Sankara Narasimha Bharathi*, (1883) 6 Mad. 881.

⁸ *Nga Shwe Waing*, (1900) 1 U. B. R. (1897-1901) 352.

⁹ *Priyanath Gupta v. Lal Jhi Chowkidar*,

(1923) 27 C. W. N. 479, 37 C. L. J. 526, 24 Cr. L. J. 896, [1923] AIR (C) 590.

¹⁰ *Mohammad Ahmad Khan*, [1936] A. L. J. R. 195, 37 Cr. L. J. 212, [1936] AIR (A) 171.

¹¹ Wharton, 14th Edn., p. 871.

¹² *T. G. Studdert v. J. F. Logan*, (1937) 41 C. W. N. 831, 38 Cr. L. J. 924, [1947] AIR (C) 387.

them both and the constable with the head constable's vengeance, and as a consequence the two persons refused to accompany the constable who had to go without them. It was held that the accused had committed this offence.¹³

Threat of excommunication.—Where the accused told the complainant, a member of their caste, that he should give up his field or else they would put him out of caste, it was held that this offence had not been committed.¹⁴

Threat of killing.—Where the accused and his brother having had a quarrel, the former ran off and fetched a sword, but was seized by other persons and was disarmed, he then asserted his intention of killing his brother if he was let go, it was held that the words used by the accused could not be construed into a threat within the meaning of this section.¹⁵

Threat of imprisonment.—Where the accused went to the complainant, a brother of an adult woman, and told him that he had come from the Government, and would get him six months' imprisonment if he did not let his sister go, it was held that those words did not constitute criminal intimidation, there having been no threat of an injury within the meaning of the Code or any other offence.¹⁶ But where a person held out threats to several persons to get them implicated and imprisoned if they kept to the terms of an *ikrarnama* (entered into by parties to keep the peace during *Moharram* festival), he was held guilty of this offence.¹⁷

Threat of dismissal.—Where the accused held out a threat of getting a head constable of police dismissed from service, it was held that this did not amount to a threat of injury as was punishable under this section.¹⁸

Threat of ruining by cases.—Where the accused who threatened to ruin the complainant by cases was convicted of criminal intimidation, it was held that the conviction could not stand. The Court said that had the threat been to ruin the complainant by false cases, the offence would have been committed; but as the threat was to ruin him by cases, it could not be assumed that by cases was meant false cases.¹⁹ A threat, in order to be indictable, must be made with intent to cause alarm to the complainant. Mere vague allegation by the accused that he was going to take revenge by false complaints could not amount to criminal intimidation.²⁰ A threat by a person, who was called upon to pay house-tax under a warrant for the attachment of his brother's property, that he would take legal steps, was not a threat of injury as defined in the Code.²¹

Threat of picketing.—The accused gave a notice to a shopkeeper requiring him to execute an agreement not to import for one year any foreign cloth for sale at his shop and intimating that on his failure to do so his shop would be picketed. At that time picketing was not an offence. The proposed agreement did not prohibit the sale of foreign cloth already in stock. It was held that the accused were guilty of criminal intimidation. Prohibition from importing for one year the articles in which the shop dealt would, in the ordinary course of business, cause injury to the property of the shopkeeper.²²

Threat of social boycott.—Where the conviction of the accused was based only on the two threats uttered by him, viz. (1) that the complainant would be socially boycotted, and (2) that on his death no one would carry his dead body to the place of burial if he continued to deal in foreign cloth, such threats did not amount to offences under this section and the conviction was not sustained. The fact that the complainant was a pious Mahomedan was immaterial.²³

Public servant threatened to draw up false document.—Where the accused in offering resistance to a police-officer compelled him to draw up a document to the

¹³ *Purshotam Vanamali*, (1896) Unrep. Cr. C. 850, Cr. R. No. 18 of 1896.

¹⁴ *Alya Dhurma*, (1870) Unrep. Cr. C. 37, Cr. R. August 17, 1870; *Fakirappa*, (1882) Unrep. Cr. C. 186.

¹⁵ *Data Ram*, (1882) P. R. No. 45 of 1882.

¹⁶ *Moroba Bhaskarji*, (1871) 8 B. H. C. (Cr. C.) 101.

¹⁷ *Ata Husain*, (1885) 6 A. W. N. 41.

¹⁸ *Dada Hanmant Dani*, (1895) 20 Bom. 794.

¹⁹ *Jowahir Pattak v. Parbhoo Ahir*. (1902) 30

Cal. 418; *Chithraputtra Pillai v. Parvati*, (1896) 1 Weir 623.

²⁰ *Govind Raoji Thosur*, (1900) 2 Bom. L. R. 55.

²¹ *Dayabhai Narottamdas*, (1906) Crim. Ref. No. 67 of 1906. *Cor. Batty and Heaton, JJ.*, decided on November 22, 1906 (Unrep. Bom.).

²² *Raghobar Dayal*, (1930) 53 All. 407.

²³ *Ghulam Muhammad*, (1931) 32 Cr. L. J. 1716.

effect that a search was conducted and nothing incriminating was found, it was held that they were guilty of an offence under this section.²⁴

Person informed about threatened injury to another person must be interested in that person.—The accused sent a fabricated petition to the Revenue Commissioner, S. D., containing a threat that a certain Forest Officer would be killed, if he were not removed elsewhere. It was found that the Commissioner had neither official nor personal interest in the Forest Officer. It was held that, as the person to whom the petition was addressed was not interested in the person threatened, the act intended and done by the accused did not amount to criminal intimidation.²⁵ A threat to commit suicide is not within the section unless the other person be interested in the person making the threat.¹

504. Whoever intentionally insults,¹ and thereby gives provocation to any person,² intending or knowing it to be likely that such provocation will cause him to break the public peace,³ or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Intentional insult with intent to provoke breach of the peace.

COMMENT.

Object.—This section is intended to deal with persons who are as responsible for breaches of the peace or the commission of offences as those who openly abet or incite them.² An imputation not defamatory may be uttered in the hearing of the person who is the object of it, for the purpose of provoking that person to break the public peace. If so, it is punishable under this section. A person also comes within the ambit of the section if the provocation offered by him is of such a character as to cause the person provoked “to commit any other offence.”³ The authors of the Code observe: “There are many cases in which it is fit that unpleasant truth should be told respecting an individual. But there is no case in which it is desirable that such truth should be told in such a way that the telling of it is a gross personal outrage. A person who has detected, or thinks that he has detected, a dishonest misrepresentation in a book has a right to expose it publicly. But he cannot be allowed to intrude into the presence of the author of the book, and to tell him to his face that he is a liar. A person who knows the mistress of a female school to be a woman of infamous character deserves well of society if he states what he knows. But he cannot be allowed to follow her through the streets calling her by opprobrious names, though he may be able to prove that all those names were merited. A person who brings to notice the malversation of a public functionary deserves applause. But a person who hangs a public functionary in effigy at that functionary’s door, with an opprobrious label, does what cannot be permitted, even though every word on the label, and every imputation which the exhibition was meant to convey, may be perfectly true.”⁴

This section provides a remedy for using abusive and insulting language.⁵ It requires an intention to insult and thereby to give provocation to the person insulted and an intention that such provocation should cause or the knowledge that that provocation is likely to cause the person so insulted to break the public peace or commit any other offence.⁶

Sections 499 and 504.—The difference between an offence under s. 504 and s. 499 lies in the fact that in the latter publication to the prosecutor alone is not sufficient, as such an imputation could not be said to harm the reputation of the person; but according to the former this would be a complete offence. Section 504 corresponds

²⁴ *Nirmal Singh*, (1919) 42 All. 67.

²⁵ *Mangesh Jiraji*, (1887) 11 Bom. 376.

¹ *Nubi Buksh v. Must. Oomra*, (1866) P. R. No. 109 of 1866; *Chikati Gururadu*, (1881) Weir (3rd Edn.) 890.

² *Subbiah v. Venkata Subbamma*, [1942] 2 M. L. J. 101, [1942] M. W. N. 437, (1942) 55 L. W. 421, 45 Cr. L. J. 10, [1942] AIR (M) 672.

³ *Gul Muhammad v. Akbar Ali*, (1926) 28 Cr. L. J. 172, [1927] AIR (L) 129 (2); *Vaz v. Dias*, (1929) 32 Bom. L. R. 103.

⁴ Note R, p. 185.

⁵ See *Girish Chunder Mitter v. Jatadhari Sadukhan*, (1899) 26 Cal. 653, 663, F.B.

⁶ *Chairat Valtam*, (1935) 36 Cr. L. J. 1401, [1935] AIR (S) 107 (1).

precisely with those cases in which, under the English law, defamatory matter published to the prosecutor alone would be indictable as libellous.

Ingredients.—This section requires :—

1. Intentional insult.
2. The insult must be such as to give provocation to the person insulted.
3. Intention that such provocation should cause, or knowledge that such provocation was likely to cause, the person so insulted to break the public peace or to commit any other offence.

1. '**Intentionally insults**'.—There is nothing in this section which confines the "insult" to spoken words as distinguished from words written in a letter.⁷ An "insult" is no less intentional because it is incidental to another insult or even to another statement or proceeding which is not insulting. But to insult another intentionally is not an offence unless the offender intends by that insult to provoke the other person into breaking the public peace, by assaulting him or getting him assaulted or reviling him in loud or angry tones or in any other way, or at least knows that such a disturbance is a probable result of his insult.⁸ The word 'insult' signifies, to treat with offensive disrespect, to offer indignity to. Such insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken.⁹ If the insult alleged consisted of spoken words only, it would be essential that the words should be stated in order to ascertain whether or not the words so used would constitute an insult to the mind of an ordinary person, but insult may arise out of the conduct or action of a man, irrespective of spoken words.¹⁰ An insult even if a gross insult is not an offence in itself under this section.¹¹ The section refers to an insult intentionally inflicted and which is likely to result in a breach of the peace.¹² As to what constitutes an insult depends on the calm, dispassionate opinion of the Judge, whether the act complained of, from its nature and attendant circumstances, was calculated to insult, and was done with intent to insult, the complainant, and it did not depend on the sensitive feelings of the complainant. The offence is not made to depend upon the sensitive feelings or excitable temper of the person insulted, but on the intention or knowledge of the offender. Whatever the previous provocation, a man who pulls the beard of a Mahomedan in a public street, intentionally insults him and thereby causes him provocation, knowing that such provocation is likely to cause a breach of the public peace.¹³

Abusive words.—Mere abuse unaccompanied by an intention to cause a breach of the peace or knowledge that a breach of the peace is likely does not come within this section.¹⁴ If abusive language is used in such circumstances that the Court comes to the conclusion that it cannot possibly have been intended, and cannot have been understood by those to whom it was addressed to have been intended, to be taken literally, the language does not amount to an intentional insult. It may no doubt be that the use of abusive language may form an important part of an insult by conduct.¹⁵ If abusive language is used intentionally and is of such a nature as would, in the ordinary course of events, lead the person insulted to break the peace or to commit another offence under the law, the case is not taken away from the purview of this section, merely because the insulted person exercised self-control, or being terrified by the insult, or overawed by the personality of the offender, did not actually break the peace, or commit another offence.¹⁶ The Court has not to judge the temperament or the idiosyncracies of the individual concerned. The Court should try to find out what, in the ordinary circumstances, would have been the effect of the abusive language used. The mere fact that the complainant was a Bania (belonging to a peaceful com-

⁷ *Vaz v. Dias*, (1929) 32 Bom. L. R. 108.

⁸ Per Hallifax, A. J. C., in *R. M. Siffles v. M. R. Dixit*, (1928) 25 Cr. L. J. 1079, 7 N. L. J. 57, [1924] AIR (N) 121; *Vaz v. Dias*, *ibid.*

⁹ *Jaykrishna*, (1916) 24 C. L. J. 187, 188, 21 C. W. N. 95, 97, 18 Cr. L. J. 17.

¹⁰ *Habib Khan v. Mazharul Haque*, (1917) 18 Cr. L. J. 463, [1917] AIR (P) 658.

¹¹ *Subbiah v. Venkata Subbamma*, [1942] 2 M. L. J. 101, [1942] M. W. N. 437, (1942) 55 L. W. 421, 45 Cr. L. J. 10, [1942] AIR (M) 672.

¹² *Moti Lal*, (1901) 24 All. 155.

¹³ *Bhagwan Das v. Saddiq Ahmad*, (1924) 23 A. L. J. R. 73, 26 Cr. L. J. 703, [1925] AIR (A) 318.

¹⁴ *Vaz v. Dias*, *supra*.

¹⁵ *Rangel*, (1931) 34 Bom. L. R. 282, 56 Bom. 196.

¹⁶ *Kanshi Ram v. Fazal Mohammad*, (1932) 14 Lah. 92; *Vaz v. Dias*, *supra*; *Subbiah v. Venkata Subbamma*, [1942] 2 M. L. J. 101, [1942] M. W. N. 437, (1942) 55 L. W. 421, 45 Cr. L. J. 10, [1942] AIR (M) 672.

munity) was no reason to hold that no breach of the peace could possibly result if he was insulted.¹⁷ Where abusive words are used it is necessary to know what those words are in order to decide whether the using of those words amounted to intentional insult.¹⁸

2. 'Thereby gives provocation to any person'.—It is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. The public peace can be broken by angry words as well as by deeds.¹⁹

3. 'Intending or knowing it to be likely that such provocation will cause him to break the public peace'.—An offence under this section does not necessarily involve a breach of the peace. It involves only an intention to provoke a breach of the 'public peace', or knowledge that the provocation given is likely to cause a breach of the peace.²⁰ Mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely.²¹ The law makes punishable the insulting provocation which, under ordinary circumstances, would cause a breach of the peace to be committed, and the offender is not protected from the consequences of his act because the person insulted does not accept the provocation in the manner intended. Where, therefore, A abused B to such an extent as to reduce B to a state of abject terror, it was held that A having given to B such provocation as would, under ordinary circumstances, have caused a breach of the peace, was guilty of this offence.²² But where the accused, who was one of the proprietors of a hall, came on the stage and remarked, "The contractor has taken away the money. All of them have left. If you ask us for money we will beat you with shoes,"²³ and where the accused said to an Assistant Sub-Inspector of Police, during an investigation, "You are a tyrant. Justice cannot be expected from you,"²⁴ this offence was not committed. The insult again may be of such a character that a person of ordinary temperament would not complain of the abuse and the abuse might come within the terms of s. 95.²⁵

If the provocation is not of such a character as to cause the person provoked to break the public peace or to commit any other offence no offence under this section is committed. Where a furniture dealer was alleged to have insulted a European lady customer by not getting up when she entered into the shop and by refusing to give her some pieces of furniture which her husband had on the previous day asked him to supply on hire, it was held that although his conduct might be very discourteous, rude and insolent, yet that could not be sufficient to bring him within the purview of this section.¹ Where a photographer prepared some prints, at the instance of another person, in which there was a black spot where the picture of the complainant should have appeared but there was no evidence of publication to the complainant, that is to say, there was no evidence to show that the photographer brandished the photograph before the complainant or that he transmitted it to him, it was held that the offence under this section had not been committed by the photographer.²

C A S E S .

Refusal to have social intercourse.—A complaint by certain Hindu goldsmiths, members of a sect known as *shumsees*, in which it was alleged that the other Hindu inhabitants of the village, in which they resided, refused to have any social intercourse with them, as Hindus, and excluded them from the use of wells used by the Hindus, was held not to be maintainable under this section.³

¹⁷ *Guran Ditta*, (1930) 31 P. L. R. 892, 32 Cr. L. J. 62, [1930] AIR (L) 344 (2).

¹⁸ *Karumuri Venkataratnam*, [1947] 1 M. L. J. 359, [1947] M. W. N. 279, 6 L. W. 271, 48 Cr. L. J. 970.

¹⁹ *Chunibhai Dahyabhai*, (1902) 4 Bom. L. R. 78.

²⁰ *Sadho Ram*, (1931) 7 Luck. 578.

²¹ *Kuppuswami Aiyar*, (1915) 39 Mad. 561; *Mahadeo Jagoba v. Ramlal Gowardhan Das*, (1984) 85 Cr. L. J. 1420, [1934] AIR (N) 239.

²² *Jogayya*, (1887) 10 Mad. 353; *Sooraparazu Singayya*, (1894) 1 Weir 621; *Syed Mahomed*, (1900) 1 Weir 622; *Mi Te*, (1894) 1 U. B. R. (1892-1896) 290.

²³ *Surayya*, [1935] M. W. N. 819.

²⁴ *Nasir Khan*, (1935) 86 Cr. L. J. 1210, [1935] AIR (Pesh.) 122.

²⁵ *Vaz v. Dias*, (1929) 32 Bom. L. R. 103; *Rangel*, (1931) 34 Bom. L. R. 282, 56 Bom. 196; *J. Nash Fireman v. Mrs. V. Vanspall*, (1935) 37 Cr. L. J. 296, 18 N. L. J. 170.

¹ *Rahim Baksh*, (1920) 18 A. L. J. R. 515, 21 Cr. L. J. 451, [1920] AIR (A) 10.

² *Gaurishanker v. Backha Singh*, [1938] P. W. N. 812, 19 P. L. T. 892, 39 Cr. L. J. 980 (1), [1939] AIR (P) 27.

³ *Ramditta v. Kirpa Singh*, (1882) P. R. No. 8 of 1883.

Abuse.—A police constable asked the complainant not to create any disturbance on a public road. Upon the complainant's declining to do so, he demanded his name and address, which were not given. The constable thereupon called the complainant *soowar*, and arrested and dragged him to the police-station and detained him there till his name and address were ascertained. It was held that the constable was guilty of an offence under this section.⁴ Where the accused used the expression *pelhe moonha se bako* (blurt out first) to a police-officer who had been ordered by the District authorities to serve notices upon the shopkeepers of a certain bazaar, and who attempted to serve a notice on the accused, it was held that as the use of the expression was intentionally insulting and likely to provoke a breach of the peace, the accused was guilty of this offence.⁵ Using the words "go to hell" to a person after an altercation with him amounted to this offence.⁶ Calling a man *beiman* and *badmash* constituted an offence under this section;⁷ but calling an *arora* a *kirar* (vermin) on provocation was too trivial to be an offence.⁸ Where a bill collector in the course of a discussion with another person shouted "shameless fellow, I will shoe you", it was held that this did not amount to an offence under this section.⁹ Where the accused abused another person and her agents in the course of a speech but in their absence, no offence was held to have been committed.¹⁰

The accused was digging earth from a tank whereupon the complainant having objected, the accused filthily abused him. The accused was tried for an offence under this section, and his defence was that the tank was in his possession and belonged to him. The Magistrate held that the complainant had failed to prove his possession of the disputed tank and therefore "the accused was justified under s. 104, Penal Code, in voluntarily causing the harm, i.e. using abusive language" to the complainant; and acquitted the accused, but the acquittal was set aside and a retrial ordered.¹¹

Where the accused deliberately, i.e. intentionally, set themselves to prevent the complainant from irrigating his land, and when remonstrated with, offered abuse and threatened to strike, it was held that although the words of abuse were not set out, an offence under this section was made out, the threat to strike was a threat conveying an intention on the part of the accused that they were desirous of provoking a breach of the peace and amounted to the offering of an insult.¹²

Where the accused wrote an insulting letter to the complainant who was away in another town, it was held that no offence was committed, for it was highly improbable that the complainant would travel a journey in order to create a disturbance.¹³

At a meeting of the shareholders of a company requisitioned by the accused, a proposal was made to expel the accused from the company. The accused became angry at the proposal, and as he was leaving the room of the meeting he muttered: "you damn bloody bastards and cads", which was overheard by some of the members present. The accused having been charged with an offence under this section, it was held that he had committed no offence, for there was no intention to insult, as the words used were not intended to be taken literally but were intended as mere abuse.¹⁴

PRACTICE.

Evidence.—Prove (1) that the accused insulted some person.

(2) That he did so intentionally.

(3) That he thereby gave provocation to that person.

(4) That he intended, or knew that it was likely, that such provocation would cause that person to break the public peace, or to commit any other offence.

⁴ *Goolab Rasul*, (1903) 5 Bom. L. R. 597.

⁵ *Shankar Lal*, (1927) 9 Lah. 280.

⁶ *Bhimji Naranji Dalal*, (1927) Criminal Revision No. 344 of 1927, decided by Fawcett and Mirza, JJ., on December 16, 1927 (Unrep. Bom.).

⁷ *Bakhawar Lal*, (1922) 23 P. L. R. 137, [1922] AIR (L) 459.

⁸ *Muhammad Bakhsh*, (1922) 23 Cr. L. J. 171, [1922] AIR (L) 455.

⁹ *Pitchai Pillai v. Ramaswami Aiyangar*, [1940] 1 M. L. J. 655 (1), [1940] M. W. N. 300 (2), (1940) 51 L. W. 516, 42 Cr. L. J. 48,

[1940] AIR (M) 681.

¹⁰ *Sivalinga Prasad*, [1941] M. W. N. 373, [1941] 1 M. L. J. 610, (1940) 53 L. W. 566, 42 Cr. L. J. 827, [1941] AIR (M) 683.

¹¹ *Rakhai Das Roy v. Kailash Banu*, (1909) 11 C. L. J. 113, 11 Cr. L. J. 218.

¹² *Habib Khan v. Mazharul Haque*, (1917) 18 Cr. L. J. 463, [1917] AIR (P) 658.

¹³ *R. M. Siffles v. M. R. Dixit*, (1923) 25 Cr. L. J. 1079, 7 N. L. J. 57, [1924] AIR (N) 121.

¹⁴ *Rangel*, (1931) 34 Bom. L. R. 282, 56 Bom. 196.

Where the words which constitute the insult are not found or disclosed a conviction under this section cannot be sustained.¹⁵

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

The offence under this section can be tried by the summary procedure, but the rules laid down for the trial of warrant cases must be adopted in the absence of any rules under the summary procedure chapter modifying it. Failure to ask the accused to state at the commencement of the hearing of the case whether he wishes to cross-examine and, if so, which of the prosecution witnesses whose evidence has been taken, is a serious irregularity.¹⁶

Security for keeping the peace.—Security can be demanded under s. 106 of the Criminal Procedure Code when a person is convicted under this section, according to the Bombay¹⁷ and the Allahabad¹⁸ High Courts; but not according to the Calcutta¹⁹ and the Madras²⁰ High Courts.

Charge.—The failure of the Magistrate to specifically mention the objectionable words in the charge does not vitiate the trial where the accused has not in any way been prejudiced by such omission.²¹

It should run thus :—

I (*name and office of Magistrate, etc.*.) hereby charge you (*name of accused*) as follows :—

That you, on or about the—day of—, at—, intentionally insulted and thereby gave provocation to—, intending (*or knowing it to be likely*) that such provocation will cause the said person to break the public peace (*or to commit the offence of—*), and thereby committed an offence punishable under s. 504 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Statements con-
ducting to public
mischief.

505. Whoever makes, publishes or circulates any statement, rumour or report,—

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of Her Majesty or in the Imperial Service Troops to mutiny or otherwise disregard or fail in his duty as such; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity;¹ or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;²

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating

¹⁵ *Sugartham Ammal v. Vedavalli Ammal*, [1940] M.W.N. 389.

¹⁶ *Subbiah v. Venkata Subbamma*, [1942] 2 M. L. J. 101, [1942] M. W. N. 437, (1942) 55 L. W. 421, 45 Cr. L. J. 10, [1942] AIR (M) 672.

¹⁷ *Sayed Yacoub*, (1918) 21 Bom. L. R. 270, 43 Bom. 554.

¹⁸ *Manik Rai*, (1911) 33 All. 771.

¹⁹ *Arun Samania*, (1902) 30 Cal. 366; *Asoke Prasanna Bal*, (1930) 34 C. W. N. 651, 32 Cr. L. J. 359, [1930] AIR (C) 802.

²⁰ *Muthiah Chetti*, (1905) 29 Mad. 190.

²¹ *Shankar Lal*, (1927) 9 Lah. 280.

any such statement, rumour or report, has reasonable grounds for believing that such statements, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.³

COMMENT.

This section was substituted by the Indian Penal Code (Amendment) Act (IV of 1898). The Select Committee in their Report said: "We have inserted the clause proposed by the Government, but we have altered and enlarged the scope of the Exception to the clause. No doubt the statements, rumours and reports referred to are of a highly mischievous character, but, having regard to the conditions, under which modern journalism and the discussion of public questions are necessarily carried on, we think that, when the statement, rumour, or report is published without any criminal intent, it is going too far to require the person who published it to prove its actual truth. To require such proof might be throwing an impossible burden upon him, and it should be sufficient for him to show that he had reasonable grounds for believing it, as for instance, by showing that he made due inquiry before he published it".²²

In explaining the scope of this section, the Law Member in charge of the Bill said: "In s. 505 the Select Committee have made a considerable modification. As the clause now stands, I think it need cause no apprehension to any speaker or journalist who acts in good faith. It must be borne in mind that the clause does not strike at mischievous and mendacious reports generally. It is aimed only at reports calculated to produce mutiny or to induce one section of the population to commit offences against another. If a man takes upon himself to circulate such a report, he surely cannot complain if he is asked to show that his intentions were innocent, and that he had reasonable grounds for believing the report".²³

This section instead of being inserted in Chapter VII, which deals with offences relating to the Army, Navy, or Air Force, appears in this Chapter, apparently because the repealed section contained some of the provisions contained in the present section and was not limited to offences relating to the Army, Navy or Air Force.

This section deals with the liberty of the subject and must be construed very strictly in favour of the defence.²⁴

1. **Clause (b).**—Under this clause the fear or alarm should be caused in such circumstances as to render it likely that a person may be induced to commit an offence against the State or against the public tranquillity.²⁵

As to 'offences against the State', see Chapter VI, *supra*.

2. **Clause (c).**—This clause is directed towards preventing clashes between real classes and real communities and not purely imaginary people. A speech by which the speaker is trying to foment a strike, when no strike has yet been started, and is attempting to incite prospective strikers against what are commonly known as black-legs, does not come under this clause, but under s. 117.¹

3. **'Without any such intent as aforesaid'.**—If the statement, rumour, or report is true and is published without any such intent as is specified in cl. (a), (b) or (c) a conviction cannot lie. Where the writer of an article complained in a sober language free from exaggeration and incisive comments for the consideration of public officers and others concerned with a view to their taking necessary action to prevent a repetition of what had previously taken place and the article contained no such statement, expression or comment, as might fall within the purview of this section, it was held that he could not be convicted.²

Amendments.—The words "or airman" and "or Air Force" were inserted by the Repealing and Amending Act (X of 1927). The words "or in the Royal Indian Marine" after the words "His Majesty" in cl. (a) were omitted by s. 2 and sch. of Act XXXV of 1934.

²² *Gazette of India*, 1898, Part V, p. 14.

²³ *Ibid.*, Part VI, p. 26.

²⁴ *Shib Nath Banerji*, [1937] 1 Cal. 309.

²⁵ *Manbir*, (1898) 3 C. W. N. 1.

¹ *Shib Nath Banerji*, [1937] 1 Cal. 309.

² *Deshbandhu Gupta*, (1924) 25 Cr. L. J. 976; [1924] AIR (L) 502.

PRACTICE.

Evidence.—Prove (1) that the accused made, published or circulated the statement, rumour, or report, in question.

(2) That he did so with intent to cause, or which was likely to cause, some officer, soldier, sailor, or airman, to mutiny or otherwise disregard or fail in his duty as such.

(3) That such officer, soldier, sailor, or airman belonged to the Army, Navy or Air Force of His Majesty or to the Imperial Service Troops.

Or prove (1) as above; and

(2) that he did so with intent to cause or which was likely to cause fear or alarm to the public or to some section of the public.

Or prove (1) as above; and

(2) that he did so with intent to incite, or which was likely to incite, some class or community of persons to commit some offence against some other class or community.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first class.

Sanction.—Previous sanction of Government is necessary for prosecution under this section.³

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, made (*or published, or circulated*), a statement (*or rumour, or report*), to wit—, with intent to cause, or which was likely to cause, any officer (*or soldier, or sailor, or airman*), in the Army (*or Navy, or Air Force of His Majesty, or in the Imperial Service Troops*), to mutiny (*or disregard or fail in his duty*), and thereby committed an offence punishable under s. 505 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

If the offence falls within cl. (b) then substitute the following for the second para. of the above charge:—

That you, on or about the—day of—, at—, made (*or published, or circulated*), a statement (*or rumour, or report*) with intent to cause, or which was likely to cause, [fear or alarm to the public (*or to any section of the public, to wit—*)], and thereby committed an offence punishable under s. 505 of the Indian Penal Code, and within my cognizance.

If the offence falls within cl. (c) then substitute the following for the second para. of the charge:—

That you, on or about the—day of—, at—, made (*or published, or circulated*), a statement (*or rumour, or report*) with intent to cause, or which was likely to incite any class or community of persons (*viz., specify the class or community*) to commit any offence against another class or community (*viz. specify the class or community*), and thereby committed an offence against s. 505 of the Indian Penal Code, and within my cognizance.

506. Whoever commits the offence of criminal intimidation

Punishment for criminal intimidation.

shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if the threat be to cause death or grievous hurt, or to cause

If threat be to cause death or grievous hurt, etc.

the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend

to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

* Criminal Procedure Code, s. 108. See also Swami Dayal, (1907) P. R. No. 8 of 1908, 7 Cr.

COMMENT.

This section punishes the offence of criminal intimidation as defined in s. 503.

CASE.

Where an accused person issued a notice, signed by himself as president of a self-constituted Arbitration Court, to complainant calling on him to appear on a certain date and answer a claim brought against him, failing which an *ex parte* decree would be passed against him, it was held that the statement in the notice that a decree would be passed in the event of the complainant failing to appear as directed amounted to a threat to harm the person's reputation or property and constituted this offence. The Court remarked: "The learned Sessions Judge has compared the petitioner's action to that of a bully who threatens to shoot a person though he has no license to carry fire-arms. To my mind a better comparison would be that of a person who holds an unloaded pistol at the head of another. The fact that the pistol was unloaded would be no defence to a charge of criminal intimidation if the person threatened was ignorant of this fact. The use of the word 'decree' in the notice implies that an order passed by the Arbitration Court would be enforced. Though the Court had no legal power to enforce its decree, a person in the position of [complainant] would naturally fear that it would be enforced by illegal methods".⁴

PRACTICE.

Evidence.—Prove (1) that the accused threatened some person.

(2) That such threat consisted of some injury to his person, reputation or property; or to the person, reputation or property of some one in whom he is interested.

(3) That he did so with intent to cause alarm to that person; or to cause that person to do any act which he is not legally bound to do, or omit to do any act which he is legally entitled to do as a means of avoiding the execution of such threat.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class. If threat be to cause death or grievous hurt, etc.—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Separate conviction.—If a person at one time criminally intimidates three different persons and each of those persons brings a separate charge against him the accused may be convicted of an offence as against each person, and be punished separately for each offence.⁵

Withdrawal of prosecution.—Although an offence under the latter portion of this section cannot be legally compounded under s. 345, Criminal Procedure Code, yet a withdrawal from the prosecution may be allowed in a proper case.⁶

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, committed criminal intimidation by threatening AB with injury to his person [*or reputation, or property*] with intent to cause alarm to the said AB [*or to cause him to do (specify the act intended to be done) or to omit (specify the act intended to be omitted)*]; and thereby committed an offence punishable under s. 506 of the Indian Penal Code, and within my cognizance [*or cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

Punishment.—As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (b) and sch. II. Deterrent punishment should not be passed unless there was any marked popular excitement creating or likely to create breaches of the public peace or public tumult or disorder.⁷

⁴ Per Newbould, J., in *Priyanath Gupta v. Lal Jhi Chowkidar*, (1923) 27 C. W. N. 479, 481, 87 C. L. J. 526, 529, 24 Cr. L. J. 396, 397, [1923] AIR (C) 590.

⁵ *Goolzar Khan*, (1868) 9 W. R. (Cr.) 80.

⁶ *Vithoba*, (1887) Unrep. Cr. C. 330, Cr. R. No. 20 of 1887; see *Devama*, (1875) 1 Bom. 64.

⁷ *Gossain Missir*, (1921) 2 P. L. T. 596, 22 Cr. L. J. 679.

507. Whoever commits the offence of criminal intimidation by any anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

Criminal intimidation by an anonymous communication.

COMMENT.

This section acts as a corollary to s. 506. If the criminal intimidation is by an anonymous letter, or by a letter signed with a false name, the offence will be subject to higher punishment under this section as it causes great alarm to the recipient of the letter.

For a conviction under this section it must be shown that the accused committed criminal intimidation by using threats of injury which he was in a position to put into execution. The injury need not be one to be inflicted the himself personally, but it is enough if he can cause it to be inflicted by another. Hence a person who extorts money by sending anonymous letters as if from God, conveying threats of Divine punishment if a specified sum of money be not paid to a certain person identifiable by the description given in the letters, cannot be convicted under this section as it does not lie in his power either to inflict the threatened punishment, or cause it to be inflicted.^a

PRACTICE.

Evidence.—Prove the same points as those for s. 506; and show further that the offence was committed by some anonymous communication from the accused.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 506.

508. Whoever voluntarily¹ causes or attempts to cause any person to do anything which that person is not legally bound to do,² or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure³ if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Act caused by inducing person to believe that he will be rendered an object of Divine displeasure.

ILLUSTRATIONS.

(a) A sits dhurna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of Divine displeasure. A has committed the offence defined in this section.

(b) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

COMMENT.

This section is "intended to prevent such practices as those known among the natives by the names of Dhurna and Traga".^a

1. 'Voluntarily'.—See s. 39, *supra*.

2. 'Legally bound to do'.—See s. 43, *supra*.

3. 'By some act of the offender an object of Divine displeasure'.—"It must be shown that the respondent [accused] threatened to do a future act or illegally to omit to do an act, and that by such threat he induced or attempted to induce the person threatened to believe that by that act or illegal omission the person threatened, or some one in whom the person threatened was interested, would become an object of Divine displeasure".¹⁰

It is necessary that there should be some act contemplated to be done in future by the offender. The words "by some act of the offender" should be read along with the expressions "will become" and "will be rendered" in the section.¹¹ A mere threat at large that if a debt is not paid, then, by operation of divine laws, displeasure will fall upon the debtor is not sufficient to attract this section, because it contemplates that the person intended to be harmed will be made the object of Divine displeasure by some act of the offender.¹²

A person who is excommunicated does not become an object of Divine displeasure by the act of the priest who pronounces the sentence.¹³

Illustration (a).—This illustration does not mention the thing which it is the object of the offender to cause to be done or omitted. Suppose his object to be the enforcing of a just claim, as if a creditor who has repeatedly in vain urged his debtor to pay him, finding that he has no chance of recovering his money without a troublesome and expensive law-suit, attempts the mode of recovery by sitting *dhurna*, the creditor may in such a case have adopted improper means for enforcing his just claims, but he does not attempt to cause a person to do what such person is not legally bound to do.¹⁴

PRACTICE.

Evidence.—Prove (1) that the accused caused, or attempted to cause, some person (a) to do something that he was not legally bound to do, or (b) to omit to do something that he was legally entitled to do.

(2) That he did so voluntarily.

(3) That he so caused, or attempted to cause, such person to do as above by inducing or attempting to induce him to believe that he or some one whom he has an interest in, would become, or be rendered, an object of Divine displeasure, if he failed to do, etc.

(4) That he induced such person to believe that such Divine displeasure would arise from some act of the accused.

(5) That the object of the accused was thereby to cause such person to so do or to so omit to do, such thing.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (name of accused) as follows:—

That you, on or about the—day of—, at—, voluntarily caused [or attempted to cause] AB, to do something which the said AB was not legally bound to do, to wit—, by inducing [or attempting to induce] the said AB to believe that he [or some person in whom he was interested] would become by your act, to wit—, an object of Divine displeasure, if the said AB did not do the said thing which it was your object to cause him to do, and that you thereby committed an offence punishable under s. 508 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

509. Whoever; intending to insult the modesty of any woman,¹ utters any word, makes any sound or gesture, or exhibits any object,² intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman,³ shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Word, gesture or act intended to insult the modesty of a woman.

¹⁰ *Sankara Narasimha Bharathi*, (1883) 6 Mad. 381, 394; *Mhadnack*, (1888) Unrep. Cr. C. 376.

¹¹ *Doraswamy Ayyar*, (1924) 47 Mad. 774.

¹² *Tanumal*, [1943] Kar. 146.

¹³ *DeCruz*, (1884) 8 Mad. 140.

¹⁴ *M. & M.* 453.

COMMENT.

Ingredients.—This section requires the following essentials :—

1. Intention to insult the modesty of a woman.

2. The insult must be caused

(i) by uttering any word, or making any sound or gesture, or exhibiting any object intending that such word or sound shall be heard or that the gesture or object shall be seen by such woman, or

(ii) by intruding upon the privacy of such woman.

1. **'Intending to insult the modesty of any woman'.**—This section makes intention to insult the modesty of a woman the essential ingredient of the offence.¹⁵ There must be some individual woman or women whose modesty has been outraged. It does not require the woman, whose modesty it is intended to insult, to have either heard the word or seen the action. The intention of the offender that she should see or hear is all that is required. The law allows such intention to be presumed. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances.¹⁶ If a man attempts to attract the attention of a woman persistently and publicly and by unusual methods, thereby causing resentment and annoyance, he is very close upon insulting the woman.

The word 'modesty' does not lead only to the contemplation of sexual relationship of an indecent character. The section includes indecency, but does not exclude all other acts falling short of downright indecency.

If a man, intending to outrage the modesty of a woman, exposes his person indecently to her, or uses obscene words intending that she would hear them or exhibits to her obscene drawings, he commits this offence. If such an act is done in a public place it will amount to public nuisance. If it amounts to an assault it will be punishable under s. 354.

2. **'Exhibits any object'.**—The word 'exhibit' does ordinarily express the idea of actually showing a thing to a person. On the other hand such showing need not be immediate. 'Exhibit' is practically equivalent to the word 'expose', and a thing can be exhibited or exposed to a person, although at first it may be wrapped in something which prevents that person from actually seeing the object contained in the wrapper.¹⁷ 'Exhibits' means 'displays or causes to be seen' at a place not necessarily a public place.¹⁸ Sending by post a letter containing indecent overtures to a woman comes within the words "exhibits any object".¹⁹

3. **'Intrudes upon the privacy of such woman'.**—To constitute intrusion upon the privacy of a woman, the intruder must be "intending to insult the modesty of such woman". The opening words of the section relate to and qualify each one of the acts subsequently mentioned in the section.²⁰

A man can intrude on the privacy of a woman in a public place. Every one carries about with him, even in public, his own privacy, whether it be of thought or person. No one can break in upon another's reflections and society without intruding upon his privacy. It is usually among polite people to beg pardon for doing so.

If the intrusion upon the woman's privacy is by entering her house or rooms, etc., the offence will fall within the definition of 'criminal trespass'.

CASES.

Intrusion upon privacy.—The accused in the middle of the night effected an entry in a room occupied by four women. On an alarm being given and an attempt made to capture him he escaped. He was charged with an offence under s. 456 of the Code. It was held that the act of the accused amounted to an intrusion on privacy within the meaning of this section, and that, therefore, the intent to commit an offence within the meaning of s. 441 was made out.²¹ Where the accused entered

¹⁵ *Phiaz Mahamad*, (1903) 5 Bom. L. R. 502.

¹⁶ *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391.

¹⁷ *Per Fawcett, J.*, in *Tarak Das Gupta*, (1925) 28 Bom. L. R. 99, 100, 56 Bom. 246, 248.

¹⁸ *Per Madgavkar, J.*, in *ibid.*, p. 101, and p. 249.

¹⁹ *Per Madgavkar, J.*, in *ibid.*, p. 101, and

p. 249.

²⁰ *Thomas Hopper*, (1892) P. R. No. 6 of 1892; *Lajje Ram*, (1898) P. R. No. 12 of 1898; *Phiaz Mahamad*, (1903) 5 Bom. L. R. 502.

²¹ *Premamundo Shaha v. Brindaban Chung*, (1895) 22 Cal. 994; *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391.

in the middle of the night, into the room of the complainant, with whom he had previous acquaintance and who used to speak to strangers and give *pan supari* to visitors, it was held that this offence had not been committed.²²

The accused followed in his carriage the complainant's unmarried daughter at various places, and laughed and grinned and stared at her while passing and re-passing in his carriage, and stood up in it and shouted her name and so on. He was convicted under this section, and the High Court, in confirming the conviction, observed: "We do not think it proper to draw subtle distinctions to show that these acts do not amount to outraging the modesty of a woman and encroaching upon her privacy. Especially in this country, where women are trying to come out in public, it would be making a farce of the law, if we were to say that the conduct of the appellant did not amount to an offence and that the Magistrate has taken an incorrect view of the section of the Indian Penal Code under which the accused had been convicted and sentenced".²³ These observations were quoted with approval in a case in which the accused, a University graduate, sent by post to the complainant, an English nurse, a letter containing indecent overtures and suggesting that the complainant should take certain action in order to show whether she accepted the terms mentioned in the letter. The complainant informed the police, and in consequence of what they did, the accused was found to be the person who had sent the letter. It was held that in the circumstances an inference arose that the accused intended to insult the modesty of the complainant.²⁴

PRACTICE.

Evidence.—Prove (1) that the accused uttered the words, or made the sound or gestures, etc., in question.

(2) That such word, sound, or gesture was intended by the accused to be heard or seen by some woman.

(3) That he thereby intended to insult the modesty of that woman.

There must be some individual woman whose modesty has been outraged and there must be an allegation in the complaint that the action complained of has insulted the modesty of a particular woman or women and not merely of any class or order or section of women. It is however not necessary that the individual woman or women should herself or themselves make a complaint.²⁵

Or prove—

(1) That the accused intruded upon the privacy of some woman.

(2) and (3) as above.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the—day of—, at—, intending to insult the modesty of AB, uttered the words, to wit—(*or made some sound or gesture, to wit—, or exhibited some object, to wit—,*) intending that the same shall be heard [*or seen*] by the said AB, and that you thereby committed an offence punishable under s. 509 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

510. Whoever, in a state of intoxication appears in any public place, or in any place which it is a trespass in him to enter,¹ and there conducts himself in such a manner as to cause annoyance to any person,² shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

²² *Piaz Mahamad*, (1903) 5 Bom. L. R. 502.

²³ *Mahamad Kassam Chisty*, (1911) Criminal Appeal No. 454 of 1910, decided on January 18, 1911, per Chandavarkar and Heaton, JJ., (Unrep. Bom.).

²⁴ *Tarak Das Gupta*, (1925) 23 Bom. L. R. 99, 50 Bom. 246.

²⁵ *Khair Mahomed*, (1924) 19 S. L. R. 87, 26 Cr. L. J. 904, [1925] AIR (S) 271.

COMMENT.

The immunity from punishment which the Code, through motives of humanity and justice, allows to persons mentally affected, is not extended to him who commits an offence through drunkenness; he shall not be excused, because his incapacity arose from his own default, but is answerable equally as if he had been when the act was done, in the full possession of his faculties, a principle of law which is embodied in the familiar adage, *qui peccat ebrius luat sobrius* (let him who sins when drunk be punished when sober).

Under the Police Act¹ cases of drunkenness are often punished, and the provisions of this section are rarely applied.

Ingredients.—This section requires two essentials:—

1. Appearance of a person in a state of intoxication in
 - (i) any public place, or
 - (ii) any place which it is a trespass in him to enter.
2. The person so appearing must have conducted himself in such a manner as to cause annoyance to any person.

1. 'In a state of intoxication appears in any public place, or any place which it is a trespass in him to enter'.—The person must be in a state of intoxication caused by liquor or other drinks or drugs. As to the meaning of 'public place', see s. 294, *supra*; and as to 'trespass', see s. 411, *supra*.

2. 'Conducts himself in such a manner as to cause annoyance to any person'.—Mere intoxication is not made punishable. It is only when a person appears, in a state of drunkenness, in a public place, as in a street, or goes to a place where he has no right to go, and causes annoyance to the people, that he commits this offence.

PRACTICE.

Evidence.—Prove (1) that the accused appeared in some public place, or some place which it was a trespass in him to enter.

(2) That he was then in a state of intoxication.

(3) That he conducted himself in such a manner as to cause annoyance to some person.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

A private citizen has the right to arrest under the common law any person as to whom there is reasonable apprehension that he would commit a breach of the peace. The accused, a Village Magistrate, arrested a man who was very drunk and who had torn the sacred thread of a person and had bit the accused in the foot. The accused was convicted under s. 341 for wrongful restraint. It was held, quashing the conviction, that there was ample justification for the accused, not as a Village Magistrate but as a private citizen, to put a restraint upon the drunken and disorderly person who was not only threatening to commit a breach of the peace but was a danger to the other villagers.²

¹ Act V of 1861, s. 34 (6).

² *Ramaswami Ayyar*, (1921) 44 Mad: 918.

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

511. Whoever attempts to commit an offence punishable by this Code¹ with transportation or imprisonment,² or to cause such an offence to be committed,³ and in such attempt does any act towards the commission of the offence,⁴ shall, where no express provision is made by this Code⁵ for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term⁶ provided for that offence, or with such fine as is provided for the offence, or with both.

ILLUSTRATIONS.

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

COMMENT.

This is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with transportation or imprisonment and not only those punishable with death, or transportation for life.¹

By s. 10 of the Indian Army (Amendment) Act (XI of 1918) a similar provision is inserted in the Indian Army Act (VIII of 1911) as s. 39A.

Scope.—According to the Allahabad High Court this section does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307.² The Bombay High Court has, however, held otherwise in a case³ which has been doubted in a later case.⁴ The former Chief Court of the Punjab had laid down that this section was “in terms much wider than s. 307. Under the last mentioned section [s. 307] the act done must... be one capable of causing death, and it must also be the last proximate act necessary to constitute the completed offence; under s. 511 the act may be any act in the course of the attempt towards commission of the offence”.⁵

This section does not apply to cases of dacoity.⁶

Stages of crime.—In every crime, there is, first, intention to commit; secondly, preparation to commit it; thirdly, attempt to commit it. If the third stage, that is, attempt, is successful, then the crime is complete. If the attempt fails the crime is not complete but the law punishes the person attempting the act. An ‘attempt’ is made punishable, because every ‘attempt’, although it fails of success, must create alarm, which of itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment; as the injury is not as great as if the act had been committed, only half the punishment is awarded.⁷

Every attempt to commit a felony or misdemeanour is under common law a misdemeanour.

¹ *Dost Mohammad*, [1945] Lah. 403, 406.

² *Niddha*, (1891) 14 All. 38; *Tulsha*, (1897) 20 All. 143.

³ *Cassidy*, (1867) 4 B. H. C. (Cr. C.) 17.

⁴ *Vasudeo Gogte*, (1932) 34 Bom. L. R. 571,

578, 56 Bom. 434.

⁵ Per Rattigan, J., in *Jiwan Das*, (1904) P. R. No. 30 of 1904, p. 86, 1 Cr. L. J. 1078.

⁶ *Koonce*, (1867) 7 W. R. (Cr.) 48.

⁷ Livingstone.

An attempt to commit a crime is to be distinguished from an intention to commit it ; and from preparation made for its commission.⁸

1. **Intention.**—Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice.⁹ But the law will not take notice of an intent without an act.¹⁰ Mere intention to commit an offence, not followed by any act, cannot constitute an offence.¹¹ The “will is not to be taken for the deed” unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention can only be proved by acts, as “juries cannot look into the breast of criminals”.

It is a rule laid down by Lord Mansfield that “so long as an act rests in bare intention it is not punishable by our laws : but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done ; and if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable”.¹² When “a man is charged with doing an act [that is, wrongful act without any legal justification], of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act”.¹³

Although there is no presumption that a person intends what is merely a possible result of his action or a result which, though reasonably certain, is not known to him to be so, still, it must be presumed that when a man voluntarily does an act knowing at the time that in the natural course of events a certain result will follow he intends to bring about that result.¹⁴

2. **Preparation.**—Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made.¹⁵ Where a man, having a wife living, caused the banns of marriage between himself and a woman to be published, it was held that he could not be punished for an attempt to commit bigamy, because the act of causing the publication of the banns of marriage was an act done in the preparation to marry, but did not amount to an attempt to marry. The accused might, before any ceremony of marriage was commenced, have willed not to carry out his criminal intention of marrying her.¹⁶ The provisions of the section do not extend to make punishable as attempts acts done in the mere stage of preparation.¹⁷

Preparation to commit an offence is punishable only when the preparation is to commit offences under s. 122 (waging war against the King-Emperor) and s. 399 (preparation to commit dacoity).

Preparation may amount to an abetment.¹⁸ But preparation to commit an offence which leads to nothing does not amount to an abetment under s. 109.¹⁹

The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact.²⁰

Purchasing of stamp-paper.—Mere purchasing of a stamp-paper in the name of the person whose name it was intended to forge, did not constitute an attempt.²¹ But in a subsequent case, on similar facts, the same High Court has held otherwise. M instigated Z to personate C and to purchase in C's name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed C's name on such paper as the purchaser of it. M acted with the intention that such endorsement might be used against C in a judicial proceeding. It was held that the offence of fabricating

⁸ *Peterson*, (1876) 1 All. 316, 317.

⁹ Stephen's General View of the Criminal Law of England, p. 69 (2nd Edn.).

¹⁰ *Dugdale*, (1853) 1 E. & B. 435.

¹¹ *Baku*, (1899) 1 Bom. L. R. 678, 24 Bom. 287.

¹² *Scofield*, (1874) Cald. 297, 403.

¹³ Per Lord Ellenborough, C. J., in *Dixon*, (1814) 3 M. & S. 11, 15; *Hicklin*, (1868) L. R. 3 Q. B. 360, 375; *Martin*, (1881) 8 Q. B. D. 54, 58; *Lovett*, (1889) 9 C. & P. 462.

¹⁴ *Luxman Raghunath*, (1902) 4 Bom. L. R. 280, 26 Bom. 558.

¹⁵ *Lakshumi Prasad*, (1922) 23 Cr. L. J. 108, [1923] AIR (P) 307; *Jain Lal*, (1942) 21 Pat.

L. C.—82

667, [1923] AIR (P) 307.

¹⁶ *Peterson*, (1876) 1 All. 316; *Padala Venkatasami*, (1881) 3 Mad. 4, 5. See *C. Srinivasan*, (1902) 25 Mad. 726.

¹⁷ *Ramsarun Chowbey*, (1872) 4 N. W. P. 46, 48.

¹⁸ See *Padala Venkatasami*, supra.

¹⁹ *Surat Bahadur alias Bharthi*, (1924) 1 O. W. N. 362, 25 Cr. L. J. 1162, [1925] AIR (O) 158.

²⁰ *R. MacCrea*, (1893) 15 All. 173.

²¹ *Ramsarun Chowbey*, (1872) 4 N. W. P. 46. See *Gulab Singh*, (1916) 14 A. L. J. R. 688, 17 Cr. L. J. 481, [1916] AIR (A) 141.

false evidence had been actually committed, and that M was properly convicted of abetting the commission of such offence.²² The former case was distinguished on the following grounds: "The endorsement of the stamp-vendor forms no part of the document which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp-paper. The offence of forgery had therefore not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication: something had been done. It is true that no judicial proceeding had been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement should have been procured. The petitioner had undoubtedly threatened Chatter Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of a stamp is to afford proof of the person to whom it is sold, and in suits brought on documents written on stamp-paper it is the usual course, when the execution of the documents is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and therefore as evidence of the probability that the document was made by the person by whom the paper was procured. I do not say that in the case cited the accused should have been discharged. Had the point been taken the Court might have held the accused guilty of the offence of which the petitioner has been convicted, but I am of opinion that in the case before the Court the evidence for the prosecution warranted the inference that the petitioner procured the false endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it".²³

In another case, C, calling himself K, went to a stamp-vendor, accompanied by a man named Kalyan, and purchased from him in the name of K a stamp-paper. The two men then went to a petition-writer, and C again giving his name as K, they asked the petition-writer to write for them a bond for Rs. 50, payable by K to Kalyan. The petition-writer commenced to write the bond, but, his suspicions having been aroused, did not finish it, but took C and Kalyan to the nearest police-station. It was held that Kalyan was guilty of an attempt to commit the offence under s. 467, and C of abetment of the said attempt.²⁴ *Ramsarun's* case was distinguished on the ground that nothing was written on the stamp-paper in that case.

False document.—In a case the Madras High Court arrived at the same conclusion as that in *Ramsarun's* case. The accused had conspired with other persons to prepare a document purporting to be a valuable security which he knew would be a false document, and be used for the purposes of fraud. He for that end prepared a draft which he was about to copy on an old stamp-paper produced for the purpose, and applied to a witness to supply the Telugu date corresponding to the English date which the document was to contain. It was held that the accused had not passed beyond the stage of preparation, and was not guilty of an attempt to forge. The Court, however, convicted him of abetment.²⁵

In a Calcutta case, a person gave orders for the printing of certain receipt forms similar to those used by the Bengal Coal Company, and corrected the proofs of the same, it being his intention to use the receipt forms in order to commit a fraud. It was held that he could not be convicted of an attempt to commit forgery until he had done some act towards making one of the forms a false document, that until a form had been converted into a document, all that was done consisted in mere preparation for the commission of an offence. Garth, C. J., said: "In my opinion, the printed form was not in itself a false document, and that it would not have become a false document, or part of a document (according to the definition in s. 464) until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company. The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and for the same reason, I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and had only

²² *Mula*, (1879) 2 All. 105.

²³ Per Turner, J., in *ibid.*, p. 106.

²⁴ *Kalyan Singh*, (1894) 16 All. 409.

²⁵ *Padala Venkatasami*, (1881) 3 Mad. 4.

completed a single letter of the name, I think that he would have been guilty of the offence charged, because, . . . 'the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted'. But as it was, all that he did consisted in mere preparation for the commission of the crime. He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence". Prinsep, J., said: "The acts . . . committed do not amount to an attempt, but at most only to a preparation to commit a forgery which might have proceeded no further. . . There must be something 'commenced which would have ended in the crime if not interrupted'.¹ The definition of 'attempt' as given in the judgment in this case may be regarded as overruled in view of later English decisions on the point.²

Personation.—Where the accused was found carrying a police jacket under his arm with the intent that it should be believed that he was a police constable, it was held that he was not guilty under s. 171 as his act amounted merely to preparation to commit the offence punishable under that section.³

Obtaining certificate by false statement.—Where the accused made a false representation at an octroi office as to the contents of certain vessels with the object of obtaining a certificate entitling him to obtain a refund of octroi duty, but prior to the granting of the certificate the octroi officer found that the representation was false and no certificate, was given, it was held that this amounted to preparation for cheating.⁴

Adulteration.—A contractor for the supply of milk to a regimental hospital was found in the hospital compound with about three gallons of stale milk in his possession going in the direction of the place where the cows were about to be milked, this milk being in a can similar to those in which the cows were milked. It was held that his act did not amount to more than preparation.⁵

Procuring poisonous drug to kill.—The accused asked a native doctor to supply her with the medicine for the purpose of poisoning her son-in-law. It was held that the offence committed was not an attempt to murder, as it was a mere act by way of preparation to commit an offence and was not a transaction which would have necessarily ended in murder if not interrupted, but that such act might be held to be an instigation by the native doctor to abet the accused in the commission of murder, and with reference to s. 108, Explanation 4, might have been punished under ss. 116 and 302.⁶

Administering poison.—Where a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison, it was held that she could not be convicted under this section read with s. 328, as the administration of the harmless substance was not an act towards the administration of the poisonous substance. Her act which was complete in itself and not constituting an offence could not constitute an attempt to commit an offence.⁷ If a person intending to administer to a pregnant woman something capable of causing a miscarriage, in fact administers a harmless substance or a substance which is not proved to have been capable of causing the intended harm either at all or in the quantity administered, he cannot be convicted of an attempt to cause miscarriage, inasmuch as the act he did was not an "act done towards the commission of the offence" within the meaning of this section.⁸

Arming oneself with weapon to kill another.—The accused, on quarrelling with the complainant, fetched a sword, but was seized and disarmed by others before he could use it. He, however, asserted, while under restraint, his intention of killing the complainant if he were let go. It was held that fetching a sword was not an at-

¹ *Riasat Ali*, (1881) 7 Cal. 352, 356, 357.

² *Brown*, (1889) 24 Q. B. D. 357; *Ring*, (1892) 17 Cox 491.

³ *Nga Po Kyau*, (1904) 1 U. B. R. (P. C.) 3, 1 Cr. L. J. 554.

⁴ *Dhundi*, (1886) 8 All. 304.

⁵ *Sukha*, (1885) P. R. No. 40 of 1885.

⁶ *Musli. Bakhtwar*, (1882) P. R. No. 24 of 1882.

⁷ *Mt. Rupsir Panku*, (1895) 9 C. P. L. R. (Cr.) 14.

⁸ *Asgarali Pradhania*, (1933) 61 Cal. 54.

tempt under this section, since it was not "an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt; there was, it may be conceded, a preparation towards the commission of some such offence, but mere preparation is not sufficient to complete the offence of attempt under s. 511. . . It is quite possible that although the prisoner fetched the sword he might not after all have actually used it against the complainant, who was his own brother".⁹ Similarly, where the accused raised his knife in a threatening manner manifesting an intention to stab, but did not actually try to stab the complainant, it was held that the act fell short of an attempt to stab.¹⁰

Suicide.—A woman ran to a well, stating that she would jump into it, and she was caught before she could reach it. The High Court in holding that she could not be convicted of an attempt to commit suicide remarked: "There is no doubt that the accused intended to commit suicide, and that she prepared to carry out that intention and proceeded to the well. She might have, however, still changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence."¹¹

Murder.—A young Brahmin widow was confined of a child. The chief constable of police, acting on information that the accused was about to kill the baby, went to search her house with a number of men, and found her lying on the first floor, and discovered on the second floor a living new-born child wrapped up in a cloth with a cooking pot turned over it. The Sessions Judge convicted the accused of attempt to murder. The High Court, on appeal, reversed the conviction, on the ground that the evidence was insufficient to support it.¹²

Theft.—The accused, with another boy, was seen by a policeman to sit together on some door-steps near a crowd, and when a well-dressed person came up to see what was going on, one of the accused made a sign to others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of that man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, and to place a hand against the dress of a woman but no actual attempt to insert that hand into the pocket was observed. They then returned to the door-step and resumed their seats. They repeated this two or three times. It was held that this was not sufficient evidence of an attempt to steal.¹³ Where the accused made some preliminary diggings which were necessary to remove the earth so that he could get at a stone slab fixed to a Buddhist stupa, it was held that the act of the accused amounted to preparation and not to an attempt to commit theft.¹⁴ Accused was caught at night in the vicinity of some cattle which were tethered on complainant's land and near which complainant and his brother were sleeping. It was held that it could reasonably be inferred that accused intended to commit theft and was therefore guilty of an offence of criminal trespass, but that he could not be held guilty of an attempt to commit theft.¹⁵

House-trespass.—A person, who went at night on the roof of the house of another person with a stick and an instrument used for house-breaking, was held to have committed house-trespass under s. 447, and not attempt to commit house-breaking by night. The Court observed: "Mere presence on the roof of the house cannot be construed into an attempt to commit an offence under s. 511. . . In order to apply s. 511 . . . it is necessary not merely that there should be an attempt to commit an offence, but likewise that an act was done as such attempt towards the commission of the offence. Mere passing on the roof of the house cannot in any sense be termed an act towards the commission of the burglary. It is an act of approach towards the house for the purpose of stealthily effecting an entrance into the premises, but can hardly be said to exceed the limits of mere preparation. While on the roof the accused had yet time to make up his mind to recede or attempt an entrance according as he found his opportunity or the state of vigilance inside the premises. It cannot be said that

⁹ *Data Ram*, (1882) P. R. No. 45 of 1882, at p. 76. See also *Shera*, (1868) P. R. No. 18 of 1868.

¹⁰ *Tha Do Hla*, (1902) 1 L. B. R. 264.

¹¹ Per Muttusami Ayyar, J., in *Ramakka*, (1884) 8 Mad. 5, 6.

¹² *Chima*, (1871) 8 B. H. C. (Cr. C.) 164.

¹³ *Taylor*, (1871) 25 L. T. 75.

¹⁴ *Veeriah*, [1935] M. W. N. 651.

¹⁵ *Nauranga*, (1922) 24 Cr. L. J. 248, [1924] AIR (L) 223.

by his presence on the roof of the house he had finally committed himself to committing the offence of house-breaking."¹⁶

Cheating.—The mere taking of thumb impressions on a blank piece of paper may be a preparation to cheat but unless something is written on it, it cannot amount to cheating or attempt to cheat. The Court said: "It is not enough to assume that probably the intention of the petitioners was to convert the blank paper into a written document. Were we to find that the mere presence on the paper of thumb impressions was sufficient to show an intention to use that paper dishonestly, then the hobby of autograph collecting would be a dangerous one."¹⁷ The mere writing out of bogus telegrams with a view to despatch them for the purpose of cheating, amounts only to preparation.¹⁸ The forwarding of fictitious consignment notes by a station-master was held merely to be a preparation to commit the offence of cheating, as it was not done in the attempt to cheat.¹⁹ This view is not sound, though the decision is right as the accused was convicted of abetment. With the object of obtaining money under an insurance policy the accused had recourse to a fraudulent device in order to attract the attention of passers-by and induce them to believe that he had been assaulted, bound, and robbed by burglars. Owing to the intervention of the police, who discovered the fraud, no communication was made to the underwriters, nor was any claim made under the policy. It was held that the accused could not be convicted of an attempt to obtain money by false pretences.²⁰ A debtor sent a parcel containing waste-paper by insured post to his creditor, as if the parcel contained currency-notes, and thus induced the creditor to sign the acknowledgment. It was held that the debtor was not guilty of an attempt to cheat but he had by arming himself with the postal acknowledgment completed his preparations to cheat or attempt to cheat. But as he had filed the postal receipt in Court in support of his defence that he had discharged the debt he had attempted to use as true fabricated evidence (s. 196).²¹ A clerk employed to weigh carts of sugar-cane upon a machine and enter the gross tare and net weights in a register, weighed a cart of sugar-cane and entered its gross weight as 16 maunds, 30 scers, but soon after the cart was re-weighed by a superior officer and found to be only 14 maunds, 20 seers. The clerk had not filled up the other columns fixing the liability absolutely upon the company when he was intercepted and charged for cheating. It was held that the writing of the false figure in the register had not passed from the stage of preparation into that of an attempt to commit the offence of cheating.²²

Adultery.—Preparation or providing an opportunity is a stage of the proceeding short of attempt and is not punishable by law.²³ An opportunity was made for sexual intercourse by a married woman's going to the accused's shop. She was at once followed, and the shop, as it were, besieged. It was held that the acts done amounted only to preparation and were not punishable as an attempt to commit adultery.²⁴ The accused, a member of a municipal committee, wanted a woman to pass the night with, and the committee *chaprasi* brought a woman to the committee house. The woman's husband found her and the accused together in a room and took her away before the accused had sexual intercourse with her. It was held that the accused had not passed beyond the stage of preparing to commit the offence of adultery, and therefore he could not be convicted of attempt to commit adultery.²⁵

Kidnapping.—The law allows *locus penitentie*, and will not hold that a person has attempted a crime until he has passed beyond the stage of preparation.¹ An indirect preparation which does not amount to an act which can be held to be a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same. A minor girl under the age of sixteen years was taken by accused No. 1, under the direction of accused No. 2, from Sholapur to Tuljapur (in

¹⁶ *Walidad*, (1907) P. R. No. 15 of 1907, at p. 55, 6 Cr. L. J. 444, 445, followed in *Batwa Khan*, (1919) 18 L. B. R. 51, 20 Cr. L. J. 571, [1919] AIR (LB) 38.

¹⁷ *Sheo Prasad*, (1926) 7 P. L. T. 772, 774, 27 Cr. L. J. 609, 610, [1926] AIR (P) 267.

¹⁸ *Raman Chettiar*, (1926) 51 M. L. J. 635, 28 Cr. L. J. 95, [1927] AIR (M) 77.

¹⁹ *Raghunath*, (1889) Unrep. Cr. C. 470.

²⁰ *Robinson*, [1915] 2 K. B. 342.

²¹ *Vythinathaswami Aiyer*, (1926) 24 L. W.

²² 725, 51 M. L. J. 800, 28 Cr. L. J. 70, [1927] AIR (M) 199; *Raman Behari Roy*, (1928) 50 Cal. 849; *Tula Ram*, (1923) 21 A. L. J. R. 865, 26 Cr. L. J. 209, [1924] AIR (A) 205.

²³ *Lakshumi Prasad*, (1922) 23 Cr. L. J. 108, [1923] AIR (P) 307.

²⁴ *Paira Ram*, (1902) P. R. No. 25 of 1902.

²⁵ *Ibid.*

¹ *Ghulam Mahomed*, (1879) P. R. No. 18 of 1879.

¹ *Padala Venkatasami*, (1881) 3 Mad. 4.

the Nizam's territory) and there dedicated to goddess Amba, with intent or knowing it to be likely that the minor would be used for the purpose of prostitution. It was held that the intention of either of the accused while they were staying at Sholapur did not constitute any offence, and their removal with the girl to Tuljapur did not by itself constitute an abetment. Ranade, J., said: "In the present case, beyond the mere intention and indirect preparation, there was no distinct offence by way of instigating the act committed out of British India. Mere intention not followed by any act cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abetment of the same".²

Rape.—Facts amounting to preparation only so far as a particular offence is concerned may independently amount to another offence under certain circumstances. In a case the accused was convicted by the Sessions Judge of an attempt to rape. On appeal, it was contended that the evidence could not be relied on as establishing more than an indecent assault. Melvill, J., said: "The only point on which we entertain any doubt in this case is whether the prisoner's conduct amounted to an attempt to commit rape. In *Rex v. Lloyd*,³ Patterson, J., in summing up, said:—'In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part'. We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has not believed her allegation that penetration took place, and has consequently refused to convict the prisoner of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement, that the prisoner's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence (while the Civil Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the prisoner showed any stains which would indicate to what point the prisoner's criminality had proceeded."⁴ The conviction was made under s. 354.

Smuggling.—Where the accused who was given a large quantity of opium by one X at Chidambaram (British territory) with instructions to meet him at Karaikal (French territory) and there give it to him was caught by an excise officer with the opium travelling in a bus to Tranquebar (British territory) and charged under s. 7 read with s. 20 of the Dangerous Drugs Act (II of 1930), it was held that as the accused had to leave the bus at Tranquebar and then to make a journey of six or seven miles before he could get to Karaikal, he must be given the benefit of the doubt that he might have repented of his intention before reaching French territory and there was only a preparation and not an attempt even if the accused intended to transport the opium into French territory.⁵

3. Attempt.—'Attempt' is the direct movement towards the commission after the preparations have been made.⁶ An attempt to commit a crime must be something more than mere preparation.⁷ Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.⁸ The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination in 'attempt'

² *Baku*, (1899) 24 Bom. 287, 291, 1 Bom. L. R. 678, 681.

³ (1836) 7 C. & P. 318, 319.

⁴ *Shankar*, (1881) 5 Bom. 403, 404.

⁵ *Narayanawami Pillai*, (1932) 36 L. W. 127, [1932] M. W. N. 545, 33 Cr. L. J. 582, [1932] AIR (M) 507.

⁶ Quoted with approval from Mayne's Criminal Law in *Peterson*, (1876) 1 All. 316, 317, and *Padala Venkatasami*, (1881) 3 Mad. 4.

⁷ *Robinson*, [1915] 2 K. B. 342.

⁸ *Eagleton*, (1855) 6 Cox 559; *Woods*, (1930) 29 Cox 165.

as compared with 'preparation',⁹ and such greater degree of determination may be estimated in various ways. Where one step of the accused is decidedly illegal *per se*, that is a great proof of fixed determination. Where such acts are open and not hidden, that is a further proof of determination.

"Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted".¹⁰

The difference between what is a mere preparation, and an attempt, was intended to be distinguished by the authors of the Code,¹¹ who had framed for that purpose the following illustrations:—

(a) A, intending to murder Z by means of a spring gun, purchases such a gun. A has not yet committed the offence defined in this clause. A sets the gun loaded in Z's path, and leaves it there. A has committed the offence defined in this clause.

(b) A, intending to murder Z by poison, purchases poison, and mixes the same with food which remains in A's keeping. A has not yet committed the offence defined in this clause. A places the food on Z's table, or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this clause.

The Calcutta High Court, in *Riasat Ali's* case,¹² laid down that a person could not be convicted of an attempt to commit an offence under this section unless the offence would have been committed if the attempt charged had succeeded. It based its decision on the observation of Cockburn, C. J., in *M'Pherson's* case¹³ (viz. "The word 'attempt' clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed"), and of Blackburn, J., in *Cheeseman's* case¹⁴ (viz. "if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime"). In *M'Pherson's* case the accused was indicted for breaking and entering a dwelling-house and stealing therein certain goods. All those goods had been stolen by other persons before the accused entered the house; but there were other goods of the complainant which the accused might have stolen if he had not been interrupted. The jury acquitted the accused of the felony charged, but found him guilty of breaking and entering the dwelling-house of the complainant and attempting to steal his goods therein. It was held that the conviction was wrong. In *Cheeseman's* case the accused was entrusted by his master with some meat which was to be weighed out and delivered to a customer. By means of a false weight he kept back a part of the meat with intent to steal it; but the fraud was discovered before he had actually moved away with it. It was held that he had committed an attempt to steal the meat. *M'Pherson's* case was followed in *The Queen v. Collins*¹⁵ wherein Cockburn, C. J., again said: "An attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit". In this case the accused put his hand into the gown pocket of a lady with intent to steal what he could find there; but the pocket was empty and he could not steal anything. It was held that he could not be convicted of an attempt to steal. But *Collins's* case had been expressly overruled in *Reg. v. Brown*¹⁶ and *Reg. v. Ring*,¹⁷ which lay down that in order to prove that an attempt to commit a felony has been committed, it is not necessary to prove that, had the attempt not been frustrated, the felony would have been committed. In *Brown's* case the accused had pleaded guilty to an indictment charging him with having attempted to commit unnatural offences with domestic fowls. In *Ring's* case the accused were seen to hurry on to the platform of a station just as a train was about to start; they did not go by that train, and separated on

⁹ *Mangal*, (1884) 1 O. D. 129.

¹⁰ Per Mookerjee, J., in *Amritia Bazar Patrika Press Ltd.*, (1919) 47 Cal. 190, 234, s.b.; *Kishen Singh*, (1927) 28 P. L. R. 575, 28 Cr. L. J. 663, [1927] AIR (L) 580.

¹¹ Draft Penal Code, Clause 308, p. 53.

¹² (1881) 7 Cal. 352.

¹³ (1857) Dears. & B. 197, 202, 7 Cox 281.

¹⁴ (1862) L. & C. 140, 145.

¹⁵ (1864) 33 L. J. (M. C.) 177, 178.

¹⁶ (1880) 24 Q. B. D. 357.

¹⁷ (1892) 17 Cox 491.

reaching the platform. On the arrival of the succeeding train, they crowded round and hustled a woman who was entering a compartment, and one of them was seen endeavouring to find the pocket of her dress. It was held that they were guilty of an attempt to steal. In *The Queen v. Williams*¹⁸ two Judges expressly say that they do not assent to the notion that a person cannot be convicted of an attempt to do that which the law says he cannot do. However, in a case,¹⁹ decided five years after *Brown's* case, we find the Calcutta High Court re-affirming its decision in *Riasat Ali's* case. In a subsequent case²⁰ the Calcutta decisions were reconsidered and the High Court has held that the decisions in *M'Pherson's* case and *Collin's* case are not law either in India or in England.

The Allahabad High Court has not followed *Riasat Ali's* case. It has remarked in *The Queen v. Ramsarun Chowbey*²¹ and in *R. MacCrea's* case²² that the ruling of English Judges on the criminal law of England are inapplicable to the interpretation of the Indian Penal Code, which the Courts in India must interpret on the same principles of interpretation as they would employ in the interpretation of any other Act of the Legislature. In the latter case A had obtained administration to the estate of his brother H, and had caused a Government promissory note, No. 9764, which belonged to M, to be entered in the letters of administration as part of the estate of the deceased. The note was in the possession of the Controller-General and the accused MacCrea joined A, in an attempt to induce that officer to deliver it to him, or to A. Letters were written by the accused to that officer but they were not relied on; and the Judge directed the attention of the jury to the acts committed by the accused in making use of the letters of administration granted to A, and in the preparation of a so-called copy of the lost note, and its production before the City Magistrate. The scheme failed, and the accused was convicted of an attempt to cheat.²³

In *Ramsarun's* case²⁴ Turner, J., said: "To constitute then the offence of attempt under this Section, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in attempting the commission of the offence.

"Two illustrations of the offence of attempt as defined in this Section are given in the Code; both are illustrations of cases in which the offence has been committed. In each we find an act done with the intent of committing an offence and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence, and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition.

"From the illustrations it may be inferred that the Legislature did not mean that the act done must be itself an ingredient (so to say) of the offence attempted, and in this respect there appears to me there is a noticeable difference between the definition given in the Section under consideration and that given in Section 307. To convict a person of an attempt to murder under Section 307 it must be shewn that he has done some act with such intention and that if *by that act* he caused death he would be guilty of murder under Section 307, then the act necessary to constitute the attempt is an act which, if it had not fallen short of its object, would have constituted the offence attempted. Similarly, to constitute an attempt under Section 308, the act proved must be an act which, had the results contemplated by the doer followed would have completed the offence attempted, whereas, under the terms of Section 511, it is only necessary to prove an act done in the attempt *towards* the commission of the offence, and as the illustrations show an act in itself complete and not falling short of its object, or failing to bring about the result anticipated by the doer.

"The circumstances stated in the illustrations to Section 511... would not have constituted attempts under the English law, and I cannot but think they were introduced in order to show that the provisions of Section 511... were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English law".

In *R. MacCrea's* case²⁵ Knox, J., observed: "In that case [*Riasat Ali's*], the learned Chief Justice appears to have acted upon English precedents, and those pre-

¹⁸ [1893] 1 Q. B. 320.

¹⁹ *Chandi Pershad v. Abdur Rahman*, (1894)

22 Cal. 181, 188.

²⁰ *Asgarali Pradhania*, (1893) 61 Cal. 54.

²¹ (1872) 4 N. W. P. 46.

²² (1893) 15 All. 173, 178.

²³ *R. MacCrea*, (1893) 15 All. 173, 176.

²⁴ (1872) 4 N. W. P. 46, 47, 48.

²⁵ (1893) 15 All. 173, 177, 178.

cedents, precedents of no modern date. So far as I am concerned, I feel myself unable to follow the English law, because there appears to me a wide difference between the meaning of the word 'attempt' as understood by English lawyers in the phrase 'attempt to commit a felony', and the word 'attempt' as actually defined in the Indian Penal Code. With all respect therefore to the learned Judges who decided the case of *Riasat Ali*, I have no doubt myself that the interpretation laid down by them is not a sound and exhaustive interpretation of the word 'attempt' as used in s. 511". In this case no reference is made to *Queen v. Peterson*,¹ in which Pearson, J., followed the American rule that "an attempt can only be manifested by acts which would end in the consummation of the offence, but for the intervention of circumstances independent of the will of the party".

Following the above observations, the Madras High Court held that "in the offence of cheating the actual transaction must have begun, and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt".²

In a Bombay case 'attempt' has been defined as "an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment".³ "When a man does an intentional act with a view to attain a certain end and fails of his object through some circumstance independent of his own will, then that man has attempted to effect the object at which he aimed".⁴ All that is necessary to constitute an attempt is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress is interrupted.⁵

Stephen⁶ says: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begin cannot be defined; but depends upon the circumstances of each particular case". Attempt is also defined as "an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation and possessing, except for failure to consummate, all the elements of the substantive crime".⁷

1. 'Offence punishable by this Code'.—This leaves untouched attempts to commit, or to cause to be committed, offences under special or local laws which are not also offences under the Code. No criminal liability can be incurred under the Code by an attempt to do an act which, if done, will not be an offence against the Code.⁸

Impossible offence.—"An attempt... is possible, even when the offence attempted cannot be committed; as when a person, intending to pick another person's pocket, thrusts his hand into the pocket, but finds it empty. That such an act would amount to a criminal attempt, appears from the illustrations to section 511. But in doing such an act, the offender's intention is to commit a complete offence, and his act only falls short of the offence by reason of an accidental circumstance which has prevented the completion of the offence... It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code".⁹

¹ (1876) 1 All. 310, 317.

² Per Jackson, J., in *Raman Chettiar*, (1926) 51 M. L. J. 635, 636, 28 Cr. L. J. 95, 96, [1927] AIR (M) 77.

³ Per Jenkins, C. J., in *Luxman Narayan Joshi*, (1899) 2 Bom. L. R. 280, 296.

⁴ Per Jenkins, C. J. in *Vinayek Narayan Bhatye*, (1899) 2 Bom. L. R. 304, 307 308; *Jaimal*, (1924) 26 Cr. L. J. 1424, [1926] AIR (L) 147.

⁵ *Ganesh Balwant Modak*, (1909) 34 Bom. 378, 12 Bom. L. R. 21; *Rahamat Ali*, (1927) 28 Cr. L. J. 680, 681, [1927] AIR (L) 684.

⁶ Dig. of Crim. L., Art. 50 (5th Edn.).

⁷ *Vide* American and English Encyclopaedia of Law, Vol. III, p. 250 (2nd Edn.), where several definitions of 'attempt' are given.

⁸ *Mangesh Jivaji*, (1887) 11 Bom. 376, 381;

Boston, (1910) P. R. No. 2 of 1911, 12 Cr. L. J. 116; *Ram Charit Ram Bhakat v. Chairman, Rajshahi District Board*, [1938] 1 Cal. 420.

⁹ Per Birdwood, J., in *Mangesh Jivaji*, in *ibid.*, pp. 380, 381. *Mt. Rupsir Panku*, (1895) 9 C. P. L. R. (Cr.) 14, does not lay down sound law. In that case a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison. It was held that she could not be convicted under this section and s. 328 as the administration of the harmless substance was not an act towards the administration of a poisonous substance; and that the act which was complete in itself and not constituting an offence, could not constitute an attempt to commit an offence.

The trend of recent English decisions is that it is not necessary that it should have been legally or physically possible for the offender to commit the full offence.¹⁰

2. 'With transportation or imprisonment'.—Offences punishable with death only, or fine only, are not contemplated by this section.

3. 'To cause such an offence to be committed'.—This will include an attempt to abet an offence. So it has been held that it is not legally impossible to attempt the abetment of an offence—the abetment of an offence being itself an offence.¹¹ A common form of such attempt is the soliciting of another to commit an offence.¹² The act done towards the commission of the offence consists in the solicitation itself. It will not affect the offence though the person solicited declines the persuasion.

4. 'Does any act towards the commission of the offence'.—These are the vital words. 'Intention alone, or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation, followed by any 'act done towards the commission of the offence,' are sufficient'.¹³ In each of the two illustrations given under this section there is not merely an act done with the intention to commit an offence, which act is unsuccessful because it could not possibly result in the completion of the offence, but an act is done 'towards the commission of the offence', that is to say, the offence remains incomplete only because something yet remains to be done, which the person intending to commit the offence is unable to do by reason of circumstances independent of his own volition. Thus, in ill. (a) the act of breaking open the box is done towards the commission of the theft of the jewels. The theft itself, that is, the actual removal of the jewels, still remains to be done and it remains undone only because it turns out that there are no jewels to remove. In ill. (b) Z fails to comply with the essentials of theft simply because there is nothing in the pocket.

The words 'does any act towards the commission of the offence' must not be construed to include all acts, however remote, which tend towards the commission of the offence. The thing done may be too small or it may proceed too short a way towards the accomplishment of the offence for the law to notice it as an attempt (*vide* ill. to s. 307). "It is difficult, and perhaps impossible, to lay down a clear and definite rule, to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence;... Many cases, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough".¹⁴ It has been laid down that "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it; but acts immediately connected with it are".¹⁵ "From the moment when an intention is formed to commit an offence, every act done which facilitates the commission of the offence and which is done with that object in view, is in one sense 'an act done towards the commission of the offence', but the doing of every such act does not constitute an attempt to commit the offence. It must in every case be a question depending upon the circumstances whether a particular act done (with the requisite intention) towards the commission of an offence, is sufficiently proximate to its commission to constitute an attempt, or is so remote as to merely constitute preparation for its commission".¹⁶ The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. Thus, it is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack, if he go to the stack, with the intention of setting fire to it, and light a lucifer match for that purpose, but abandons the attempt because he finds that he is being watched.¹⁷

For a conviction under this section it is not necessary that the accused should complete every stage in the actual offence except the final stage. It is enough if in the attempt he did any act towards the commission of the offence.¹⁷

¹⁰ *Brown*, (1889) 24 Q. B. D. 357; *Ring*, (1892) 17 Cox 491; *Williams*, [1898] 1 Q. B. 320.

¹¹ *R. Spier*, (1887) P. R. No. 49 of 1887.

¹² *Asgarali Pradhania*, (1883) 61 Cal. 54, 59, 60.

¹³ Per Jervis, C. J., in *Robert's Case*, (1855) Dears. Cr. C. 539, 550.

¹⁴ Per Parke, B., in *Eagleton*, (1855) 6 Cox 559, 571; *Robert's Case*, (1855) Dears. Cr. C.

539, 25 L. J. (M. C.) 17; *Cheeseman*, (1862) 9 Cox 100.

¹⁵ Per Plowden, J., in *Ghulam Mahomed*, (1879) P. R. No. 18 of 1879, at pp. 87, 38.

¹⁶ *William Taylor*, (1859) 1 F. & F. 511.

¹⁷ *Raghunath alias Ram Singh*, (1940) 16 Luck. 194.

In a village, incendiarism had occurred on several occasions produced by a ball of rag with a piece of burning charcoal within it. The accused one evening was discovered to have a ball of that description concealed in his loincloth which contained burning charcoal. It was held, but not unanimously, that he was guilty of an attempt to commit mischief by fire. Glover, J., said: "Had this ball contained a piece of unlighted charcoal only, I should have considered that there had been no sufficient commencement of any act which tended towards the commission of mischief by fire, and that the prisoner would have been in the same position as a person who, intending to murder some other person whether by shooting or poisoning him, buys a gun or poison and keeps the same by him, such acts being ambiguous, and not so immediately connected with the offence as to make the parties punishable under s. 511... But, in this case, the instrument for causing mischief by fire was completely ready and was not used, only because the party carrying it had no opportunity. It must, I think, be assumed, that a person going about at night provided with an apparatus specially fitted for committing mischief by fire, intends to commit that mischief, and that he has already begun to move towards the execution of his purpose, and that is sufficient to constitute an 'attempt'". Mitter, J., on the other hand, said: "The only fact proved against the prisoner is that he was apprehended with a ball of rag containing a piece of lighted charcoal in his possession; but this fact is no more consistent with the intention of setting fire to a human dwelling than with that of setting fire to a stack of hay or to something else. There is not a particle of evidence on the record to show that the prisoner intended to destroy any particular object by fire, and in the absence of such evidence it is impossible to say that he intended to destroy a building used as a human dwelling... The mere fact of being in possession of a ball, like the one which was found with the prisoner, is by no means sufficient to warrant a conviction for attempting to cause mischief by fire. In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence', but that the act itself should have been done *'in the attempt'* to commit it. The Sessions Judge says that the very fact that the prisoner went out of his house with the ball which was found in his possession, was an overt act, 'towards the commission of the offence', but the question is, was there any attempt to commit a particular offence, and if so, was the act done *'in such attempt'*. I am of opinion, that both these questions ought to be answered in the negative. Suppose a man goes out of his house into the street with a loaded gun in his possession, and suppose even that there is evidence to show that he did so with the intention of shooting Z. If Z is not found in the street, or when found no attempt is made to shoot him either from fear or repentance, or from any other cause, can it be said that the man is guilty of attempting to murder Z? The going out of one's house with a loaded gun and with the intention of shooting a particular individual might be in one sense considered as an act done towards the shooting of that individual; but so long as nothing further is done, so long as there is no attempt to shoot him, and no overt act done *'in such attempt'*, it is impossible to hold that there has been an attempt to murder. There can be no doubt that the man, who goes out of his house in such a manner and with such an intention, does an act which is highly reprehensible and improper, and the Legislature might have, if it thought fit, declared it punishable as an offence; but in the absence of such a declaration, it is not for us to say that the author of that act ought not to go unpunished... The distinctions made by the Legislature between the offences of 'attempting to commit dacoity', 'making preparations for dacoity', and 'assembling together for the purpose of committing dacoity', seem to support this view very strongly".¹⁸

An act too remote, or quite foreign to the end proposed, or too small for the law's notice, creates no apparent danger and no perturbation in the peaceful order of things, and therefore is not sufficient in attempt.¹⁹ But where a person does an act, the natural consequence of which is criminal, but such consequence is prevented by extraneous causes, he is nevertheless to be taken to have intended that the natural consequence of his act should result, that is to say, he is to be considered as having intended to commit the crime which would have resulted had he not been prevented from completing his act. Where, therefore, in support of a conviction for attempt-

¹⁸ *Doyal Bawri*, (1869) 3 Beng. L. R. (A. Cr. J.) 55, 56, 57.

¹⁹ *Bishop's New Criminal Law*, Vol. 1, s. 739, (8th Edn.), p. 446.

ing to discharge a loaded fire-gun with intent to do grievous bodily harm, the evidence was that the accused had presented a loaded revolver at another person, but had been prevented from discharging it by a third person, it was held that the accused intended to do that which he was prevented from doing; and that there was sufficient evidence to support the conviction.²⁰ Similarly, where the accused pointed at the prosecutor a revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, and he pulled the trigger of the revolver, but the hammer fell upon a chamber which contained an empty cartridge case, it was held that the accused could be convicted of attempting to discharge a loaded fire-arm with intent to murder.²¹ Where the acts committed by the accused consisted in running after the complainant with an axe in his hand and raising it to the shoulder when about four footsteps from the complainant, but before there was time to do anything further in pursuance of his purpose the axe was snatched out of the accused's hands, it was held that the accused was not guilty of an attempt to commit murder as neither of his acts could *per se* have caused death, but that he was guilty of an offence to cause grievous hurt punishable under this section read with s. 326.²²

In *The Queen v. Ramsaran Chowbey*,²³ Turner, J., said: "I do not hold that the provisions of this Section would extend to make punishable as attempts acts done in the mere stage of preparation. Although such acts are doubtless done towards the commission of the offence, they are not done *in the attempt* to commit the offence in the construction which I think should be put on the term 'attempt' as used in this section. I regard that term as here employed as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done, or omitted, which of itself is a necessary constituent of the offence attempted". But in *R. MacCrea's case*,²⁴ Knox, J., after remarking that Turner, J., arrived at that conclusion not without some doubt, observes: "I do not hold, and have no hesitation in saying, that s. 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

"It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series.

"Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of a valuable security commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt.

"The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence. It is in most cases a question for the jury to distinguish between an act before attempt has begun, an act after attempt begun, and towards commission of the offence attempted, and an act independent of the attempt altogether".

²⁰ *Duckworth*, (1892) 17 Cox 495.

²¹ *Jackson*, (1890) 17 Cox 104.

²² *Jivan Das*, (1904) P. R. No. 30 of 1904, 1

Cr. L. J. 1078.

²³ (1872) 4 N. W. P. 46, 48.

²⁴ (1893) 15 All. 173, 179.

Blair, J., also in the same case,²⁵ remarks: "The definition of 'attempt' is conveyed in s. 511...It seems to me that that section uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and, though the Act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that, whosoever in such attempt, obviously using the word in the larger sense, does any act, etc., shall be punishable. The term 'any act' excludes the notion that the *final* act short of actual commission is alone punishable, and the notion that any of the other acts would be without the range of this section is probably derived from the rulings in the English cases..."

"The difficulty with s. 511 might easily have been removed by saying that where in such an attempt, using the words in the larger sense, any person does any act towards the commission of an offence he shall be held to have committed an 'attempt' within the meaning of this section. That I take to be the real meaning and drift of the section, differentiating in a marked manner the definition of 'attempt' in the Indian Penal Code and the accepted English doctrine". The Privy Council on leave to appeal in this case observed: "The learned Judge who tried the case laid down in his charge to the jury that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned Judge clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence".¹

The Bombay High Court, agreeing with the opinion of Knox, J., has held that this section does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act.²

The Calcutta High Court has, in an early case,³ laid down: "In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence', but that the act itself [that is the overt act] should have been done '*in the attempt*' to commit it [that is, the offence]". If an accused, intending to administer something capable of causing a miscarriage, administers a harmless substance, it cannot amount to an "act towards the commission of the offence" of causing miscarriage. He is, therefore, not guilty of an attempt to cause miscarriage. It is different, however, when his failure is not due to any act or omission of his own, but to the intervention of some factor independent of his own volition.⁴

The former Chief Court of the Punjab had decided that "from the moment when an intention is formed to commit an offence, every act done which facilitates the commission of the offence and which is done with that object in view, is, in one sense, 'an act done towards the commission of the offence', but the doing of every such act does not constitute an attempt to commit the offence. It must in every case be a question depending upon the circumstances, whether a particular act done (with the requisite intention) towards the commission of an offence, is sufficiently proximate to its commission to constitute an attempt, or is so remote as to merely constitute preparation for its commission".⁵ An attempt to commit an offence may be committed even though, in order to the completion of the offence, something more remained to be done by the accused.⁶ The view that an attempt to commit an offence is not punishable under this section unless the final act short of actual commission of that offence has been accomplished is an erroneous one.⁷

The Court of Criminal Appeal in England has held that an indictment for attempt to commit a crime cannot be sustained by proof of acts remotely and not im-

²⁵ *R. MacCrea*, (1893) 15 All. 173, 181, 182.

¹ Per Lord Herschell, L. C., in *Macrea*, (1893) 20 I. A. 90, 94, 15 All. 310, 314.

² *Anant Vinayak Puranik*, (1900) 2 Bom. L. R. 653, 25 Bom. 90.

³ Per Mitter, J., in *Doyal Bawri*, (1869) 3 Beng. L. R. (A. Cr. J.) 55, 57. See *Hurjee Mull v. Imam Ali Sircar*, (1908) 8 C. W. N. 278, 1 Cr. L. J. 124.

⁴ *Asgarali Pradhania*, (1933) 61 Cal. 54.

⁵ Per Plowden, J., in *Ghulam Mahomed*, (1879) P. R. No. 13 of 1879, approved of in *Jones*, (1925) 27 Cr. L. J. 916, 918, [1925] AIR (R) 247.

⁶ *Abdullah*, (1914) P. R. No. 14 of 1914, 15 Cr. L. J. 265, [1914] AIR (L) 315.

⁷ *Shib Charan*, (1928) 10 Lah. 253.

mediately connected with the full offence. Two letters were written by the accused to a man who had advertised for a situation and were sent to him by post. The letters which were couched in obscene and lecherous terms, purported to be written by a woman, and invited the recipient to come to the place where the accused lived, and to have immoral relations. The recipient, on reading them believed they were written by a woman. He did not go to the place where the accused lived and no meeting between them took place. The accused was charged with attempting to procure the commission of an act of gross indecency by the recipient of the letters with himself. It was held that the accused's acts were only remotely, and not immediately, connected with the commission of the offence and that such acts did not in law constitute an attempt to procure the commission of the offence charged.⁸

False evidence.—Where the accused dug a hole intending to place salt in it, in order that the discovery of the salt might be used in evidence against the prosecutor in a judicial proceeding, it was held that he was guilty of an attempt to fabricate false evidence, because by digging the pit he did an act towards the commission of the offence.⁹

Counterfeiting coin.—The accused, with intent to coin counterfeit half-dollars of Peru, caused to be made and procured in England dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it, but the accused intended to procure the rest of the necessary apparatus for the purpose and with the intention of using the entire apparatus, when procured, in making the counterfeit coin. It was found that the accused intended to make only a few of the counterfeit coins in England by way of trying whether the apparatus would answer before sending it out to Peru to be there used in making counterfeit coin. It was held that to make a few coins in England with the object stated would be to commit the offence of making counterfeit foreign coin and that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence.¹⁰

Rape.—The accused caught hold of a girl, threw her down, put sand in her mouth, got on her chest and attempted to have intercourse with her. She resisted and cried and her screams attracted a couple of persons seeing whom the accused ran away. It was held that the offence committed was an attempt to commit rape.¹¹

Unnatural offence.—The accused sent to H a letter with intent to incite H to commit an unnatural offence. H was a boy at school and he had received two other letters from the accused which he had read, but he had not read the one on which the charge was framed and which he had handed over to the school authorities. It was held that the sending of the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as H was not aware of its contents.¹²

Bribery.—Where B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department, and instancing two cases in which, by that influence, increased pensions had been obtained, proceeded to intimate that anything might be affected by payment, and, on the overture being rejected, concluded by declaring that A would rue and repent the rejection of it, it was held that the offence of attempting to obtain a bribe was consummated.¹³ A person who offers to pay gratification to a public servant is punishable under ss. 116, 161 and 511.¹⁴

Cheating.—M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency-notes, stating that the other halves were lost, and inquiring what steps should be taken for the recovery of the value of the notes. The Currency Office having, upon inquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M, and re-

⁸ *Harry Woods*, (1930) 22 Cr. App. R. 41, 29 Cox 105.

⁹ *Nunda*, (1872) 4 N. W. P. 133.

¹⁰ *Robert's Case*, (1855) Dears. Cr. C. 539.

¹¹ *Bhartu*, (1933) 34 P. L. R. 832, 35 Cr. L.

J. 432, [1933] AIR (L) 1002 (1).

¹² *Ransford*, (1874) 18 Cox 9.

¹³ *Baldeo Sahai*, (1879) 2 All. 253.

¹⁴ *Ahad Shah*, (1917) P. R. No. 18 of 1918 19 Cr. L. J. 621, [1918] AIR (L) 152.

turned by him to the Currency Office. It was held that, although there was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat.¹⁵ Where the accused posed that he could double a currency note and a police officer knowing that he could not do so but with a view to get him convicted gave him some notes and caught him while, after going through the mock process of doubling notes, he tried to substitute some pages of a book in their place, it was held that the accused went far beyond the stage of preparation and was liable to be convicted of the offence of attempting to cheat.¹⁶ The accused, who was indebted to the complainant, despatched to the latter an envelope insured for Rs. 530 containing two pices of waste-paper, intending to use the receipt for the same as evidence of payment of Rs. 530 towards the liquidation of his debt to the complainant. It was held that the accused was guilty of an attempt to cheat.¹⁷ This ruling is of doubtful authority.¹⁸

The accused, having contracted to deliver a certain quantity of good cotton to the complainants, delivered instead for acceptance by the complainants a quantity of bad cotton, that is, cotton heavily adulterated with rubbish in such a manner that the fraud would be likely to escape the ordinary inspection. The complainant's agent, to whom delivery was offered, suspected the character of the goods and declined to accept them. The accused were, on these facts, convicted of the offence of attempting to cheat. On appeal, they were acquitted by the Sessions Judge on the ground that the acts of the accused did not amount to an attempt to cheat but only to a preparation for cheating. It was held, setting aside the order of acquittal, that there was a complete case of an attempt to cheat, and the only reason why the offence stopped short at an attempt and did not proceed to the cheating itself was because the party who was sought to be cheated was cautious and not confiding; and that the accused did all they could to perfect their offence, that is to say, an overt act was begun which would have led to the finished offence, but for an interruption arising independently of the will of the accused.¹⁹ A manufactured spurious trinkets and took them to N saying they were of gold (which they were not) and that they were stolen property (which was also not true) and that he (A) did not like to sell them in the bazaar and asked him to buy. N did not buy, but A was arrested. It was argued that no attempt to cheat had been proved, because more had to be done by A, such as weighing the article etc., before wrongful loss would fall upon N. It was held that the act of A amounted to an attempt to cheat.²⁰ The accused sold three tins of an article known as Flit to the complainant's brother. It was found that the contents of the tin were spurious. The accused went again to the shop of the complainant's brother with four dozen tins of Flit for sale and was arrested. The Chemical Analyser certified that the contents of the tins so brought did not contain the article known as Flit. It was held that the accused was guilty of an attempt at cheating though the complainant and his brother knew that the stuff which the accused was selling was probably not Flit.²¹

The first accused insured his paddy in certain godowns with three Fire Insurance Companies, and, on the godowns being burnt down, he first sent to the Insurance Companies notices informing them of the fire and subsequently presented his claims in which he deliberately made false statements as to the quantity of paddy stored in the godowns and destroyed by the fire. It was held that the sending of the notices was an act of preparation but when the accused followed up these notices with the actual claim papers, he committed himself to a representation of fact which being false to his knowledge must be regarded as an overt act towards the commission of the offence of cheating—an act which had gone beyond the stage of preparation.²² The accused sent two anonymous letters to the complainant, a well-to-do Mahomedan, purporting to come from the Deity at Nagore directing him to pay certain sums of

¹⁵ *The Government of Bengal v. Umesh Chunder Mitter*, (1888) 16 Cal. 310; *Shib Charan*, (1928) 10 Lah. 253.

¹⁶ *Raghunath alias Ram Singh*, (1940) 16 Luck. 194.

¹⁷ *Arura*, (1912) P. R. No. 10 of 1913, 14 Cr. L. J. 436.

¹⁸ See *Raman Behari Roy*, (1923) 50 Cal. 849; *Tula Ram*, (1923) 21 A. L. J. R. 865, 26 Cr. L. J. 203, [1924] AIR (A) 205; *Vythinathaswami Aiyer*, (1926) 24 L. W. 725, 51 M. L. J.

800, 28 Cr. L. J. 70, [1927] AIR (M) 199.

¹⁹ *Mansing Daji Patil*, (1913) 15 Bom. L. R. 568, 14 Cr. L. J. 433.

²⁰ *Abdullah*, (1914) P. R. No. 14 of 1914, 15 Cr. L. J. 265, [1914] AIR (L) 315.

²¹ *Kamalnayan Bhawanidutt*, (1932) Cr. App. No. 213 of 1932, decided by Beaumont, C. J., and Nanavati, J., on August 13, 1932 (Unrep. Bom.).

²² *Maung Po Hmyin*, (1923) 2 Ran. 53.

money to a person specified in the letters and threatening him with ruin and death from Divine displeasure if he failed to do so. He showed two more letters to the complainant purporting to have been received by him from the Nagore Deity wherein he was commanded to explain the serious situation and to receive Rs. 300 from the complainant and finally followed it up with a letter saying that that was the last communication that the complainant would receive and that dire consequences would follow without further warning. The complainant complied with the demand though he did not believe the letters. It was held that the accused was guilty of an attempt to cheat.²³

Where the accused informed an octroi superintendent that there were sixteen maunds of an article in a cart, whereas there were only six, and by this act he induced the superintendent to grant him a refund of the duty of sixteen maunds of the article instead of six maunds, and where this was discovered before any money was paid to the accused, it was held that the accused was guilty of an attempt to cheat.²⁴ Where the accused instigated a *muharrir* to do an illegal thing, viz., to endorse a refund pass for goods not yet arrived, and to take a bribe for such dereliction of duty, it was held that he was guilty of an attempt to cheat because he did not confine his projects to his own breasts but confided them to another person whom he tried to make his accomplice.²⁵ Where the accused told B that his son had improperly pulled the alarm chain of the train in which he was travelling and broke it, that the driver of the engine in his attempt to stop the train had sustained injuries, that his son had been taken into custody and that he had sent him to bring Rs. 110 to secure his release. The accused took B to a hospital and asked for the money to be given to the driver. B did not give the money. He then took B to another house and going inside brought a paper calling it a release order. He asked B to give money for giving it to the person who had passed the order. B said that he would give the money only after seeing his son. B told the whole story to some other men who called the police and got the accused arrested. It was held that the accused was guilty of attempt to cheat as there was no delivery of any property.¹

English cases.—The accused went into a pawn-broker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying "I want five shillings on them". The pawn-broker's assistant asked him if they were silver, and he said they were. The assistant tested them, and found they were not silver and in consequence did not give him any money, but sent for a policeman, and gave him into custody. It was held that this amounted to an attempt to obtain money under false pretences.² A, who was in the employ of B, a tanner, took skins from a warehouse of B to C, the foreman of B, at another part of the premises, pretending that he had done work on them for which he was to be paid. A intended to return the skins to his master when he had been paid for his pretended work on them. It was held that this was an attempt to obtain money by false pretences and did not amount to larceny.³ The accused was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent to the accused 5s., but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue. It was held that the accused might be convicted on this evidence of attempt to obtain money by false pretences. The Court said: "As soon as ever the letter was put into the post the offence was committed."⁴ The accused described himself as the principal of the "British Health Institute" and issued advertisements stating that arrangements had been made for testing urine, if desired, at a nominal fee of 1s. 6d. Two individuals, who suspected the genuineness of the advertisement, forwarded to the appellant a solution of water with colouring ingredients mixed with soap, and asked for an analysis of their "water". Letters were received from the accused advising a course of treatment to cost not less than one guinea in each case. It was held that the accused was guilty of obtaining money by false pretences even though the person to whom the false pretence was made knew it to be false.⁵

Theft.—The accused entered the complainant's cattle enclosure by making a hole in a thorn-hedge with intent to commit theft of the cattle. It was held that he

²³ *Doraswamy Ayyar*, (1924) 48 Mad. 774.

²⁴ *Bhagwan Das*, (1905) 2 A. L. J. R. 718, 2 Cr. L. J. 788.

²⁵ *Mangal*, (1884) 1 O. D. 129.

¹ *Chhedai*, [1942] All. 889.

² *Ball*, (1842) Car. & Mar. 249.

³ *Holloway*, (1849) 8 Cox 241.

⁴ *Hensler*, (1870) 11 Cox 570, 573.

⁵ *Light*, (1915) 24 Cox 718.

was guilty of an attempt to commit theft, for the attempt began when entry was effected into the enclosure by making a hole in the hedge.⁶ Accused made his way into an open thorned enclosure in which goats and sheep were kept. He was disturbed and ran away. It was held that he was guilty of attempt to commit theft.⁷

The accused was caught while attempting to steal the purse of P from his pocket. P, however, seized the purse from outside his pocket and also the accused's hand. It was held that although the accused did move the purse for the purpose of committing theft, he did not commit the offence of theft, because he was unable to move the purse from the possession of P. The offence was, therefore, one punishable under this section and not under s. 379.⁸

House-trespass.—Where the accused entered on a verandah and attempted to push open a door, it was held that he was guilty of house-trespass.⁹

House-breaking.—The accused commenced to dig a hole in the wall of the complainant's dwelling-house with intent to make their entry into the house through it and, having so entered, to commit theft in the house. The hole was not in fact completed, that is, it did not completely penetrate from one side of the wall to the other, as the accused were interrupted before they could complete it. The trying Magistrate convicted the accused of the offence of attempting to commit house-breaking by night. On appeal, the Sessions Judge acquitted the accused on the ground that the act of the accused amounted only to a preparation and not to an attempt to commit house-breaking by night. It was held, reversing the order of acquittal, that the accused's acts amounted in law to an attempt, inasmuch as the actual transaction, the distinct overt act, was begun and to a certain extent carried through, though not to completion by reason of the accused being interrupted by other people.¹⁰ Where the accused were disturbed and captured as soon as they opened a door and before they actually effected entry into a shop, it was held that they were not guilty of house-breaking as the offence of house-breaking could not be committed without entry into the house and so they were guilty only of an attempt to commit house-breaking.¹¹ Where the accused went on to the roof of a house and had started to go down the ladder into the courtyard when he retraced his footsteps and jumped down from the back of the roof, it was held that it could not be said that he entered into the building but was guilty of an attempt to commit house-breaking.¹²

Melting sovereigns.—The accused, a professional melter of gold and silver, was found near the heated furnace in his workshop with a crucible containing molten silver and 580 sovereigns close at hand. He was, on these facts, found guilty of the offence of attempting to melt sovereigns punishable under Rules 21A and 28 of the Defence of India Consolidation Rules, 1915. It was held that he was guilty of attempt to melt sovereigns, for the only act that remained unperformed to complete the offence of melting the sovereigns was the final act of putting the sovereigns into the molten silver in the crucible.¹³

Abduction.—Where the accused lifted a woman on her refusing to accompany them from the bed of her husband where she was sleeping on the roof of the house and on alarm being given dropped her there and made good their escape, it was held that the offence of abduction was not completed but the accused were guilty of an attempt to abduct her.¹⁴

5. 'Where no express provision is made by this Code'.—This section does not apply to cases of attempts made punishable by express provisions of the Code. The attempts specially provided for are:—

Sec. 121, attempt to wage war against the Queen.

⁶ *Kohmi*, (1914) P. R. No. 24 of 1914, 16 Cr. L. J. 1, [1914] AIR (L) 584.

⁷ *Gharita*, (1918) P. R. No. 13 of 1919, 20 Cr. L. J. 402; *Jaimal*, (1924) 26 Cr. L. J. 1424, [1926] AIR (L) 147.

⁸ *Duraiswamy Mudali*, [1942] 1 M. L. J. 491, [1942] M. W. N. 870, (1942) 55 L. W. 297, 54 Cr. L. J. 501, [1942] AIR (M) 521.

⁹ *Nga Pan Hlaing*, (1914) 16 Cr. L. J. 2.

¹⁰ *Chandkha Salabatkhia*, (1918) 37 Bom. 553,

15 Bom. L. R. 564.

¹¹ *Mohammed Hussain*, (1927) 29 P. L. R. 54, 29 Cr. L. J. 4.

¹² *Nanhun*, (1938) 34 P. L. R. 906, 34 Cr. L. J. 1181.

¹³ *Abu Hasan*, (1919) 21 Bom. L. R. 747, 20 Cr. L. J. 677.

¹⁴ *Altu*, (1925) 26 P. L. R. 119, 26 Cr. L. J. 943, [1925] AIR (L) 512.

Sec. 124, attempt wrongfully to restrain the Governor-General and other high officials with intent to induce or compel them to exercise or refrain from exercising any of their lawful powers.

Sec. 125, attempt to wage war against the Government of an Asiatic Power in alliance or at peace with the King.

Sec. 130, attempt to rescue State prisoners or prisoners of war.

Sec. 161, attempt by a public servant to obtain an illegal gratification.

Sec. 162, attempt to obtain a gratification in order by corrupt or illegal means to influence a public servant.

Sec. 163, attempt to obtain a gratification for exercising personal influence over a public servant.

Sec. 196, attempt to use as true, evidence known to be false.

Secs. 198 and 200, attempt to use as true, a certificate or declaration known to be false in a material point.

Sec. 213, attempt to obtain a gratification to screen an offender from punishment.

Secs. 239 and 240, attempt to induce a person to receive a counterfeit coin.

Sec. 241, attempt to induce a person to receive as genuine a counterfeit coin which, when the offender took it, he did not know to be counterfeit.

Secs. 307 and 308, attempt to commit murder and culpable homicide.

Sec. 309, attempt to commit suicide.

Secs. 385, 387 and 389, attempt to put a person in fear of injury or accusation in order to commit extortion.

Sec. 391, conjoint attempt of five or more persons to commit a dacoity.

Secs. 393, 394 and 398, attempt to commit robbery.

Sec. 460, attempt by one of many joint house-breakers by night to cause death or grievous hurt.

6. 'For a term of transportation...which may extend to one-half of the longest term, etc.'—In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years (s. 67).

Section 75.—The offences which fall under this section must be punished entirely irrespective of s. 75.¹⁵ See Comment on s. 75.

PRACTICE.

Evidence.—Prove (1) that the accused attempted to commit some offence punishable with transportation or imprisonment under the Indian Penal Code, or that he attempted to cause such offence to be committed.

(2) That in such attempt he did some act towards the commission of that offence.

The Court should be satisfied that the offender had in his mind the design to commit a certain offence, and that he had begun to move towards an execution of his purpose: there must also be proof of some act, not of an ambiguous kind, but directly approximating to the commission of the offence. When the offender's design is made manifest by any such act, it becomes an attempt cognizable as an offence, and punishable under this section.

Procedure.—Same as that for the offence attempted.

Where an accused person has been indicted for committing any offence, the jury may find him not guilty of committing, but guilty of attempting to commit, the offence under this section.¹⁶

Charge.—The charge should make mention of this section and the section declaring the punishment for the offence attempted to be committed.¹⁷

It should run thus:—

¹⁵ *Bharosa*, (1895) 17 All. 123.

¹⁶ Criminal Procedure Code, s. 238.

¹⁷ (1864) 1 W. R. (Cr. L.) 10, 11.

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, attempted to commit (*specify the offence attempted*), and in such attempt did a certain act towards the commission of the said offence, to wit (*specify the act done*) ; and that you thereby committed an offence punishable under section——(*specify the section punishing the offence attempted*) and s. 511 of the Indian Penal Code, and within my cognizance [*or within the cognizance of the Court of Session (or the High Court)*].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—A was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for seven years, which he commuted, under s. 59, to transportation for the same term. It was held that, under ss. 376 and 511 a sentence of imprisonment for the offence committed could not be for a longer term than five years, and such sentence could not be commuted, under s. 59, to transportation for a longer term.¹⁸

In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal.¹⁹

¹⁸ *Joseph Meriam*, (1868) 1 Beng. L. R. (A2 Cr. J.) 5, 10 W. R. (Cr.) 10.

¹⁹ *Yella valad Parshia*, (1864) 3 B. H. C. (Cr. C.) 37. See the Whipping Act (IV of 1909) set out in the Appendix.

APPENDIX.

THE CHILD MARRIAGE RESTRAINT ACT.

(Act No. XIX of 1929, as amended by Act VII of 1938 and Act XIX of 1938.)

AN Act to restrain the solemnisation of child marriages.

WHEREAS it is expedient to restrain the solemnisation of child marriages ; it is hereby enacted as follows :—

Short title, extent
and commencement.

1. (1) This Act may be called the Child Marriage Restraint Act, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas and applies also to—

(a) all British subjects and servants of the Crown in any part of India ; and

(b) all British subjects who are domiciled in any part of India wherever they may be.

(3) It shall come into force on the 1st day of April, 1930.

NOTE.

So far as Hindus are concerned this Act is not *ultra vires* of the Indian Legislature.¹ The addition of clauses (a) and (b) by Act VII of 1938 overrules the decisions of the Bombay² and the Nagpur³ High Courts which held that this Act was limited in its operation to British India and only struck at marriages contracted in British India.

The fact that persons committing an offence under this Act are subjects of a Native State makes no difference even if such an act is not an offence in that State.⁴

A marriage performed outside British India to evade the provisions of the Child Marriage Restraint Act is not one opposed to public policy and a provision for contribution made in a decree in a partition suit can be enforced in execution, though the marriage was so performed.⁵

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “child” means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age ;

(b) “child marriage” means a marriage to which either of the contracting parties is a child ;

(c) “contracting party” to a marriage means either of the parties whose marriage is or is about to be thereby solemnised ; and

(d) “minor” means person of either sex who is under eighteen years of age.

Punishment for
male adult below
twenty-one years of
age marrying a child.

3. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.

NOTE.

When the marriage of a child is celebrated in contravention of the provisions of this Act, certain penalties are imposed on persons bringing about such a marriage, but the marriage is not declared by the Act to be an invalid marriage.⁶

Punishment for
male adult above
twenty-one years of
age marrying a child.

4. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

¹ *Jalsi Kuar*, (1933) 14 P. L. T. 438, 35 Cr. L. J. 20, [1933] AIR (P) 471.

² *Narayan Mahale*, (1935) 37 Bom. L. R. 885, 59 Bom. 745. See also *Sreeramamurthy v. Ranganayakulu*, [1937] M. W. N. 22, [1937] 1 M. L. J. 388, 38 Cr. L. J. 587, 45 L. W. 210, [1937] AIR (M) 273, which held to the contrary.

³ *Haider v. Isa Syed*, (1937) 39 Cr. L. J. 651, [1938] AIR (N) 335.

⁴ *Superintendent & Remembrancer of Legal Affairs, Bengal v. Radha Kishen*, (1935) 39 C. W. N. 656, 37 Cr. L. J. 757.

⁵ *Anandaramayya v. Subbayya*, [1940] 2 M. L. J. 353, [1940] M. W. N. 832, [1940] AIR (M) 901.

⁶ *Moti v. Beni*, [1936] A. L. J. R. 1097, 38 Cr. L. J. 301, [1936] AIR (A) 852; *Ram Baran v. Sital Pathak*, [1939] A. L. J. R. 173, [1939] AIR (A) 340.

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

NOTE.

According to the Nagpur High Court this section does not include the bridegroom and the parent or guardian of a minor contracting party. It applies to persons other than the contracting parties to the marriage and their parents and guardians.⁷ The Allahabad High Court has differed from this view and held that this section deals with persons who perform, conduct or direct any child marriage. A marriage between a girl of over fourteen years of age and a boy of less than eighteen years was performed and conducted by their respective fathers. Upon their prosecution, it was contended that there was no valid marriage as the parties belonged to the same *gotra*, that *gauna* ceremony had not been performed, and that the girl not being a "child" as defined in the Act, her father could not be convicted under the Act. It was held that the marriage ceremony, having been performed, no question of the validity or the invalidity of the marriage, or of consummation or absence of consummation thereof, could arise; and that the two fathers could be convicted under this section and the fact that the bride was not a "child" did not affect the question of her father's liability as it was he who gave his daughter in marriage and took part in the marriage ceremonies.⁸ The Madras High Court has approved the view of the Nagpur High Court and has dissented from the Allahabad High Court. It has held that the section under which the parents are liable is not this section but s. 6.⁹ The Bombay High Court following the view of the Madras and the Nagpur High Courts has held that the words "performs, conducts or directs" in this section bear the same import and mean working towards the end, that is completing the union; and are used by the Legislature to indicate the solemnization of the marriage. They do not suggest the arranging of marriage merely or attending a marriage ceremony with a view to assisting in the solemnization of the marriage. They are used in relation to the ceremony of marriage. The mere participation in the latter ceremony (e.g. the giving in Kanyadan of a grown-up girl by her parents) does not offend against the provisions of this section.¹⁰

This section contemplates that the person who solemnizes a marriage must make some reasonable enquiry as to the ages of the parties of the marriage and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and the bridegroom and forms his own opinion. Where there was no proof of enquiry on the part of the priest as to the age of the bridegroom, he was held liable under this section.¹¹

Mere applying for permission to conduct such festivities as dancing (*nach*), fire-works, etc., on the occasion of a marriage does not amount to an offence under this section.¹²

6. (1) Where a minor contracts a child marriage,¹ any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

NOTE.

This section provides for the offence in cases where a minor himself contracts a child marriage and any person having charge of the minor does any act to promote the marriage or permits it to be solemnised.¹³

This section only aims at permitting or failing to prevent a marriage which is made penal under the earlier sections, and does not impose a penalty for permitting a marriage which is lawful.¹⁴

1. 'Where a minor contracts a child marriage'.—This expression is wide enough to cover a case of a marriage to which both parties are minors as well as to one to which one party is a minor. Where

⁷ *Ganpat Rao*, (1932) 28 N. L. R. 302, 34 Cr. L. J. 311, [1932] AIR (N) 174.

⁸ *Munshi Ram*, (1935) 58 All. 402.

⁹ *Public Prosecutor v. Rattayya*, [1937] Mad. 854.

¹⁰ *Fulabhai Joshi*, (1940) 42 Bom. L. R. 857, [1940] Bom. 709.

¹¹ *Public Prosecutor v. Rattayya*, [1937] Mad. 854.

¹² *Bachchu Lal*, [1936] O. W. N. 480, 37 Cr. L. J. 616, [1936] AIR (O) 311.

¹³ *Munshi Ram*, (1935) 58 All. 402.

¹⁴ *Narayan Mahale*, (1935) 37 Bom. L. R. 885, 59 Bom. 745.

a Hindu parent or guardian takes part in a child marriage, he must be deemed to have done an act to promote the marriage, to have permitted the solemnization of the marriage, or to have negligently failed to prevent the solemnization and is liable to punishment under this section and not for two offences under s. 5 and this section respectively.¹⁵ The expression "where a minor contracts a child marriage" should not be construed so as to mean that the section applies only to cases where the child himself or herself entered into an agreement for the marriage. The liability rests on any parent or guardian who is in any way responsible for the marriage of his minor child, by whomsoever the agreement and arrangements for the marriage may be made. Where the father is alive and living with his daughter and is in charge of her the grandfather is not liable under this section even though he may also have made arrangements for the marriage.¹⁶

A creditor who advances money to enable an infant to marry is not punishable under this section or s. 5.¹⁷

Where the father of the bridegroom promotes a marriage, the mother has no authority by law to prevent the marriage and her mere participation in the marriage cannot be regarded as constituting an offence under this section which is confined only to the person who has actual charge of the minor either as parent or as guardian at the time.¹⁸

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

Imprisonment not to be awarded for offences under section 3.

8. Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a Magistrate of the first class shall take cognizance of, or try, any offence under this Act.

Jurisdiction under this Act.

NOTE.

An Additional District Magistrate who has been given all the powers of a District Magistrate is empowered to try a case under this Act.¹⁹

9. No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.

Mode of taking cognizance of offences.

NOTE.

The phrases "no Court shall take cognizance of any offence" in this section and "no charge as to any such offence shall be enquired into" in s. 188 of the Criminal Procedure Code are not to be interpreted as meaning one and the same thing. When an offence under this section is alleged to be committed in an Indian State outside British India cognizance of the offence can be taken by a Magistrate in British India, before the production of a certificate from the Political Agent of the Indian State concerned, though the enquiry into the charge will depend on the actual production of the certificate.²⁰

The limitation of one year, substituted in this section by the amending Act XIX of 1938 still holds good despite the repeal of that Act in view of s. 4 of the repealing Act XXV of 1942.²¹

10. The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

Preliminary inquiries into offences under this Act.

NOTE.

The Court taking cognizance of an offence under this Act is bound to hold a preliminary enquiry before taking action, unless it dismisses the complaint under s. 203 of the Code of Criminal Procedure.²² According to the Lahore High Court omission to comply with this mandatory provision is an illegality which vitiates the trial.²³ The Nagpur High Court has held that the failure to hold a preliminary enquiry under s. 203 of the Criminal Procedure Code in compliance with the provisions of this section is not

¹⁵ *Ganpat Rao*, (1932) 28 N. L. R. 402, 34 Cr. L. J. 311, [1932] AIR (N) 174.

¹⁶ *Bhagwat Sarup*, [1945] All. 272.

¹⁷ *Ram Jash Agarwal v. Chand Mandal*, [1937] 2 Cal. 764.

¹⁸ *Public Prosecutor v. Rattayya*, [1937] Mad. 854.

¹⁹ *Abdur Rahiman*, [1937] Mad. 1034.

²⁰ *Harnarayan v. Govindram*, [1942] Nag. 193.

²¹ *Amritrao v. Chandrabhan*, (1946) 47 Cr. L. J. 794.

²² *Chand Mal*, (1933) 15 Lah. 63; *Harihar Tiwari v. Etwari Gop*, [1939] P. W. N. 670, 20 P. L. T. 495, 40 Cr. L. J. 887, [1939] AIR (P) 525.

²³ *Mangal Ram v. Kalu*, (1930) 12 Lah. 383.

an irregularity in the mode of trial, but is one of procedure only, curable under s. 537 of the Code. It does not vitiate the trial in the absence of any proof of failure of justice when the judgment has been passed by a Court of competent jurisdiction, which took cognizance of the case before the stage for ordering preliminary enquiry had been reached.²⁴ The Chief Court of Sind has followed the view of the Lahore High Court.²⁵

The transfer by a District Magistrate of a case under the Child Marriage Restraint Act to a Sub-Divisional Magistrate for disposal according to law without himself making an enquiry under s. 203, Criminal Procedure Code, is illegal.¹

An anonymous petition stating that an offence under the Child Marriage Restraint Act was about to take place is not a complaint nor is a letter written by a police officer to the District Magistrate who had forwarded the petition to him for inquiry, a "complaint". Proceedings initiated by the Magistrate regarding the letter as a complaint are bad by virtue of s. 9 of the Act.²

11. (1) When the Court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898, and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

NOTE.

The mere fact that a security bond furnished by a complainant is found to be defective, does not vitiate the trial under s. 6 as it does not affect the merits of the case.³

12. (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment.

THE CONTEMPT OF COURTS ACT.

(Act No. XII of 1926).

AN Act to define and limit the powers of certain Courts in punishing contempts of Courts.

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of Courts;

AND WHEREAS it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court; It is hereby enacted as follows:—

²⁴ *Mehtar*, [1940] Nag. 488.

²⁵ *Muhammad Hashim*, [1940] Kar. 442.

¹ *Sivagami Ammal v. Muthu Aiyar*, [1939] 1 M. L. J. 111, [1938] M.W. N. 1812, 48 L. W.

774, 40 Cr. L. J. 514 (2), [1939] AIR (M) 274.

² *Jagdeo v. Hill*, [1938] Ran. 150.

³ *Bachchu Lal*, [1936] O. W. N. 480, 37 Cr. L. J. 616, [1936] AIR (O) 311.

Short title, extent and commencement.

1. (1) This Act may be called the Contempt of Courts Act, 1926.

(2) It shall extend to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

NOTE.

The non-Presidency High Courts in India as superior Courts of Record have an inherent power to punish contempt of themselves and this power has not been taken away or in any wise limited by the Contempt of Courts Act; it has been left undisturbed and consequently the High Courts in India continue to deal with contempt of themselves in the same manner as a Court of Record does under the Common Law of England. It is a necessary incidence of this jurisdiction that such contempts are punishable summarily by committal. There is no limitation imposed on the High Courts in the matter of punishment. Consequently the High Court is competent to pass an order committing a person to custody in jail until he apologises to the High Court and pays into Court the moneys received by him in defiance of the orders of the Court.⁴

The majority of Judges of the Allahabad High Court in a full bench case hold that no power to punish for contempt of an inferior Court now exists independently of the Indian Penal Code and this Act. The minority hold that the High Court has inherent powers to punish contempt of Court committed against either the High Court or a Court subordinate to it.⁵

A High Court Judge has the same powers to commit for contempt in the exercise of his insolvency jurisdiction as in the exercise of his original jurisdiction.⁶

2. (1) Subject to the provisions of sub-section (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves.

(2) Subject to the provisions of sub-section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-section (1).

(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

NOTE.

Under sub-s. (1) whatever the High Court can do in the case of a contempt of the High Court it can also do in the case of a contempt of a subordinate Court. And since the High Court can act of its own motion in a case of contempt of the High Court, it can also do so in the case of a contempt of a Court subordinate to it.⁷ The Lahore High Court is a Court of Record by virtue of ss. 219 and 220 of the Government of India Act, 1935, and as such the power to commit for contempt is a necessary incident and attribute of the Lahore High Court, and, therefore, it possesses the ordinary jurisdiction of a Court of Record and can proceed summarily to try contempt cases.⁸

The words "subordinate Court" are used in a wide sense as including any Court over which the High Court has superintendence.⁹

Any act done or writing published which is calculated to obstruct or interfere with due course of justice or the legal process of the Court¹⁰ or to bring a Court or a Judge into contempt, or to lower his authority or is likely to prejudice the public for or against a party is contempt of Court.¹¹ Similarly, attacks made on the personal character of a Judge or attributing base or improper motives to the decision of a case amounts to a contempt of Court.¹² But on the other hand Courts should not be too sensitive where no harm has been caused or was intended to be caused.¹³ Any publication, which is calculated to poison the minds of the jurors, intimidate witnesses or parties or create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt. It is of the very essence of the offence that proceedings should be pending when the offending publication appears. The offence

⁴ *Lala Harkishan Lal*, (1936) 17 Lah. 69, S.B.

⁵ *Mahant Shantanand Gir v. Mahant Basudevand Gir*, (1930) 52 All. 619, F.B.

⁶ *Official Assignee, Madras v. Suryakanthammal*, (1938) 48 L. W. 462.

⁷ *Superintendent and Legal Remembrancer of Legal Affairs, Bihar v. Murali Manohar Prasad*, (1940) 20 Pat. 306.

⁸ *K. L. Gauba*, [1942] Lah. 441, F.B.

⁹ *Advocate-General, Burma v. Maung Chit*

Maung, [1940] Ran. 188, S.B.

¹⁰ *Government Pleader, Bombay v. Shankar Javedekar*, (1937) 40 Bom. L. R. 78, [1938] Bom. 176.

¹¹ *Government Pleader, Bombay v. Tulsidas Jadhav*, (1937) 40 Bom. L. R. 75, [1938] Bom. 179.

¹² *Government Pleader, Bombay v. Tulsidas Jadhav*, (1937) 40 Bom. L. R. 75, [1938] Bom. 179.

¹³ *F. B. Kolte*, [1942] Nag. 506, 510.

of contempt may be committed even if there is no proceeding or cause actually pending provided that such a proceeding or cause is imminent and the writer of the offending publication either knew it to be imminent or should have known that it was imminent.¹⁴ The publication of comments on a case which is pending trial in a Court is contempt of Court if the comments are such as are likely to prejudice the administration of justice in the case. A printer cannot escape liability imposed on him by law by alleging a contract with the owner of the press that he was not to be responsible for the contents of the publication. A journalist should acquaint himself with his duties and liabilities. Youth and inexperience or a subsequent apology would not be an excuse as a rule.¹⁵ Where the article published is calculated to influence the mind of not only the prosecution witnesses but also the general public and is, therefore, highly prejudicial to a fair trial, though very likely no great harm has been actually done the object of writing being to prejudice the public against the merits of the prosecution, the act amounts to a gross contempt of Court.¹⁶ To suggest in a newspaper article that evidence intended to be used in a prosecution, which is either proceeding or is plainly contemplated, has been obtained by improper means and is unreliable, or to suggest that admissions of the accused have been improperly obtained, is conduct calculated to interfere with the due course of justice.¹⁷ Pending a suit for an injunction restraining the defendants from entering the plaintiff's forests and cutting firewood therein, respondent No. 2 wrote and respondent No. 1 published an article accusing the plaintiff of having ruined the defendants and of having concocted false criminal cases against them. The article further accused the plaintiff of using his influence maliciously and to the detriment of the defendants. The article after setting out the defendants' case and inferring the same to be true concluded with an appeal for assistance for the defendants. It was held that the article had the effect of holding up the plaintiff to hatred or contempt and was liable to prejudice the course of justice and hence constituted a contempt of Court, and the belief of the respondents that it would not prejudice the fair trial of the suit was immaterial. The fact that the trial Judge would not be affected by the article had no bearing on the matter.¹⁸ Where, while a criminal case was pending, a public meeting was called and speeches were delivered there with the object of influencing the decision of the criminal Court, preventing witnesses from giving evidence, and bringing pressure on the complainant to withdraw his complaint, it was held that it amounted to contempt of Court.¹⁹ It is gross contempt to attribute to a Judge of the High Court a deplorable lack of experience and sense of responsibility and reasonable want of competence and care as a Judge, and to propose that an inquiry be made into the circumstances under which the "extraordinary" judgment was written because (as was averred) there must have been extraordinary causes for the aberration of the Judge which it was a public duty to expose.²⁰ A criticism of an executive officer, no matter how severe, cannot amount to contempt of Court unless such criticism contains matter calculated *substantially* to interfere with the due course of justice. It is one thing to say during the pendency of proceedings that an executive officer should not have taken a particular course. It is quite a different thing to say that the course he took was wholly illegal.²¹

Garbled and misleading headlines published in a newspaper, amounting to a criticism of the prosecution case in the guise of a summary of the proceedings in Court, calculated to produce an atmosphere of prejudice in which the proceedings must go on, is contempt of Court. Criticism of a capital sentence case pending confirmation by the High Court may amount to contempt although no appeal has been preferred at the date of such criticism.²²

Where an advocate sent a communication to a Judge, before whom an execution case was pending, that if he did not stay proceedings pending the disposal of a revision application he would run the risk of a suit for damages being brought against him, it was held that the advocate was guilty of contempt of Court under s. 3.²³ A letter written by a party to the Judge seized of the case, while he was exercising jurisdiction in respect of it, containing an imputation that he acted unlawfully and with a view to cause him loss, constitutes contempt of a Court punishable under s. 3 but does not amount to an offence of contempt of Court punishable by the Penal Code.²⁴ An arrangement was arrived at between opposing parties, both sides undertaking not to add to certain embankments or alter them in any way without going to the Collector and getting permission of the Government. A complaint filed by one party alleging breach of the arrangement by the other was dismissed by the District Magistrate who was also the Collector. The complainant's party then wrote a letter to the Collector stating that the opposite

¹⁴ "Tribune", Lahore, [1944] Lah. 111.

¹⁵ *Maung Tin Saw*, (1927) 6 Ran. 39.

¹⁶ *Ganesh Shankar Vidyarthi*, (1928) 26 A. L. J. R. 1307, 30 Cr. L. J. 217, [1929] AIR (A) 81; *Hakim Qari Nasir Ahmad v. Mr. Anis Ahmad Abbasi*, (1940) 16 Luck. 506; *Anis Ahmad Abbasi v. Hakim Qari Nasir Ahmad*, (1941) 16 Luck. 758.

¹⁷ *Government Pleader, Bombay v. Shankar Javadekar*, (1937) 40 Bom. L. R. 73, [1938] Bom. 176.

¹⁸ *Rajah of Venkatagiri v. Rama Naidu*, (1937) 48 L. W. 444.

¹⁹ *Radha Krishna, Lala v. Raja Ram*, (1940) 16 Luck. 61.

²⁰ *D. S. Bukhari*, (1927) 29 P. L. R. 294, 28 Cr. L. J. 727, [1927] AIR (P) 610, F.B.

²¹ "Tribune", Lahore, [1944] Lah. 111.

²² *His Excellency the Governor of Bengal in Council v. Tusharkanti Ghosh*, (1932) 60 Cal. 603.

²³ *Advocate, in the matter of*, [1934] A. L. J. R. 145.

²⁴ *Subordinate Judge, Hoshangabad v. Jawa-harlal*, [1941] Nag. 304.

party's "people have been emboldened by the view that you have taken in the case and the orders that were passed by you." The Collector taking this as contempt of his authority in his capacity as a District Magistrate when he had dismissed the complaint, referred the matter to the High Court under the Contempt of Courts Act. It was held that there was no judicial matter before the Magistrate at all and the action of the Magistrate was a mere rejection of the complaint; that a criticism that the Magistrate's view of the case had emboldened the accused was not in the nature of a criticism of a judicial decision, and, even if there had been such a criticism, it was not of a kind to bring the Magistrate's Court into contempt or to diminish its authority.²⁵ Where in a pending action the plaintiff's counsel sent a notice to the defendant's guardian that he should withdraw a plea in the written statement the language of which was defamatory *per se* of the plaintiff's deceased father, and pay a named sum as damages, and in case he failed to comply with the terms of the notice legal action would be taken, it was held that the sending of the notice amounted to a direct interference with the administration of justice and the plaintiff and his counsel were guilty of contempt of Court.¹ Where a letter was addressed by a party to a civil suit to his adversary's counsel threatening legal proceedings in case the counsel failed unconditionally to withdraw certain passages in the statement filed by him for his client, it was held that this amounted to contempt of Court.²

Where in an article on 'The Bar Council Election', which was published in a newspaper, an advocate remarked that "in this connection it is amusing to note that when a comparatively undeserving lawyer is raised to the Bench which is a fairly frequent occurrence in our judicial history", it was held that the passage in question did not contain a fair criticism or comment and was nothing more or less than an insulting reference to the character and capacity of the Judges in an article in which any reference to the High Court was entirely out of place, and the reference amounted to contempt of Court.³ Where at a meeting of the Bar Association, an advocate in the course of his speech said, "the man in the street has lost confidence in the administration of justice in the province", it was held that the use of the expression constituted contempt of Court.⁴

Matter published in a newspaper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that with which he is charged, is contempt of Court as it must tend to interfere with the fair trial of that charge. But contempt of Court is not a matter of mere form or technicality but of substance. Even if the observations on the subject-matter of a proceeding may be likely to interfere with the course of justice, and may technically amount to contempt, the Court may not interfere, if it is not satisfied that such comments were calculated to prejudice the fair trial.⁵

An order of the Bombay Court of Small Causes directing the person to do a specific thing within a limited time can, if disobeyed, be enforced by the High Court by proceedings for contempt of Court under the Contempt of Courts Act, 1926.⁶ Where a person had been committed to the Court of Session upon a charge under s. 304 of the Penal Code, and certain articles commenting on the incident of the murder and on the commitment of the accused appeared in a newspaper, from the time of the investigation stage, it was held, considering the articles in question, that they tended to prejudice the case of the accused in the minds of likely jurymen and as such they tended to interfere with the due course of justice and that, therefore, they amounted to contempt.⁷

When an accused person files a written statement in which he makes certain statements which are considered to be defamatory by a third party who gives a notice to him demanding apology and damages, there is no intention to interfere with the proceedings in the criminal Court and the action of the third party in giving the notice does not, therefore, amount to contempt of Court.⁸

Sub-sec. 2.—The Chief Court of Oudh has power to deal with the contempt of Subordinate Courts.⁹ The Chief Court of Sind which is also a Court of Record has a right to punish in a summary way contempt of itself. Where there has been interference with, or disturbance of, the possession of a receiver which constitutes contempt, the Court should order restoration of *status quo* and should not pass an order which amounts to a condonation of the contempt.¹⁰

Sub-sec. 3.—The meaning of this clause is that where under the Penal Code there is already a provision for punishing a contempt of Court as a contempt of Court, this Act itself shall have no

¹ *Girindra Mohan Misra*, [1937] P. W. N. 137, 17 P. L. T. 861, 38 Cr. L. J. 392, [1937] AIR (P) 124.

² *Rajender Singh v. Uma Pershad*, [1935] A. L. J. R. 29.

³ *Telhara Cotton Ginning Co. Ltd. v. Kashinath Gangadhar Namjoshi*, [1940] Nag. 69.

⁴ *Advocate of Allahabad*, [1935] A. L. J. R. 125.

⁵ *Muhammad Wasim*, (1932) 34 Cr. L. J. 726, [1933] AIR (O) 118.

⁶ *S. A. Dange v. S. T. Shepperd*, [1938] A. L. J. R. 665, 32 Cr. L. J. 78, [1938] AIR (A) 483.

⁶ *Ali Mahomed Adamalli (No. 2)*, (1941) 44 Bom. L. R. 249, 43 Cr. L. J. 667, [1941] AIR (B) 154 (1).

⁷ *Superintendent and Remembrancer of Legal Affairs, Bihar v. Murali Manohar Prasad*, (1940) 20 Pat. 308; *Mahadeo Prasad v. Tej Narain Bahadur*, [1943] O. W. N. 331, (1943) 45 Cr. L. J. 108, [1944] AIR (O) 14.

⁸ *V. B. Kolte*, [1942] Nag. 506.

⁹ *Mohammad Yusuf v. Imtiaz Ahmad Khan*, (1939) 14 Luck. 492.

¹⁰ *Ramzan v. Abubucker*, [1944] Kar. 396.

application; it does not mean that when the act which has constituted the contempt of Court also constitutes an offence under the Penal Code it may not be punished under this Act. A single act may be both an offence under the Penal Code and may also be a contempt of Court and may be punishable in either or both capacities.¹¹ When an act is punishable under the Penal Code not as contempt of Court but as some other offence, e.g., defamation, the jurisdiction under the Contempt of Courts Act is not barred by this sub-section and the act is one punishable both under that Act and under the Penal Code. The object of proceedings under the Contempt of Courts Act is to vindicate the dignity and honour of the Courts subordinate to the High Court and this purpose cannot be served by the institution of complaints for defamation by the judicial officers in cases where the contempt of Court also amounts to defamation.¹² The prohibitions contained in this sub-section refer to offences punishable as contempt of Court by the Penal Code and not to offences punishable there otherwise than as contempt.¹³

This Act enables the High Court to punish contempt of the inferior Court, notwithstanding that such contempt as is complained of is not an offence (as contempt) against any of the sections of the Penal Code; only those contempts which are punishable by the Code as contempts of Court are excluded from the jurisdiction of the High Court by the Act.¹⁴

The failure to furnish information under s. 6A is an offence under the provisions of the Wakf Act yet it is not an offence punishable under the Indian Penal Code. Consequently the High Court is not prohibited from dealing with it by the terms of sub-s. (3) of this section.¹⁵

The standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt cannot be lessened, but it must be remembered that the question of committal or non-committal is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships of the Privy Council would be slow to interfere with that discretion.¹⁶

Procedure.—An application in contempt made to the High Court, for the contempt of itself and of a subordinate Court, need not necessarily be dealt with by the Court on the Crown side and in such a case it is not necessary that a party, if represented, must appear through an advocate represented by an attorney.¹⁷ In cases in which a mofussil Court has no jurisdiction in regard to contempt of itself, the correct procedure, in ordinary circumstances, is not an application to that Court followed by an inquiry and a reference to the High Court, but a proper application to the High Court direct by the party aggrieved, the procedure to be followed as to notice, etc., being that on applications to the original side.¹⁸ When the charge is one of contempt of Court no action can be taken where the particular acts of contempt which the party complained against is required to answer to, are not set forth specifically in the petition, although the same might be matters of record and although a rule may already have been issued. Allegations made in affidavit which are stated to be true only to the deponent's information, the source of which is not disclosed, cannot be taken any notice of.¹⁹

The provisions of the Code of Criminal Procedure are not applicable to summary proceedings taken for punishing a contempt and, therefore, s. 556 does not apply because proceedings for punishing contempt are taken not with a view to protect the Court as a whole or the individual Judges of the Court from a repetition of the attack but with a view to protect the public and specially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court from the mischief they will incur if the authority of the Court be undermined or impaired. The gravamen is an endeavour to shake the confidence of the public in the Court. It is not only the duty of a Judge who has been personally attacked to sit in judgment over the contemnor but he has no other alternative but to do so as it is impossible to vindicate the reputation and prestige of the Court which has been attacked by taking proceedings in any Court for libel or otherwise.²⁰

A contemnor who has been called upon to show cause why he should not be punished for an attack on the Court or its Judges does not occupy the position of a defendant in a libel action where he may plead or prove justification or the position of an accused person in a prosecution for defamation. Even assuming that the writer of a manifesto believes all he states therein to be true, the writer is not permitted to lead evidence to establish the truth of his allegation.²¹

Contempt proceedings are summary and a very arbitrary method of dealing with an offence and, therefore, should be sparingly instituted and a person not convicted unless his conviction is essential in the interests of justice.²²

¹¹ *Kaulashia*, (1932) 12 Pat. 1; *Bennett Coleman & Co. Ltd. v. G. S. Monga*, (1936) 38 P. L. R. 1166, 38 Cr. L. J. 73, [1936] AIR (L) 917.

¹² *Jagannath Prasad*, [1938] All. 548.

¹³ *Subordinate Judge, Hoshangabad v. Jawaharlal*, [1941] Nag. 304.

¹⁴ *Jnanendra Prasad Bose v. Gopal Prasad Sen*, (1932) 12 Pat. 172; *Narayan Chandra v. Panchu*, (1935) 40 C. W. N. 413, 37 Cr. L. J. 65, [1935] AIR (C) 684.

¹⁵ *Ali Mahomed Adamali*, (1945) 62 I. A. 226, 48 Bom. L. R. 116.

¹⁶ *Ibid.*

¹⁷ *Superintendent and Remembrancer of Legal Affairs, Bengal v. Khagendranath Das Gupta*, (1930) 58 Cal. 458.

¹⁸ *Amulya Chandra Bhaduri v. Satish Chandra Giri*, (1931) 35 C. W. N. 1265, 33 Cr. L. J. 444, [1932] AIR (C) 255.

¹⁹ *Amulya Chandra Bhaduri v. Satish Chandra Giri*, (1931) 35 C. W. N. 1267, 33 Cr. L. J. 369(2).

²⁰ *K. L. Gauba*, [1942] Lah. 411, F.B.

²¹ *Ibid.*

²² "*Tribune*", *Lahore*, [1944] Lah. 111.

3. Save as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both:

Limit of punishment
for contempt of Court.

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court:

Provided further that notwithstanding anything elsewhere contained in any law no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it.

NOTE.

Where the High Court awarded a punishment of four months' simple imprisonment and also ordered the accused to pay a certain sum as costs of the Crown and of the complainant, it was held that the High Court had jurisdiction to pass the order for payment of costs.²³

The proviso seems to contemplate an apology at a late stage, but where the accused takes such action as any reasonable man must realise to be likely to prejudice the trial of a case and instead of apologising at the earliest opportunity he or his counsel contends most strenuously that no contempt has been committed his apology can only be regarded as an afterthought put forward in the hope of avoiding the wrath to come, it is a gross case of contempt which he must purge by a suitable sentence.²⁴

THE INDIAN CRIMINAL LAW AMENDMENT ACT.

(ACT NO. XIV OF 1908).

AN ACT to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace.

WHEREAS it is expedient to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Indian Criminal Law Amendment Act, 1908.

(2) It extends to the Provinces of Bengal and of Eastern Bengal and Assam; but the Provincial Government of any other Province may, at any time, by notification in the Official Gazette, extend the whole or any Part thereof to that Province.

[Sub-section (2) was amended by Act XXXVIII of 1920, s. 2, and Sch. I.]

[Sub-section (3) repealed by Act V of 1922, s. 3]

PART I.

SPECIAL PROCEDURE.

[Repealed by Act V of 1922, s. 3]

PART II.

UNLAWFUL ASSOCIATIONS.

Definitions.

15. In this Part—

(1) "association" means any combination or body of persons, whether the same be known by any distinctive name or not; and

(2) "unlawful association" means an association—

(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or

(b) which has been declared to be unlawful by the Provincial Government under the powers hereby conferred.

16.* (1) If the Provincial Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Provincial Government may, by notification in the Official Gazette, declare such association to be unlawful.

Power to declare
association unlawful.

²³ *Wahid-ullah Ahrari*, (1935) 58 All. 374.

²⁴ *Hakim Qari Nazir Ahmad v. Mr. Anis*

Ahmad Abbasi, (1940) 16 Luck. 506.

* In the Province of Bombay the following section has been inserted by Bom. Act VI of 1947, s. 27:—

16A. If the Provincial Government is of opinion that any association is organized or

[Sub-section (2) was repealed by the Government of India (Adaptation of Indian Laws and Order), 1937.]

NOTE.

In order to prove that an association has been declared unlawful, the Government must not only insert a declaration in the official *Gazette*, but must publish the *Gazette* in the manner usually adopted for publishing such *Gazette*, and allow a reasonable opportunity to the people concerned to see the *Gazette*.¹ The accused were members of an association which was declared unlawful by a notification published in the *Bombay Government Gazette* on October 10, 1930. There was no evidence of the general publication of the *Gazette* on that day at that place. On October 11, at about 5 A.M. the police went to the place of the association, collected the accused, explained to them the contents of the notification, and arrested them. Two of the accused were convicted under s. 17 (2) and the rest under s. 17 (1) of the Act. It was held that under the circumstances the declaration that the association was unlawful was sufficiently notified to the accused; (2) that there was no evidence to show that the accused continued as members of the association after it had been declared unlawful; (3) that from the fact that the accused were members of an association when it was lawful it could not be presumed that they continued to be members after it was declared unlawful.²

A general notification declaring unlawful all associations, by whatever name known or whether known by any name or not, which have certain specified objects subversive of law, order and peace, is insufficient compliance with this section, read with s. 15.³

17. (1) Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations¹ of any such association, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

(3) An offence under sub-section (1) shall be cognizable by the police, and notwithstanding anything contained in the Code of Criminal Procedure, 1898, shall be non-bailable.

NOTE.

The accused visited a village and addressed the people at the village gate. He stated that the British *raj* had come to an end or at any rate was about to do so, and exhorted the people to hold a *divan* and take steps to establish an independent State at that village. After staying at the village for two or three days he went away and immediately after his departure an unlawful association was formed of which his son was made the Secretary, and his brother, the Vice-President, other office-holders being also appointed. The accused also told the people that he had given Rs. 2,000 towards the movement which had been paid to his son and people could go to the latter to have their names registered. It appeared that Rs. 860 had actually been paid by the accused to his son at that time, which payment was apparently made as a subscription and for the purpose of being utilized for the objects of the association, the formation of which the accused was advocating. The question was whether the accused's words and actions constituted an offence under this Act, or the Penal Code. It was held that the accused's act did not come within the purview of either clause (1) or (2) of this section, as he did not contribute to the funds or assist in the management of an *existing* association. It was held, however, that the accused 'instigated' the formation of an association which was unlawful under s. 15 (2) (a) of this Act, and, therefore, abetted its formation (ss. 107 and 108 of the Indian Penal Code) and as any

¹ *Balkrishna Hirlekar*, (1930) 33 Bom. L. R. 82, 55 Bom. 356.

R. 383, 32 Cr. L. J. 725, [1931] AIR (B) 203.

² *Dharamanand Kosambi*, (1930) 33 Bom. L.

³ *Swadesh Ranjan Dutta*, (1933) 37 C. W. N. 964, 35 Cr. L. J. 605 (2), [1934] AIR (C) 161.

equipped for the purpose of enabling the members of the association to be employed, or is organized or equipped in such manner as to arouse reasonable apprehension that the members of the association may be employed, in usurping the functions of His Majesty's forces or of any police force or of any force constituted under any law for the time being in force or for the use or display of physical force in furtherance of the common object of the association, the Provincial Government may by notification in the *Official Gazette* declare such association to be unlawful.

one becoming a member of that association or contributing funds to it would be guilty of an offence under sub-s. (1), accused's act amounted to an abetment of an offence. It was further held that as this abetment was of the commission of an offence by a class of persons exceeding ten, the accused had brought himself within the ambit of s. 117 of the Penal Code and was liable to the punishment provided therein.⁴

There is nothing in this section to impose upon the members of an association declared unlawful the obligation of doing anything specific to terminate their membership; but the Legislature has relied on the general declaration of illegality as bringing the association to an end. In a prosecution under clause (1) the Crown is bound to prove that the accused, who was a member of an association before, continued to be a member of it after, it was declared unlawful. It is not for the accused to prove that he has ceased to be a member of such an association. There is no justification for presuming that because a person is a member of an association which is lawful, he remains a member of that association after it is declared unlawful. The Courts must, on the contrary, presume that when the Local Government declares a particular association to be unlawful the citizens will recognize that declaration and will loyally carry it out and that they will cease absolutely to be members of the association declared unlawful or in any way to act as such.⁵

An offence under s. 117 of the Indian Penal Code read with clause (1) of this section can be tried as a summons case, if the sentence imposed does not exceed imprisonment for six months.⁶

1. 'Assists the operations'.—The publication by a newspaper of a programme of activities of an unlawful association amounts to assisting in the operations of such association.⁷ There must be such a connection between the acts of the accused and the operations of the unlawful association that an intention to assist the operations of such association may be properly inferred. It is not necessary that the accused should be members of the unlawful association or that they should be acting in co-operation with it, or under its orders, or anything of that sort. There must, however, be a sufficient connection between their acts and the operations of the association to enable the Court to infer an intention to assist in those operations. The mere existence of a common aim between the person accused and the unlawful association is not enough to involve assistance. Where one of the regular activities of an unlawful association is to engage in picketing cloth shops in order to persuade people not to buy foreign cloth, and the methods of picketing employed by the association are similar to those employed by the accused who independently picket the shops, there is a sufficient connection between their acts and the operations of the unlawful association to justify an inference that they are assisting and intending to assist in its operations.⁸ Where the only object of an unlawful association is to control processions of a political character early in the morning, the accused who take part in a similar procession, though not affiliated to the unlawful association, are sufficiently connected with its activities to give rise to an inference that they are in fact intending to assist in the operations of the association.⁹ The mere reproduction in a newspaper of a harmless criticism, upon a letter which has been generally circulated, appearing in the *Congress Bulletin*, published by an unlawful association, does not amount to assisting the operations of an unlawful association. Similarly, the printing of an appeal to merchants to deal only in Indian cloth, made by a person purporting to be the president of an unlawful association, is not an offence under clause (1).¹⁰ The Madras High Court has, however, taken a different view of s. 17. It has held that s. 17 (1) does not make the advocating of boycott, the shouting out of slogans and the carrying of Congress flags an offence. Doing such things does not necessarily amount to assisting the operations of an unlawful association though there is identity of objects. There must be some kind of connection proved between the person and the unlawful association. The words "assisting the operations of an association", would be meaningless unless the operations of the association are in the person's mind and an intention to assist them is also there. Such intention to assist the operations of that association must be inferred from some unambiguous overt act. The accused took part in a demonstration accompanied by a national flag and the singing of political songs. He went to the street wherein foreign cloth and British goods were sold and advocated their boycott. He was charged with having acted in furtherance of the resolution of the All-India Congress Working Committee, an association declared unlawful, and thereby committed an offence under cl. (1) of this section. The accused was not a member of that unlawful association nor was he shown to have taken part in meetings of that association, or contributed or received or solicited any subscriptions for the purposes of that association. It was held that he could not be convicted under this section.¹¹ Where a member of an association declared unlawful made a speech at a meeting organised thereby it was held that he assisted

⁴ *Mihan Singh*, (1923) 5 Lah. 1.

⁵ *Shripad*, (1930) 33 Bom. L. R. 90, 55 Bom. 484.

⁶ *Narsinha Chandur*, (1931) 33 Bom. L. R. 353, 32 Cr. L. J. 718, [1931] AIR (B) 199.

⁷ *Sohrab Kapadia*, (1930) 33 Bom. L. R. 314, 32 Cr. L. J. 804, [1931] AIR (B) 206.

⁸ *Gangubai*, (1930) 33 Bom. L. R. 319, 55

Bom. 442.

⁹ *Adhikari*, (1930) 33 Bom. L. R. 325, 32 Cr. L. J. 723, [1931] AIR (B) 202.

¹⁰ *Sadanand*, (1931) 33 Bom. L. R. 652, 32 Cr. L. J. 1158, [1931] AIR (B) 413.

¹¹ *Iswaradu*, [1932] M. W. N. 1263, 34 Cr. L. J. 823, [1933] AIR (M) 369.

in its management or promoted a meeting thereof and was guilty under cl. (2) of this section, even though his speech was not violent.¹² Where the national flag was hoisted over a shop and the date and hour of the hoisting coincided with the date and hour when the public had been requested by certain unlawful associations by means of pamphlets to hoist the flag in celebration of the Independence Day, and the accused refused to take it down when requested by the police to do so, it was held that in the circumstances the hoisting of the flag or the refusal to take it down did not amount to assisting the operations of an unlawful association, and was not an offence under cl. (1) of this section.¹³ The mere display of a Congress flag over a shop and refusal to take it down at the request of the police does not amount to 'assisting the operations of an unlawful association' and is not an offence under cl. (1) of this section. A warning by the District Magistrate by public notification, in the absence of any order forbidding such an act that the public are assisting the operations of the Congress by setting up such flags over their shops, cannot make such an act an offence.¹⁴ The leader of a party which induces boys to take out and publicly exhibit the Congress flags and for which those boys are given clothes and some cash in lieu of services to be rendered by them is guilty under cl. (2) of this section.¹⁵

The word 'assists' means "intentionally assists". Painting on the surface of a road the words "Boycott British Goods" will amount to an offence under clause (1) of this section if there is evidence to show that the person who painted was thereby assisting the operations of an unlawful association.¹⁶

Power to notify and take possession of places used for the purposes of an unlawful association.

17A. (1) The Provincial Government may, by notification in the Official Gazette, notify any place which in its opinion is used for the purposes of an unlawful association.

Explanation.—For the purposes of this section 'place' includes a house or building, or part thereof, or a tent or vessel.

(2) The District Magistrate or in a Presidency-town the Commissioner of Police, or any officer authorised in this behalf in writing by the District Magistrate or Commissioner of Police, as the case may be, may thereupon take possession of the notified place and evict therefrom any person found therein, and shall forthwith make a report of the taking possession to the Provincial Government :

Provided that where such place contains any apartment occupied by women or children, reasonable time and facilities shall be afforded for their withdrawal with the least possible inconvenience.

(3) A notified place whereof possession is taken under sub-section (2) shall be deemed to remain in the possession of Government so long as the notification under sub-section (1) in respect thereof remains in force.

17B. (1) The District Magistrate, Commissioner of Police or officer taking possession of a notified place shall also take possession of all moveable property found therein, and shall make a list thereof in the presence of two respectable witnesses.

(2) If, in the opinion of the District Magistrate, or in a Presidency-town the Commissioner of Police, any articles specified in the list are or may be used for the purposes of the unlawful association, he may proceed subject to the provisions hereafter contained in this section to order such articles to be forfeited to His Majesty.

(3) All other articles specified in the list shall be delivered to the person whom he considers to be entitled to possession thereof, or, if no such person is found, shall be disposed of in such manner as the District Magistrate or Commissioner of Police, as the case may be, may direct.

(4) The District Magistrate or Commissioner of Police shall publish, as nearly as may be in the manner provided in section 87 of the Code of Criminal Procedure, 1898, for the publication of a proclamation, a notice specifying the articles which it is proposed to forfeit and calling upon any person claiming that any article is not liable to forfeiture to submit in writing within fifteen days any representation he desires to make against the forfeiture of the article.

(5) Where any such representation is accepted by the District Magistrate or Commissioner of Police, he shall deal with the article concerned in accordance with the provisions of sub-section (3).

(6) Where any such representation is rejected, the representation, with the

¹² *Swadesh Ranjan Dutta*, (1933) 37 C. W. N. 964, 35 Cr. L. J. 605 (2), [1934] AIR (C) 161.

¹³ *Jogendra Mohan Chowdhury*, (1933) 37 C. W. N. 992, 34 Cr. L. J. 925, [1933] AIR (C) 695 (1).

¹⁴ *Ram Prasad*, (1932) 34 Cr. L. J. 22, [1933]

AIR (A) 95.

¹⁵ *Mathra Das*, (1933) 34 P. L. R. 923, 34 Cr. L. J. 1178, [1933] AIR (L) 387 (2).

¹⁶ *Panduranga Mudali*, (1932) 63 M. L. J. 906, [1932] M. W. N. 1357, 63 M. L. J. 906, 34 Cr. L. J. 90, [1933] AIR (M) 35.

decision thereon, shall be forwarded to the District Judge, in the case of a decision by a District Magistrate, or, to the Chief Judge of the Small Cause Court, in the case of a decision by the Commissioner of Police, and no order of forfeiture shall be made until the District Judge or Chief Judge of the Small Cause Court, as the case may be, has adjudicated upon the representation. Where the decision is not confirmed the articles shall be dealt with in accordance with the provisions of sub-section (3).

(7) In making an adjudication under sub-section (6) the procedure to be followed shall be the procedure laid down in the Code of Civil Procedure, 1908, for the investigation of claims so far as it can be made to apply, and the decision of the District Judge or Chief Judge of the Small Cause Court, as the case may be, shall be final.

(8) If the article seized is live stock or is of a perishable nature, the District Magistrate or Commissioner of Police may, if he thinks it expedient, order the immediate sale thereof, and the proceeds of the sale shall be disposed of in the manner herein provided for the disposal of other articles.

17C. Any person who enters or remains upon a notified place without the permission of the District Magistrate, or of an officer authorised by him in this behalf, shall be deemed to commit criminal trespass.

17D. Before a notification under sub-section (1) of section 17A is cancelled, the Provincial Government shall give such general or special directions as it may deem requisite regulating the relinquishment by Government of possession of notified places.

17E. (1) Where the Provincial Government is satisfied, after such inquiry as it may think fit, that any monies, securities or credits are being used or are intended to be used for the purposes of an unlawful association, the Provincial Government may, by order in writing, declare such monies, securities or credits to be forfeited to His Majesty.

(2) A copy of an order under sub-section (1) may be served on the person having custody of the monies, securities or credits, and on the service of such copy such person shall pay or deliver the monies, securities or credits to the order of the Provincial Government :

Provided that, in the case of monies or securities, a copy of the order may be endorsed for execution to such officer as the Provincial Government may select, and such officer shall have power to enter upon and search for such monies and securities in any premises where they may reasonably be suspected to be, and to seize the same.

(3) Before an order of forfeiture is made under sub-section (1) the Provincial Government shall give written notice to the person (if any) in whose custody the monies, securities or credits are found of its intention to forfeit, and any person aggrieved thereby may within fifteen days from the issue of such notice file an application to the District Judge in a district, or to the Chief Judge of the Small Cause Court in a Presidency-town, to establish that the monies, securities or credits or any of them are not liable to forfeiture, and if any such application is made, no order of forfeiture shall be passed in respect of the monies, securities or credits concerned until such application has been disposed of, and unless the District Judge or Chief Judge of the Small Cause Court has decided that the monies, securities or credits are liable to forfeiture.

(4) In disposing of an application under sub-section (3) the procedure to be followed shall be the procedure laid down in the Code of Civil Procedure, 1908, for the investigation of claims so far as it can be made to apply, and the decision of the District Judge or Chief Judge of the Small Cause Court, as the case may be, shall be final.

(5) Where the Provincial Government has reason to believe that any person has custody of any monies, securities or credits which are being used or are intended to be used for the purposes of an unlawful association, the Provincial Government may, by order in writing, prohibit such person from paying, delivering, transferring or otherwise dealing in any manner whatsoever with the same, save in accordance with the written orders of the Provincial Government. A copy of such order shall be served upon the person to whom it is directed.

(6) The Provincial Government may endorse a copy of an order under sub-section (5) for investigation to any officer it may select, and such copy shall be warrant

whereunder such officer may enter upon any premises of the person to whom the order is directed, examine the books of such person, search for monies and securities, and make inquiries from such person, or any officer, agent or servant of such person, touching the origin of and dealings in any monies, securities or credits which the investigating officer may suspect are being used or are intended to be used for the purposes of an unlawful association.

(7) A copy of an order under this section may be served in the manner provided in the Code of Criminal Procedure, 1898, for the service of a summons, or, where the person to be served is a corporation, company, bank or association of persons, it may be served on any secretary, director or other officer or person concerned with the management thereof, or by leaving it or sending it by post addressed to the corporation, company, bank or association at its registered office, or, where there is no registered office, at the place where it carries on business.

(8) Where an order of forfeiture is made under sub-section (1) in respect of any monies, securities or credits in respect of which a prohibitory order has been made under sub-section (5), such order of forfeiture shall have effect from the date of the prohibitory order, and the person to whom the prohibitory order was directed shall pay or deliver the whole of the monies, securities, or credits forfeited, to the order of the Provincial Government.

(9) Where any person liable under this section to pay or deliver any monies, securities, or credits to the order of the Provincial Government refuses or fails to comply with any direction of the Provincial Government in this behalf, the Provincial Government may recover from such person, as arrears of land-revenue or as a fine, the amount of such monies or credits or the market value of such securities.

(10) In this section, "security" includes a document whereby any person acknowledges that he is under a legal liability to pay money, or whereunder any person obtains a legal right to the payment of money; and the market value of any security means the value as fixed by any officer or person deputed by the Provincial Government in this behalf.

(11) Except so far as is necessary for the purposes of any proceeding under this section, no information obtained in the course of any investigation made under sub-section (6) shall be divulged by any officer of Government, without the consent of the Provincial Government.

17F. Every report of the taking possession of property and every declaration of forfeiture made, or purporting to be made, under this Act, shall, as against all persons, be conclusive proof that the property specified therein has been taken possession of by Government or has been forfeited, as the case may be, and save as provided in sections 17B and 17E no proceeding purporting to be taken under section 17A, 17B, 17C, 17D or 17E shall be called in question by any Court, and no civil or criminal proceeding shall be instituted against any person for anything in good faith done or intended to be done under the said sections or against Government or any person acting on behalf of or by authority of Government for any loss or damage caused to or in respect of any property whereof possession has been taken by Government under this Act.

18. An association shall not be deemed to have ceased to exist by reason only of any formal act of dissolution or change of title, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any members thereof.

THE SCHEDULE.

(Repealed by Act V of 1922, s. 3.)

THE CRIMINAL LAW AMENDMENT ACT, 1932.

(ACT No. XXIII OF 1932.)

An Act to Supplement the Criminal Law.

WHEREAS it is expedient to supplement the Criminal Law and to that end to amend the Indian Press (Emergency Powers) Act, 1931, and further to amend the Indian Criminal Law Amendment Act, 1908, for the purposes hereinafter appearing ;
It is hereby enacted as follows :—

Short title, extent,
duration and com-
mencement.

1. (1) This Act may be called the Criminal Law Amend-
ment Act, 1932

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) [*Repealed by the Criminal Law Amendment Act, 1935.*]

(4) The whole of the Act except section 7 shall come into force at once, and the Provincial Government may, by notification in the Official Gazette, direct that section 7 shall come into force in any area on such date as may be specified in the notification.

NOTE.

The repeal of the Criminal Law Amendment Act, 1935, by the Repealing and Amending Act (XX of 1937) does not affect the sections of the Criminal Law Amendment Act, 1932, which are not repealed.¹

2. [*Repealed by the Criminal Law Amendment Act, 1935.*]

3. [*Repealed by the Criminal Law Amendment Act, 1935.*]

4. [*Repealed by the Criminal Law Amendment Act, 1935.*]

5. (1) Whoever publishes, circulates or repeats in public any passage from a newspaper, book or other document copies whereof have been declared to be forfeited to His Majesty under any law for the time being in force, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) No Court shall take cognizance of an offence punishable under this section unless the Provincial Government has certified that the passage published, circulated or repeated contains, in the opinion of the Provincial Government, seditious or other matter of the nature referred to in sub-section (1) of section 99A of the Code of Criminal Procedure, 1898, or sub-section (1) of section 4 of the Indian Press (Emergency Powers) Act, 1931.

NOTE.

This section makes dissemination of contents of proscribed literature an offence punishable under the Code. It enacts the provisions of s. 28 of Ordinance X of 1932 which ran as follows :—

28. Whoever publishes, circulates or repeats in public any passage from a newspaper, book or other document copies whereof have been declared to be forfeited to His Majesty under any other law for the time being in force, shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

6. [*Repealed by the Criminal Law Amendment Act, 1935.*]

Molesting a person to
prejudice of employ-
ment or business.

7. (1) Whoever—

(a) with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employ, or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof, or

(b) loiters or does any similar act at or near the place where a person carries on business, in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place,

¹ *Swami Arunagirinatha*, [1939] Mad. 87.

shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Explanation.—Encouragement of indigenous industries or advocacy of temperance without the commission of any of the acts prohibited by this section is not an offence under this section.

(2) No Court shall take cognizance of an offence punishable under this section except upon a report in writing of facts which constitute such offence made by a police officer not below the rank of officer in charge of a police station.

NOTE.

This section is intended to punish picketing. It enacts in a modified form ss. 66 and 67 of Ordinance X of 1932.

The section makes no limitation in respect of the parties disputing or the nature of the dispute giving rise to a situation where picketing is employed. Its application is universal. Had it been the intention of the legislature to exclude the application of this section from cases arising out of industrial disputes, it would have said so in explicit terms, more particularly in view of the nature of the majority of the other sections of the Act which have their origin in Ordinances. There is no conflict between this section and the Trade Unions Act (XVI of 1926).²

Clause (1) (a) applies as much to picketing of public servants as of private individuals. The Madras Government having passed an order for the introduction of Hindi in the schools, the accused who was opposed to such introduction incited others to loiter in front of the Premier's house with a view to compelling him to take steps to withdraw that order. It was held that the accused was guilty of abetment of an offence under cl. (1) (a).³

8. *[Repealed by the Criminal Law Amendment Act, 1935.]*

Procedure in offences under the Act.

9. Notwithstanding anything contained in the Code of Criminal Procedure, 1898,—

(i) no Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under this Act;

(ii) an offence punishable under section 5 or 7 shall be cognizable by the police;

(iii) *[Repealed by the Criminal Law Amendment Act, 1935.]*;

and (iv) an offence punishable under section 7 shall be non-bailable.

10. (1) The Provincial Government may, by notification in the Official Gazette, declare that any offence punishable under sections 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code, when committed in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

(2) The Provincial Government may, in like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under section 188 or section 506 of the Indian Penal Code, shall be non-bailable.

11. *[Incorporated as s. 16 (2) in the Indian Criminal Law Amendment Act, 1908, by this Act.]*

12. *[Incorporated as s. 17 (3) in the Indian Criminal Law Amendment Act, 1908, by this Act.]*

13. *[Incorporated as ss. 17A, 17B, 17C, 17D, 17E and 17F in the Indian Criminal Law Amendment Act, 1908, by this Act.]*

14. *[Incorporated in the Preamble of the Indian Press (Emergency Powers) Act, 1931, by this Act.]*

15. *[Repealed by the Criminal Law Amendment Act, 1935.]*

16. *[Incorporated in the Indian Press (Emergency Powers) Act, 1931, after cl. (b) of sub-section (1) of s. 4 and after Explanation 1, by this Act.]*

17. *[Repealed by the Criminal Law Amendment Act, 1935.]*

² R. S. Ruikar, (1934) 31 N. L. R. 318, 36 Cr. L. J. 1153, [1935] AIR (N) 149.

³ Swami Arunagirinatha, [1930] Mad. 87.

18. Anything done or any proceedings commenced in pursuance of the provisions of Chapter VI of the Special Powers Ordinance, 1932, shall, upon the commencement of this Act, be deemed to have been done or to have been commenced in pursuance of the corresponding provisions of the Indian Criminal Law Amendment Act, 1908, as amended by this Act, and shall have effect as if this Act was already in force when such thing was done or such proceedings were commenced.

Adoption and continuance of action taken under Ordinance X of 1932.

19. Anything done or any proceedings commenced in pursuance of the provisions of the Indian Press (Emergency Powers) Act, 1931, as amended by section 77 of the Special Powers Ordinance, 1932, shall, upon the commencement of this Act, be deemed to have been done or to have been commenced in pursuance of the corresponding provisions of the Indian Press (Emergency Powers) Act, 1931, as amended by this Act, and shall have effect as if this Act was already in force when such thing was done or such proceedings were commenced.

Adoption and continuance of action taken under Act XXIII of 1931 as amended by Ordinance X of 1932.

20. [*Repealed by the Criminal Law Amendment Act, 1935.*]

THE CRIMINAL LAW AMENDMENT ACT, 1938.

ACT No. XX OF 1938.

An Act to amend the criminal law.

WHEREAS it is expedient to supplement the criminal law by providing for the punishment of certain acts prejudicial to the recruitment of persons to serve in, and to the discipline of, His Majesty's Forces; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Criminal Law Amendment Act, 1938.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province on such date as the Provincial Government may, by notification in the Official Gazette, appoint in this behalf for such province.

2. Whoever—

Dissuasion from enlistment and instigation to mutiny or insubordination after enlistment.

(a) with intent to affect adversely the recruitment of persons to serve in the Military, Naval or Air Forces of His Majesty, wilfully dissuades or attempts to dissuade the public or any person from entering any such Forces, or

(b) without dissuading or attempting to dissuade any person from entering such Forces, instigates the public or any person to do, after entering any such Force, any thing which is an offence punishable as mutiny or insubordination under section 27 of the Indian Army Act, 1911, or sections 10 to 12 and 14 to 17 inclusive of the Naval Discipline Act as applied to the Indian Navy by the Indian Navy (Discipline) Act, 1934, or sections 35 to 37 inclusive of the Indian Air Force Act, 1932, as the case may be, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

No person shall be prosecuted for any offence under this Act except with the previous sanction of the Provincial Government.

Exception 1.—The provisions of clause (a) of this section do not extend to comments on or criticism of the policy of Government in connection with the Military, Naval or Air Forces, made in good faith without any intention of dissuading from enlistment.

Exception 2.—The provisions of clause (a) of this section do not extend to the case in which advice is given in good faith for the benefit of the individual to whom it is given, or for the benefit of any member of his family or of any of his dependents.

THE INDIAN ELECTIONS OFFENCES AND INQUIRIES ACT.

(ACT No. XXXIX OF 1920.)

AN Act to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act or the Government of India Act, 1935.

WHEREAS it is expedient to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act or the Government of India Act, 1935; It is hereby enacted as follows :—

PRELIMINARY.

- Short title and extent. 1. (1) This Act may be called the Indian Elections Offences and Inquiries Act, 1920; and
(2) It extends to the whole of British India.

NOTE.

To make provision with respect to certain matters connected with elections under the Government of India Act, 1935, His Majesty in Council has promulgated the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936.¹ It declares certain offences and practices to be offences and practices involving disqualification for members of the Provincial Legislatures and fixes the periods for which the disqualifications are to operate.

PART I.

AMENDMENT OF THE INDIAN PENAL CODE AND CODE OF CRIMINAL
PROCEDURE.

[Repealed by the Repealing Act, I of 1938.]

[The amendments in the Penal Code are introduced in the text at proper places.]

PART II.

ELECTION INQUIRIES AND OTHER MATTERS.

Definitions.

4. In this Part, unless there is anything repugnant in the subject or context,—

- (a) “costs” means all costs, charges and expenses of, or incidental to, and inquiry;
(b) “election” means an election to a Chamber of any Legislature or Legislative Council constituted under the Government of India Act or the Government of India Act, 1935;
(c) “inquiry” means an inquiry in respect of an election by Commissioners appointed for that purpose by the Governor General or Governor;
(d) “pleader” means any person entitled to appear and plead for another in a civil Court, and includes an advocate, a vakil, and an attorney of a High Court.

5. Commissioners appointed to hold an inquiry shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters :—

- Powers of Commissioners. (a) discovery and inspection,
(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses,
(c) compelling the production of documents,
(d) examining witnesses on oath,
(e) granting adjournments,

¹ See *Gazette of India*, dated 25-7-1936, Part I, pp. 955-968.

(f) reception of evidence taken on affidavit, and
 (g) issuing commissions for the examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to them to be material; and shall be deemed to be a civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

Explanation.—For the purposes of enforcing the attendance of witnesses, the local limits of the Commissioners' jurisdiction shall be the limits of the Province in which the election was held.

Application of Act I
of 1872 to inquiries.

6. The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to an inquiry.

Documentary evi-
dence.

7. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence on the ground that it is not duly stamped or registered.

Obligation of witness
to answer any certi-
ficate of indemnity.

8. (1) No witness shall be excused from answering any question as to any matter relevant to a matter in issue in an inquiry upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate him; or that it will expose, or tend, directly or indirectly, to expose him to a penalty or forfeiture of any kind:

Provided that—

(i) no person who has voted at an election shall be required to state for whom he has voted; and

(ii) a witness who, in the opinion of the Commissioners, has answered truly all questions which he has been required by them to answer shall be entitled to receive a certificate of indemnity, and such certificate may be pleaded by such person in any Court and shall be deemed to be a full and complete defence to or upon any charge under Chapter IXA of the Indian Penal Code arising out of the matter to which such certificate relates, nor shall any such answer be admissible in evidence against him in any suit or other proceeding.

(2) Nothing in sub-section (1) shall be deemed to relieve a person receiving a certificate of indemnity from any disqualification in connection with an election imposed by any law or any rule having the force of law.

Appearance by
pleader.

9. Any appearance, application or act before the Commissioners may be made or done by the party in person or by a pleader duly appointed to act on his behalf:

Provided that any such appearance shall, if the Commissioners so direct, be made by the party in person.

10. The reasonable expenses incurred by any person in attending to give evidence may be allowed by the Commissioners to such person, and shall, unless the Commissioners otherwise direct, be deemed to be part of the costs.

Costs and pleader's
fees, etc.

11. (1) Costs shall be in the discretion of the Commissioners, and the Commissioners shall have full power to determine by and to whom and to what extent costs are to be paid and to include in their report all necessary recommendations for the purposes aforesaid. The Commissioners may allow interest on costs at a rate not exceeding six per cent per annum, and such interest shall be added to the costs.

(2) The fees payable by a party in respect of fees of his adversary's pleader shall be such fees as the Commissioners may allow.

12. Any order made by the Central Government or Provincial Government on the report of the Commissioners regarding the costs of the inquiry may be produced before the principal civil Court of original jurisdiction within the local limits of whose jurisdiction any person directed by such order to pay any sum of money has a place of residence or business, or, where such place is within the local limits of the ordinary original civil jurisdiction of a chartered High

Execution of orders
at to costs.

Court, before the Court of Small Causes having jurisdiction there, and such Court shall execute such order or cause it to be executed in the same manner and by the same procedure as if it were a decree for the payment of money made by itself in a suit.

13. Any person who has been convicted of an offence under section 171E or 171F of the Indian Penal Code or has been disqualified from exercising any electoral right, for a period of not less than five years on account of malpractices in connection with an election shall be disqualified for five years from the date of such conviction or disqualification from—
- (a) being appointed to, or acting in, any judicial office ;
 - (b) being elected to any office of any local authority when the appointment to such office is by election, or holding or exercising any such office to which no salary is attached ;
 - (c) being elected or sitting or voting as a member of any local authority ; or
 - (d) being appointed or acting as a trustee of a public trust :

Provided that the Governor General, in the case of an election to a Chamber of the Federal Legislature or the Indian Legislature, and the Governor, in the case of an election to a Chamber of a Provincial Legislature, may, in his discretion, exempt any such person from such disqualification.

14. (1) Every officer, clerk, agent or other person who performs any duties in connection with the recording or counting of votes at an election shall maintain and aid in maintaining the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy.

(2) Any person who wilfully acts in contravention of the provisions of this section shall be punished with imprisonment of either description for a term not exceeding three months or with fine, or with both.

15. As respects elections to a Chamber of a Legislature constituted under the Government of India Act, 1935, this Part of this Act shall have effect subject to any relevant provision of any Order in Council or rules made under that Act in relation to such elections.

THE EXPLOSIVE SUBSTANCES ACT.

(Act No. VI of 1908.)

AN Act further to amend the law relating to explosive substances.

WHEREAS it is necessary further to amend the law relating to explosive substances ; It is hereby enacted as follows :—

1. (1) This Act may be called the Explosive Substances Act, 1908.

- (2) It extends to the whole of British India and applies also to—
- (a) all native Indian subjects of His Majesty in any place without and beyond British India ;
 - (b) all other British subjects within the territories of any native prince or chief in India.

2. In this Act the expression “explosive substance” shall be deemed to include any materials for making any explosive substance ; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance ; also any part of any such apparatus, machine or implement.

3. Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to ten years, to which fine may be added.

Punishment for causing explosion likely to endanger life or property.

NOTE.

The essence of an offence under this section is the unlawfully and maliciously causing by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property.¹

The word 'malice' is not used in its proper sense of vindictiveness against any particular individual but in its legal acceptance. The word malice in its legal acceptance is not confined to personal spite against individuals but consists in a conscious violation of law to the prejudice of another.²

4. Any person who unlawfully¹ and maliciously—

Punishment for attempt to cause explosion or for making or keeping explosive with intent to endanger life or property.

(a) does any act with intent to cause by an explosive substance,² or conspires to cause by an explosive substance, an explosion in British India of a nature likely to endanger life or to cause serious injury to property; or

(b) makes or has in his possession³ or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India; shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added.

NOTE.

This section substantially reproduces the provisions of s. 3 of the Explosive Substances Act, 1883 (46 & 47 Vic., c. 3).

1. 'Unlawfully'.—This word signifies 'not for a lawful object'; and the word 'maliciously' means intentionally and without justification or excuse or claim of right.³ The latter word occurs in ss. 219-220 of the Indian Penal Code.

2. 'Explosive substance'.—The 'explosive substance' need not be such as to enable a person by means thereof alone without the aid of other substances, to cause danger to life or injury to property. The term 'explosive substance' includes any part of any apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive substance.

From the mere presence of mensal stains on a man's wearing apparel, it can be said that he either made or had in his possession or under his control an explosive substance with intent by means thereof to endanger life, or to cause serious injury to property in British India or to enable any other person by means thereof to endanger life or cause serious injury to property in British India.⁴

3. 'Possession'.—For purposes of an offence under cl. (b), possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity of the offending object.⁵ Where a person supplied shots and red arsenic for making one bomb only and to try it in a place without being detected and without intending to endanger human life or to cause serious injury to property, it was held that he was a party to a criminal conspiracy to commit an offence under cl. (b) as he had done overt acts in furtherance of such conspiracy.⁶

5. Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with transportation for a term

Punishment for making or possessing explosives under suspicious circumstances.

¹ *Bamayya*, (1910) 20 M. L. J. 657, [1910] M. W. N. 77, 11 Cr. L. J. 222.

² *Bhagat Singh*, (1930) 31 P. L. R. 73, 31 Cr. L. J. 290, [1930] AIR (L) 266.

³ *Amrita Lal Hazra*, (1915) 42 Cal. 957; *Dulai Singh*, (1928) 9 Lah. 531.

⁴ *Indar Datt*, (1930) 32 Cr. L. J. 818, [1931] AIR (L) 408.

⁵ *Kuldip Chand*, (1934) 37 P. L. R. 132, 36 Cr. L. J. 300, [1934] AIR (L) 768.

⁶ *Bhabananda Banerjee*, (1934) 57 C. L. J. 213, 34 Cr. L. J. 1222, [1933] AIR (C) 747, s.B.

which may extend to fourteen years, to which fine may be added or with imprisonment for a term which may extend to five years, to which fine may be added.*

NOTE.

Under this section and s. 19 of the Indian Arms Act mere possession of incriminating articles constitutes serious criminal offence and there must be *mens rea* or guilty knowledge before a person can be convicted of such possession. Mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish *prima facie* the guilt of any particular person or all of them jointly. That being so they cannot be called upon after such evidence to establish their innocence. They can only be called upon to do that when the evidence has established a *prima facie* case against anyone or more of them or all of them.⁷

Under this section it is not necessary to come to any more definite finding than that the accused had possession of the explosive substance under suspicious circumstances.⁸ Where a bomb was found in the house of a person it was not necessary for the prosecution to prove that the accused had himself placed the bomb at the place where it was found; it was sufficient to prove that it was found there, and it remained for the accused to rebut the legal inference which followed under this section.⁹

The police suspected that certain persons were manufacturing bombs and an investigation was started against them. One of them gave information to the police that some bombs were concealed in the *deorhi* of his house. The police went to the house and the accused who was there took them to the place belonging to some one else, not far from the *deorhi*, and brought out from under a manure-heap a number of articles including some bombs. On the next day he was sent to a pond outside the village and after search in the pond he brought out a bundle containing bombs. It was held that the recoveries of explosives from places accessible to others were not sufficient to prove that the accused was in possession or control of the articles recovered and the conviction of the accused was illegal.¹⁰ The mere fact that a bomb and certain cartridges were recovered at the instance of the accused by the police from a certain place is not by itself sufficient to prove a case against the accused either under this section or s. 19 of the Indian Arms Act unless and until it is proved that these articles were placed there by the accused himself.¹¹

When following certain fires in a particular locality the house of the accused was searched, a bottle containing yellow phosphorous in water was found along with certain other substances like petrol, denatured spirit, lead chromate, aluminium powder and ferric oxide, he was prosecuted and convicted for an offence punishable under this section. On revision, it was held that in the natural form in which phosphorous at the time of the search was found in water in a bottle, it was not an explosive as defined by s. 2, and that the accused was not guilty of the offence with which he was charged, as possession of it by itself would not be chargeable under the Act. It is only an incendiary. If it had been used or found in a state in which it was used or adapted for exploding a bomb, then it could be said that it would be an explosive substance as defined in the Act.¹²

6. Any person who by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission or any offence under this Act shall be punished with the punishment provided for the offence.

Punishment of abettors.

⁷ *Santa Singh*, (1944) 26 Lah. 137, F.B.
⁸ *Ramayya*, (1910) 20 M. L. J. 657, [1910] M. W. N. 77, 11 Cr. L. J. 222.
⁹ *Amar Singh*, (1919) P. R. No. 31 of 1919, 21 Cr. L. J. 230.
¹⁰ *Amrik Singh*, (1930) 32 P. L. R. 150, 32

Cr. L. J. 585, [1931] AIR (L) 50.

¹¹ *Chetu*, (1946) 48 Cr. L. J. 200, 49 P. L. R. 16.

¹² *Tammina Mutyalu*, [1945] 2 M. L. J. 414, [1945] M. W. N. 689, 58 L. W. 615, 47 Cr. L. J. 592, [1946] AIR (M) 45.

*Section 5A was added by the Bengal Criminal Law (Arms and Explosives) Act (Beng. XXI of 1932), s. 5, and is in force in Bengal.

5A. Notwithstanding anything contained in section 3, section 4, or section 5, if an offence under any of these sections is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, or by a Special Magistrate under the Bengal Suppression of Terrorist Outrages Act, 1932, any person found guilty of such offence shall be punished for transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to fourteen years, to which fine may be added.

Section 5B was added by the Bengal Criminal Law Amendment Act (Beng. VII of 1934), s. 5, and is in force in Bengal.

5B. Notwithstanding anything contained in this Act, any person who makes or has in his possession any explosive substance under circumstances indicating that he intended that such explosive substance should be used for the commission of any offence of murder shall, if he is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, be punished with death, or with transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to fourteen years, to which fine may be added.

Enhanced punishment for offences under sections 3, 4 and 5 in certain cases.

Enhanced punishment in certain cases.

NOTE.

The intention to procure, counsel, aid, abet or to be accessory to the commission of the offence is a necessary ingredient under this section, and, ordinarily, it is the primary intention of the accused that must be taken into consideration in determining his guilt.¹³

¹³ No Court shall proceed to the trial of any person for an offence against this Act except with the consent¹ of the Central Government.

Restriction on trial of offences.

NOTE.

Where a complaint was filed by a Sub-Inspector of Police before the Sub-Divisional Magistrate of an offence under s. 399 of the Penal Code, and the facts disclosed also an offence under s. 4 (b) of this Act of which the Magistrate could not then take cognizance for want of the consent of Government under this section, and a complaint was subsequently filed by the Superintendent of Police, with such consent obtained, before the Additional District Magistrate, it was held that the latter had jurisdiction to take cognizance of the offence and that the initiation and continuation of the proceedings by him were legal notwithstanding that he had not withdrawn the original case to his own file.¹⁴

1. 'Consent'.—The consent under this section should state briefly the facts which constitute the offence and authorize the trial of the accused person upon these facts as constituting, in the opinion of the consenting authority, an offence under one or other sections of the Act. It is for the Court to decide finally whether upon the facts stated in the order of consent a particular offence has been committed, and the mere fact that the consenting authority is of opinion that the facts constitute an offence under one section of the Act, is in itself no bar to a conviction of the person upon the same facts of another offence under another section.¹⁵

When a case under this Act, which is exclusively triable by the Court of Session, is being inquired into in the Court of the committing Magistrate, it is not necessary for the prosecution to obtain the sanction of the Provincial Government under this section. The Sessions Court can proceed with the trial after the consent of the Provincial Government has been obtained. When sanction has been obtained for prosecution under s. (4) (b), the Sessions Judge is competent to frame a charge in the alternative under s. 5. But even if he does not frame the alternative charge he can, under s. 237, Criminal Procedure Code, convict the accused under s. 5 though he is charged under s. (4) (b) alone.¹⁶

THE FOREIGN RELATIONS ACT.

(ACT No. XII OF 1932.)

AN Act to provide against the publication of statements likely to prejudice the maintenance of friendly relations between His Majesty's Government and the Governments of certain foreign States.

WHEREAS it is expedient to provide against the publication of statements likely to prejudice the maintenance of friendly relations between His Majesty's Government and the Governments of certain foreign States ; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Foreign Relations Act, 1932.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. Where an offence falling under Chapter XXI of the Indian Penal Code is committed against a Ruler of a State outside but adjoining India, or against the consort or son or principal Minister of such Ruler, the Central Government may make, or authorize any person to make, a complaint in writing of such offence, and, notwithstanding anything contained in section 198 of the Code of Criminal Procedure, 1898, any Court competent in other respects to take cognizance of such offence may take cognizance thereof on such complaint.

Power of Central Government to prosecute in certain cases of defamation.

¹³ *Bimal Pershad Jain*, (1934) 35 Cr. L. J. 752, [1934] AIR (L) 583.

¹⁴ *Lalit Chandra Chanda Chowdhury*, (1911) 39 Cal. 119.

¹⁵ *Amar Singh*, (1919) P. R. No. 31 of 1919, 21 Cr. L. J. 230.

¹⁶ *Nathu Ram*, (1934) 57 All. 898.

3. The provisions of sections 99A to 99G of the Code of Criminal Procedure, 1898, and of sections 27B to 27D of the Indian Post Office Act, 1898, shall apply in the case of any book, newspaper or other document containing matter which is defamatory of a Ruler of a State outside but adjoining India or of the consort or son or principal Minister of such Ruler and tends to prejudice the maintenance of friendly relations between His Majesty's Government and the Government of such State, in like manner as they apply in the case of a book, newspaper or document containing seditious matter within the meaning of those sections :

Provided that for the purposes of this section the said provisions shall be construed as if for the words "Provincial Government" wherever they occur, the words, "Central Government" were substituted.

4. Where, in any trial of an offence upon a complaint under section 2, or in any proceeding before a High Court arising out of section 3, there is a question whether any person is a Ruler of any State, or is the consort or son or principal Minister of such Ruler, a certificate under the hand of a Secretary to the Central Government that such person is such Ruler, consort, son, or principal Minister shall be conclusive proof of that fact.

THE FUGITIVE OFFENDERS ACT, 1881.

(44 & 45 VIC., c. 69)

[As adapted and modified by the Government of India (Adaption of Indian Laws) Order, 1937.]

AN Act to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other Purposes connected with the Trial of Offenders.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows ; (that is to say,)

Short title.

1. This Act may be cited as the Fugitive Offenders Act, 1881.

PART I.

RETURN OF FUGITIVES.

2. Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.

A fugitive may be so apprehended under an endorsed warrant or a provisional warrant.

3. Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be ; (that is to say,)

- (1) A Judge of a superior Court in such part ; and
 - (2) In the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police Court in Bow Street ; and
 - (3) In a British possession the Governor of that possession,
- if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the

part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate.

4. A magistrate of any part of Her Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to that part on such information, and under such circumstances, as would in his opinion justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrant may be backed and executed accordingly.

A magistrate issuing a provisional warrant shall forthwith send a report of the issue, together with the information or a certified copy thereof, if he is in the United Kingdom, to a Secretary of State, and if he is in a British possession, to the Governor of that possession, and the Secretary of State or Governor may, if he think fit, discharge the person apprehended under such warrant.

5. A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession to the Governor of that possession.

Where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus, or other like process.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant.

6. Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a superior Court, after the final decision of the Court in the case,

(1) if the fugitive is so committed in the United Kingdom, a Secretary of State ; and

(2) if the fugitive is so committed in a British possession, the Governor of that possession,

may, if he thinks it just, by warrant under his hand order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

The Governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.

7. If a fugitive who, in pursuance of this part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior Court, upon application, shall discharge the person apprehended if not returned within one month.

tion by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the Governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.

8. Where a person accused of an offence and returned in pursuance of this part of this Act to any part of Her Majesty's dominions, either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the Governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of Her Majesty's dominions in or on his way to which he was apprehended.

Sending back of persons apprehended if not prosecuted within six months or acquitted.

9. This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour.

Offences to which this part of this Act applies.

This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominion an offence to which this part of this Act applies.

10. Where it is made to appear to a superior Court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Court seems just.

Powers of superior Court to discharge fugitive when case frivolous or return unjust.

11. In Ireland the Lord Lieutenant or Lords Justices or other chief governor or governors of Ireland, also the chief secretary of such Lord Lieutenant, may, as well as a Secretary of State, execute any portion of the powers by this part of this Act vested in a Secretary of State.

Power of Lord Lieutenant in Ireland.

PART II.

INTER-COLONIAL BACKING OF WARRANTS, AND OFFENCES.

Application of part of Act.

12. This part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

Application of part of Act to group of British possessions.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent Order to except certain offences

from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient.

Backing of Warrants.

13. Where in a British possession of a group to which this part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate or some other magistrate in the same British possession.

14. The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by a warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof.

A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

15. Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of a group to which this part of this Act applies, is or is suspected of being in or on his way to any other British possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons, requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other British possession of the same group, is satisfied that the summons was issued by some judge, magistrate, or officer having lawful authority as aforesaid, may endorse the summons with his name; and the witness, on service in that possession of the summons, so endorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and shall be liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpoena or other process for requiring the attendance of a witness.

16. A magistrate in a British possession of a group to which this part of this Act applies, before the endorsement in pursuance of this part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

17. If a prisoner in a British possession whose return is authorised in pursuance of this part of this Act is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior Court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to appeal to a superior Court.

18. Where a prisoner accused of an offence is returned in pursuance of this part of this Act to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in or on his way to which he was apprehended.

19. Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the Court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior court.

NOTE.

A Magistrate purporting to act under this section cannot make an order of discharge on any other grounds than those indicated in the section. Magistrates to whom prisoners are brought under s. 14 are not entitled to decide whether the issue of the warrant for the apprehension of the prisoner was or was not justifiable on the evidence. They can only act under this section if the case appears to be trivial or if the magistrate considers the application not made bona fide, not made in the interest of public justice or for some other reason of that kind.¹

PART III.

Trial, &c., of Offences.

20. Where two British possessions adjoin, a person accused of an offence committed on or within the distance of five hundred yards from the common boundary of such possessions may be apprehended, tried, and punished in either of such possessions.

21. Where an offence is committed on any person or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried in any British possession through a part of which such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed; and where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary

¹ *Muhammad Naina v. Bawa Sahib*, (1933) 45 M. L. J. 50, [1933] M. W. N. 324, 65 M. L.

J. 56, 37 L. W. 735, 34 Cr. L. J. 883, [1933] AIR (M) 508 (1).

of any British possession, a person may be tried for such offence in any British possession of which it is the boundary :

Provided that nothing in this section shall authorise the trial for such offence of a person who is not a British subject, where it is not shown that the offence was committed in a British possession.

22. A person accused of the offence (under whatever name it is known) of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of this Act, may be tried either in the part of Her Majesty's dominions in which such deposition or evidence is used, or in the part in which the same was sworn, made, given, or fabricated, as the justice of the case may require.

Trial of offence of false swearing or giving false evidence.

23. Where any part of this Act provides for the place of trial of a person accused of an offence, that offence shall, for all purposes of and incidental to the apprehension, trial, and punishment of such person, and of and incidental to any proceedings and matters preliminary, incidental to, or consequential thereon, and of and incidental to the jurisdiction of any court, constable, or officer with reference to such offence, and to any person accused of such offence, be deemed to have been committed in any place in which the person accused of the offence can be tried for it ; and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874.

Supplemental provision as to trial of person in any place.

24. Where a warrant for the apprehension of a person accused of an offence has been endorsed in pursuance of any part of this Act in any part of Her Majesty's dominions, or where any part of the Act provides for the place of trial of a person accused of an offence, every court and magistrate of the part in which the warrant is endorsed or the person accused of the offence can be tried shall have the same power of issuing a warrant to search for any property alleged to be stolen or to be otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that court or magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such court or magistrate.

Issue of search warrant.

25. Where a person is in legal custody in a British possession either in pursuance of this Act or otherwise, and such person is required to be removed in custody to another place in or belonging to the same British possession, such person, if removed by sea in a vessel belonging to Her Majesty or any of Her Majesty's subjects, shall be deemed to continue in legal custody until he reaches the place to which he is required to be removed ; and the provisions of this Act with respect to the retaking of a prisoner who has escaped, and with respect to the trial and punishment of a person guilty of the offence of escaping or attempting to escape, or aiding or attempting to aid a prisoner to escape, shall apply to the case of a prisoner escaping while being lawfully removed as aforesaid, in like manner as if he were being removed in pursuance of a warrant endorsed in pursuance of this Act.

Removal of prisoner by sea from one place to another.

PART IV.

SUPPLEMENTAL.

Warrants and Escape.

26. An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the endorsement or some other.

Endorsement of warrant.

For the purposes of this Act every warrant, summons, subpoena, and process,

and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office.

27. Where a fugitive or prisoner is authorised to be returned to any part of Her Majesty's dominions in pursuance of Part One or Part Two of this Act, such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty or to any of Her subjects.

Conveyance of fugitives and witnesses.

For the purpose aforesaid, the authority signing the warrant for the return may order the master of any ship belonging to any subject of Her Majesty bound to the said part of Her Majesty's dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, so that such master be not required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage; or more than one witness for every fifty tons of such tonnage.

The said authority shall endorse or cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her as the Board of Trade from time to time require. Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails on payment or tender of a reasonable amount for expenses to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable on summary conviction to a fine not exceeding fifty pounds, which may be recovered in any part of Her Majesty's dominions in like manner as a penalty of the same amount under the Merchant Shipping Act, 1854, and the Acts amending the same.

28. If a prisoner escape, by breach of prison or otherwise, out of the custody of a person acting under a warrant issued or endorsed in pursuance of this Act, he may be retaken in the same manner as a person accused of a crime against the law of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

Escape of prisoner from custody.

A person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise, from custody under any warrant issued or endorsed in pursuance of this Act, may be tried in any of the following parts of Her Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes and the part in which the offender is found.

Evidence.

29. A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions to be evidence, and authentication of depositions and warrants.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts; may, if duly authenticated, be received in evidence in proceedings under this Act:

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act, if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made, and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a governor of a British possession, or of a colonial

secretary, or of some secretary or minister administering a department of the government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it.

Miscellaneous.

Provision as to exercise of jurisdiction by magistrates. 30. The jurisdiction under Part One of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,—

(1) In England, by a chief magistrate of the metropolitan police courts or one of the other magistrates of the metropolitan police court at Bow Street; and

(2) In Scotland, by the sheriff or sheriff substitute of the county of Edinburgh; and

(3) In Ireland, by one of the police magistrates of the Dublin metropolitan police district; and

(4) In a British possession, by any judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the Metropolitan police court in Bow Street, or by such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the legislature of that possession.

If a fugitive is apprehended and brought before a magistrate who has no power to exercise the jurisdiction under this Act in respect of that fugitive, that magistrate shall order the fugitive to be brought before some magistrate having that jurisdiction, and such order shall be obeyed.

Power as to making and revocation of Orders in Council. 31. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes of this Act, and to revoke and vary any Order so made, and every Order so made shall while it is in force have the same effect as if it were enacted in this Act.

An Order in Council made for the purposes of this Act shall be laid before Parliament as soon as may be after it is made if Parliament is then in session, or if not, as soon as may be after the commencement of the next session of Parliament.

Power of legislature of British possession to pass laws for carrying into effect this Act. 32. If the legislature of a British possession pass any Act or ordinance—

(1) For defining the offences committed in that possession to which this Act or any part thereof is to apply; or

(2) For determining the court, judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted, or otherwise in the execution of this Act; or

(4) In any manner for the carrying of this Act or any part thereof into effect in that possession,

it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or ordinance, or any part thereof, shall with or without modification or alteration be recognised and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act.

Application of Act.

Application of Act to offences at sea or triable in several parts of Her Majesty's dominions. 33. Where a person accused of an offence can, by reason of the nature of the offence, or of the place in which it was committed, or otherwise, be, under this Act or otherwise, tried for or in respect of the offence in more than one part of Her Majesty's dominions, a warrant for the apprehension of such person may be issued in any part of Her Majesty's dominions in which he can, if he happens to be there, be tried; and each part of this Act shall apply as if the offence had been committed

in the part of Her Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a Court has jurisdiction to try him :

Provided that if such person is apprehended in the United Kingdom a Secretary of State, and if he is apprehended in a British possession, the governor of such possession, may, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, order such person to be tried in the part of Her Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return shall not be executed.

34. Where a person convicted by a Court in any part of Her Majesty's dominions of an offence committed either in Her Majesty's dominions or elsewhere, is unlawfully at large before the expiration of his sentence, each part of this Act shall apply to such person, so far as is consistent with the tenor thereof, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted.

35. Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior Court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly.

36. It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application.

37. This Act shall extend to the Channel Islands and Isle of Man as if they were part of England and of the United Kingdom, and the United Kingdom and those islands shall be deemed for the purpose of this Act to be one part of Her Majesty's dominions ; and a warrant endorsed in pursuance of Part One of this Act may be executed in every place in the United Kingdom and the said islands accordingly.

38. This Act shall apply where an offence is committed, before the commencement of this Act, or, in the case of Part Two of this Act, before the application of that part to a British possession or to the offence, in like manner as if such offence had been committed after such commencement or application.

Definitions and Repeal.

39. In this Act, unless the context otherwise requires,—
The expression "Secretary of State" means one of Her Majesty's Principal Secretaries of State :

The expression "British possession" means any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and Isle of Man ; all territories and places within Her Majesty's dominions

which are under one legislature shall be deemed to be one British possession and one part of Her Majesty's dominions :

The expression "legislature", where there are local legislatures as well as a central legislature, means the central legislature only.

The expression "governor" means any person or persons administering the government of a British possession, and includes the Governor and lieutenant Governor of any part of India :

The expression "constable" means, out of England, any policeman or officer having the like powers and duties as a constable in England :

The expression "magistrate" means, except in Scotland, any justice of the peace, and in Scotland means a sheriff or sheriff substitute, and in the Channel Islands, Isle of Man, and a British possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial :

The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise :

The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly :

The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined :

The expression "superior court" means :

(1) In England, Her Majesty's Court of Appeal and High Court of Justice; and

(2) In Scotland, the High Court of Justiciary ; and

(3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin; and

(4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession.

40. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-two, which date is in this Act referred to as the commencement of this Act.

41. The Act specified in the Schedule to this Act is hereby repealed as from the commencement of this Act :

Provided that this repeal shall not affect—

(a) Any warrant duly endorsed or issued, nor anything duly done or suffered before the commencement of this Act ; nor

(b) Any obligation or liability incurred under an enactment hereby repealed; nor

(c) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed ; nor

(d) Any legal proceeding or remedy in respect of any such warrant, obligation, liability, penalty, forfeiture, or punishment as aforesaid ; and any such warrant may be endorsed and executed, and any such legal proceeding and remedy may be carried on, as if this Act had not passed.

SCHEDULE.

Year & Chapter.	Title.
6 & 7 Vict. c. 34.	An Act for the better apprehension of certain offenders.

THE INDIAN EXTRADITION ACT.

(ACT XV OF 1903.)

AN ACT to consolidate and amend the law relating to the Extradition and Rendition of Criminals.

WHEREAS it is expedient to provide for the more convenient administration in British India of the Extradition Acts, 1870 and 1873, and of the Fugitive Offenders Act, 1881 ;

And whereas it is also expedient to amend the law relating to the extradition of criminals in cases to which the Extradition Acts, 1870 and 1873, do not apply ;

It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

- Short title. 1903. 1. (1) This Act may be called the Indian Extradition Act,
- (2) It extends to the whole of British India (including British Baluchistan, the Santhal Paraganas and the Paraganas of Spiti);
- Extent and commencement. and
- (3) It shall come into force on such day as the Central Government, by notification in the Official Gazette, may direct.
- Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—
- (a) “European British subject” means a European British subject as defined by the Code of Criminal Procedure for the time being in force ;
- (b) “extradition offence” means any such offence as is described in the first schedule :
- (c) “Foreign State” means a State to which, for the time being, the Extradition Acts, 1870 and 1873, apply :
- (d) “High Court” means the High Court as defined by the Code of Criminal Procedure for the time being in force :
- (e) “offence” includes any act wheresoever committed which would, if committed in British India, constitute an offence : and
- (f) “rules” include prescribed forms.

NOTE.

Clause (a).—A European British subject does not cease to be a European British subject by her marriage with an Indian subject of a Native State of India ; nor does she cease to be such by her domicile in a Native State of India.¹

Clause (c).—Chandranagore is a ‘Foreign State’ as defined by this clause, and the provisions of Chapter II thereof must be followed before a fugitive offender can be surrendered to the French authorities.²

Clause (e).—As to the wider interpretation assigned to the word ‘offence’, see *Adams v. Emperor*.³

CHAPTER II.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF FOREIGN STATES.

3. (1) Where a requisition is made to the Central Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in British India, the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.
- Requisition for surrender.

¹ *Bai Aisha*, (1928) 31 Bom. L. R. 62, 53 Bom. 149.

² *Cullington*, (1920) 48 Cal. 328.
³ (1903) 26 Mad. 607.

(2) The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue.

(3) When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

(4) If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Central Government.

(5) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure for the time being in force, the Magistrate may release the fugitive criminal on bail.

(6) The Magistrate shall report the result of his inquiry to the Central Government and shall forward, together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Government.

(7) If the Central Government is of opinion that such report or written statement raises an important question of law, it may make an order referring such question of law to such High Court as may be named in the order, and the fugitive criminal shall not be surrendered until such question has been decided.

(8) If, upon receipt of such report and statement or upon the decision of any such question, the Central Government is of opinion that the fugitive criminal ought to be surrendered, it may issue a warrant for the custody and removal of such criminal and for his delivery at a place and to a person to be named in the warrant.

(9) It shall be lawful for any person to whom a warrant is directed in pursuance of sub-section (8), to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

(10) If such a warrant as is prescribed by sub-section (8) is not issued and executed in the case of any fugitive criminal, who has been committed to prison under sub-section (4), within two months after such committal, the High Court may, upon application made to it on behalf of such fugitive criminal, and upon proof that reasonable notice of the intention to make such application has been given to the Central Government, order such criminal to be discharged, unless sufficient cause is shown to the contrary.

NOTE.

It is the valuable right of a citizen that he should not be sent out to a foreign jurisdiction without the law relating to extradition being strictly complied with. It is the duty of the Court to give a strict interpretation to the provisions of the Extradition Act.⁴

Sub-sec. (1).—An order issued under this sub-section by the Government of Bengal upon a requisition made to the Government of India is held to be invalid, and cannot be “ratified” by a subsequent order of the Government of India. Where, however, the latter order directs the Magistrate in pursuance of the former order “and of the statutory provisions in that behalf to enquire into the said case,” the Government gives valid effect to its intention, and the Magistrate has jurisdiction to inquire. The only Government competent to issue the order for inquiry is the Government to whom

⁴ *Ram Pargas*, [1948] O. W. N. 64

the foreign State has made a requisition. This function must be performed strictly, and cannot be delegated.⁵

Sub-sec. (4).—The Magistrate must under this sub-section report the case to the Local Government.⁶

Sub-sec. (5).—The High Court has the fullest discretion, having regard to the provisions relating to bail in the Criminal Procedure Code, to grant bail to a prisoner against whom proceedings are pending under this Act.⁷

Sub-sec. (6).—This sub-section is not a substitute for and does not interfere with proceedings taken under s. 491 of the Code of Criminal Procedure. Section 491 is applicable to cases under this Act.⁸

Sub-sec. (10).—A Magistrate is not warranted in keeping people in custody on a mere allegation that criminal proceedings against them are pending in a foreign State. Unless proper steps be taken against persons detained under the Act, they must be released.⁹

4. (1) Where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Central Government in this behalf that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person, on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the crime of which he is accused or has been convicted had been committed within the local limits of his jurisdiction

Power to Magistrate to issue warrant of arrest in certain cases.

Issue of warrant to be reported forthwith.

(2) The Magistrate shall forthwith report the issue of a warrant under this section to the Central Government.

(3) A person arrested on a warrant issued under this section shall not be detained more than two months unless within that period the Magistrate receives an order made with reference to such person under section 3, sub-section (1).

Person arrested not to be detained unless order received.

(4) In the case of a person arrested or detained under this section the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the crime of which he is accused or has been convicted.

Bail.

NOTE.

Sub-sec. (1)—A Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. Section 4 merely provides a preliminary procedure. Under it an arrest may be effected before the receipt of the requisition mentioned in s. 3, otherwise the criminal might escape. The two sections do not overlap.¹⁰

5. (1) If the Central Government is of opinion that the crime of which any fugitive criminal of a Foreign State is accused or alleged to have been convicted is of a political character, it may, if it thinks fit, refuse to issue any order under section 3, sub-section (1).

Power of Government to refuse to issue order under section 3 when crime of political character.

(2) The Central Government may also at any time stay any proceedings taken under this Chapter and direct any warrant issued under this Chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged.

Power of Government to discharge any person in custody at any time.

6. The expressions "the Police Magistrate" and "the Secretary of State" in section 3 of the Extradition Act, 1870, shall be read as referring respectively to the Magistrate directed to inquire into a case under section 3 of this Act, and to the Central Government.

References to "Police Magistrate" and "Secretary of State" in section 3 of Extradition Act, 1870.

NOTE.

Under this section the Chief Presidency Magistrate has no option but to execute the warrants. Hence the Magistrate's custody of the prisoners for whom warrants are issued on arrest is legal and proper. The fact that the prisoners have been in British India at the time at which the offences with which they are charged are said to have been committed would be a good defence to the charges, but is not relevant to the question whether the custody in which they are detained is legal or illegal.¹¹

⁵ *Rudolf Stallmann*, (1911) 39 Cal. 164.

⁶ *Ram Sahai*, (1868) P. R. No. 10 of 1868.

⁷ *Rudolf Stallmann*, (1911) 39 Cal. 164.

⁸ *Rudolf Stallmann*, *ibid.*, distinguishing *Rudolf Stallmann*, (1911) 38 Cal. 547.

⁹ *Kaladgi Magistrate's Quarterly Return*, (1877) Unrep. Cr. C. 124.

¹⁰ *Rudolf Stallmann*, (1911) 39 Cal. 164.

¹¹ *C. P. Mathen*, [1939] Mad. 728.

CHAPTER III.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF STATES OTHER THAN FOREIGN STATES.

7. (1) Where an extradition offence has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any State not being a Foreign State, and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency town to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly.

(2) A warrant issued as mentioned in sub-section (1) shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants, and the accused person, when arrested, shall be produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, who shall record any statement made by him; such accused person shall then, unless released in accordance with the provisions of this Act, be forwarded to the place and delivered to the person or authority indicated in the warrant.

NOTE.

Extradition is only a means of bringing the accused before the tribunal having jurisdiction. Extradition proceedings could never limit the jurisdiction of the Court if there is nothing on the face of the proceedings to warrant the conclusion that any limitation has been imposed. The mere circumstance that one particular offence is mentioned when extradition is demanded does not necessarily lead to the conclusion that extradition is allowed for the purpose of the trial only on that charge, and on no other charge whatever. And in any event it could not exclude a trial and conviction on any charge, which the facts disclosed in the extradition proceedings would suffice to sustain.¹²

Under clause (1) there are three conditions precedent for the issue of a legal warrant: (1) the offence must be an extradition offence, (2) the accused must not be a European British subject, and (3) the offence must have been committed or must be supposed to have been committed by the accused in the territories of the State. Without all these three conditions being fulfilled the Political Agent would have no authority to issue a warrant under this section.¹³

A District Magistrate, who is addressed with a view to execution of a warrant issued by a Political Agent of a Native State under clause (1), must act in pursuance of such warrant and has no authority to ascertain whether a *prima facie* case exists against the accused or not.¹⁴

Where a warrant has been issued by the Political Agent under this section, its execution by the District Magistrate or Chief Presidency Magistrate in British India, in accordance with the Act, is, according to the Calcutta High Court, an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under s. 15.¹⁵ The Bombay High Court has, however, dissented from this view and held that the order to surrender is a judicial order, which can be revised by the High Court either under s. 439 or s. 561A, or interfered with under s. 491 of the Criminal Procedure Code.¹⁶ The view of the Patna High Court is in agreement with the Bombay view.¹⁷

On a requisition made to him by a Native State, the Political Agent, who was also a District Magistrate, issued a warrant under this section to arrest the accused. The latter surrendered of his own record and the warrant was returned unexecuted. The Political Agent then issued a certificate under s. 188 of the Criminal Procedure Code, 1898, that the accused should be tried in British India. Subsequently, the State authorities pressed for the accused's surrender, and the Political Agent accordingly ordered the accused to be handed over to the State for trial. It was held that it was not open to the Political Agent to recall the certificate issued by him under s. 188 of the Criminal Procedure Code, 1898, and that the order passed by him allowing the trial in the Native State was unsustainable.¹⁸

¹² *Khoda Uma*, (1892) 17 Bom. 369, 374, 375.

¹³ *Sandal Singh v. District Magistrate of Dehra Dun*, (1934) 56 All. 409, 417.

¹⁴ *Giyan Chand*, (1908) P. R. No. 3 of 1909, 9 Cr. L. J. 3.

¹⁵ *Gulli Sahu*, (1914) 42 Cal. 793.

¹⁶ *Bai Aisha*, (1928) 31 Bom. L. R. 62, 58

Bom. 149; *Popatbhai Becharsingji*, (1929) Cr.-Rev. No. 93 of 1929, decided by Kemp and Baker, JJ., on May 7, 1929 (Bom. Unrep.).

¹⁷ *Jaipal Bhagat*, (1921) 1 Pat. 57.

¹⁸ *Vazirsaheb Allisaheb Jhagirdar*, (1912) 14 Bom. L. R. 377, 13 Cr. L. J. 537.

The fact that the warrant issued by the Political Agent does not instruct the Magistrate in terms with regard to the particular frontier police station at which the prisoner should be delivered is not a matter of any importance.¹⁹

The expression "Political Agent" in this section when read in the light of cl. (40) of s. 3, General Clauses Act, 1897, includes an "Assistant Political Agent" who has been specifically authorized to sign extradition warrants.²⁰ The Chief Court of Oudh has held that a warrant signed by a subordinate of the Political Agent is not a legal warrant.²¹

Power to grant bail.—A British Indian Magistrate to whom a warrant has been addressed under this section has no power to admit to bail a person arrested under it apart from the provisions of ss. 8 and 8A.²²

Clause 2.—This clause prescribes the way in which the warrants in connection with "an extradition offence" referred to in cl. (1) shall be executed. In a case where the warrant is in connection with an offence under s. 395, which is an extradition offence mentioned in the first schedule, it is this clause and not s. 8, which is applicable, because s. 8 does not specify distinctly that the procedure laid down therein is for "an extradition offence". Section 8 only emphasises the fact that in either of these circumstances if the Magistrate feels inclined to do so he may report the case to the Local Government.²³

Where the accused were charged with receiving property stolen in the commission of a dacoity in Indore but it appeared that the property was received in British India, it was held that the accused could not be surrendered under the warrant of the Political Agent.²⁴

Where in the warrant issued by the Political Agent the accused is clearly well defined to ensure identity and the place at which and the authority to whom delivery is to be made are mentioned, the warrant is not wanting in particulars required by law and is not indefinite in such of its terms as are required by clause (1) to be stated therein.²⁵

(3) The provisions of the Code of Criminal Procedure for the time being in force in relation to proclamation and attachment in the case of persons absconding shall, with any necessary modifications, apply where any warrant has been received by a District Magistrate or Chief Presidency Magistrate under this section as if the warrant had been issued by himself.

8. (1) Where a Political Agent has directed by endorsement on any such warrant that the person for whose arrest it is issued may be released on executing a bond with sufficient sureties for his attendance before a person or authority indicated in this behalf in the warrant at a specified time and place, the Magistrate to whom the warrant is addressed shall on such security being given release such person from custody.

(2) When security is taken under this section, the Magistrate shall certify the fact to the Political Agent who issued the warrant, and shall retain the bond.

(3) If the person bound by any such bond does not appear at the time and place specified, the Magistrate may, on being satisfied as to his default, issue a warrant directing that he be re-arrested and handed over to any person authorized by the Political Agent to take him into custody.

(4) In the case of any bond executed under this section, the Magistrate may exercise the powers conferred by the Code of Criminal Procedure for the time being in force in relation to taking a deposit in lieu of the execution of a bond and with respect to the forfeiture of bonds and the discharge of sureties.

NOTE.

Where a person was arrested upon a warrant issued by a Political Agent under this Act, and was placed before a Magistrate, and such Magistrate passed an order releasing him on bail and directing him to appear before the Political Agent on a certain date, although there was no endorsement on the warrant giving the Magistrate power to pass such an order, it was held that in the absence of such an endorsement under this section the Magistrate had no authority to pass such an order.¹

¹⁹ *C. P. Mathen*, [1939] Mad. 728.

²⁰ *Hadibandhu Padhan*, (1945) 24 Pat. 609.

²¹ *Ram Pargas*, [1948] O. W. N. 64.

²² *Murlidhar Bhagwandas*, (1918) 20 Bom. L. R. 1009, 43 Bom. 340.

²³ *Madan Sahu*, (1934) 15 P. L. T. 493,

86 Cr. L. J. 375, [1934] AIR (P) 1553.

²⁴ *Hukam Chand*, (1873) P. R. No. 14 of 1873.

²⁵ *Bajjnath*, (1931) 8 O. W. N. 933, 32 Cr. L. J. 1243.

¹ *Raj Kumar Dutt v. Tothal Sijo*, (1907) 7 C. L. J. 171, 12 C. W. N. 602, 7 Cr. L. J. 198.

8A. (1) Notwithstanding anything contained in section 7, sub-section (2), or in section 8, when an accused person arrested in accordance with the provisions of section 7 is produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, and the statement (if any) of such accused person has been recorded, such Magistrate may, if he thinks fit, before proceeding further report the case to the Central Government and, pending the receipt of orders on such report, may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required.

(2) In the case of any bond executed in pursuance of this section, the District Magistrate or the Chief Presidency Magistrate, as the case may be, may exercise the powers conferred by the Code of Criminal Procedure for the time being in force in relation to taking a deposit in lieu of the execution of a bond and with respect to the forfeiture of bonds and the discharge of sureties.

NOTE.

If the person whose extradition is sought is a British subject in whose favour the discretion vested by a treaty might possibly be exercised by the Provincial Government, he should raise the point before the District Magistrate, who would then refer the matter for the orders of the Provincial Government under this section.²

This section was added by Act I of 1913, s. 3.

Sub-section (2) was added by Act III of 1947, s. 2.

9. Where a requisition is made to the Central Government by or on behalf of any State not being a Foreign State, for the surrender of any person accused of having committed an offence in the territories of such State, such requisition shall (except in so far as relates to the taking of evidence to show that the offence is of a political character or is not an extradition crime) be dealt with in accordance with the procedure prescribed by section 8 for requisitions made by the Government of any Foreign State as if it were a requisition made by any such Government under that section :

Provided that, if there is a Political Agent in or for any such State, the requisition shall be made through such Political Agent.

NOTE.

This section only applies when a requisition has been made to the Government of India or to a Provincial Government and not when a warrant has been addressed to the District Magistrate.³

10. (1) If it appears to any Magistrate of the first class or any Magistrate empowered by the Central Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State, or that a warrant may be issued for his arrest under section 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction.

(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent and in other cases to the Central Government.

(3) A person arrested on a warrant issued under this section shall not, without the special sanction of the Central Government, be detained more than two months, unless within such period the Magistrate receives an order made with reference to such person in accordance with the procedure prescribed by section 9, or a warrant for the arrest of such person under section. 7.

(4) In the case of a person arrested or detained under this section, the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the offence with which he is charged.

² *Moonga Lal Keot*, (1933) 12 Pat. 347.

³ *Jaipal Bhagat*, (1921) 1 Pat. 5.

NOTE.

The provisions of this Act are meant to ensure that the arrest and detention of persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure and the sections of the Act with reference to such procedure should be construed strictly in favour of the subject. When there is neither a warrant under s. 7 nor a requisition under s. 9, the Magistrate is empowered to issue a warrant under this section. It is an essential ingredient of this procedure that there should be a warrant. An arrest without such warrant is illegal.⁴

This section applies only if the warrant issued under s. 7 is legal, but absconding from jail not being one of the offences mentioned in Schedule I of this Act, a warrant for arrest on such a charge does not fall within s. 7.⁵ Where a person is arrested without a warrant either under s. 54 (g) of the Criminal Procedure Code or under s. 33 (g) of the Bombay City Police Act, 1902, and detained by a Magistrate under s. 23 of this Act, such Magistrate has power to release the arrested person on bail under this sub-section.⁶

11. (1) A person accused of an offence committed in British India, not being the offence for which his surrender is asked, or undergoing sentence under any conviction in British India, shall not be surrendered in compliance with a warrant issued by a Political Agent under section 7 or a requisition made by or on behalf of any State not being a Foreign State under section 9, except on the condition that such person be re-surrendered to the Central Government on the termination of his trial for the offence for which his surrender has been asked :

Provided that no such condition shall be deemed to prevent or postpone the execution of a sentence of death lawfully passed.

(2) On the surrender of a person undergoing sentence under a conviction in British India, his sentence shall be deemed to be suspended until the date of his re-surrender, when it shall revive and have effect for the portion thereof which was unexpired at the time of his surrender.

12. The provisions of this Chapter with reference to accused person shall, with any necessary modifications, apply to the case of a person who, having been convicted of an offence in the territories of any State not being a Foreign State, has escaped into or is in British India before his sentence has expired.

13. Every person who is accused or convicted of abetting or attempting to commit any offence shall be deemed, for the purposes of this Chapter, to be accused or convicted of having committed such offence, and shall be liable to be arrested and surrendered accordingly.

14. It shall be lawful for any person to whom a warrant is directed in pursuance of the provisions of this Chapter, to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

15. The Central Government may, by order, stay any proceedings taken under this Chapter, and may direct any warrant issued under this Chapter to be cancelled, and the person for whose arrest such warrant has been issued to be discharged.

NOTE.

The Bombay High Court has laid down that this section ousts the jurisdiction of the High Court to inquire into the propriety of the warrant ; but leaves open the question of the High Court's powers to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal.⁷ Similarly, the Calcutta High Court agreeing

⁴ *Santabir Lama*, (1984) 62 Cal. 399.

⁵ *Jaipal Bhagat*, (1921) 1 Pat. 57.

⁶ *Shriram Shambhudayal*, (1924) 26 Bom. L.

R. 984, 26 Cr. L. J. 948, [1925] AIR (B) 104.

⁷ *Huseinally Niazally*, (1905) 7 Bom. L. R. 463, 2 Cr. L. J. 489.

with this view holds that where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it.⁸ The Patna High Court has held that although this section empowers the Government of India and the Provincial Government to stay proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the accused person to be arrested, this does not oust the jurisdiction of the High Court to interfere in a case where action under the Act has not been under a valid warrant.⁹

There is no provision in this Act making an inquiry by a competent British Court in British India into the truth of the accusation, whether in the presence of the accused or otherwise, a condition precedent to the issue and execution of the warrant of the Political Agent under s. 7.¹⁰

16. The provisions of this Chapter shall apply to an offence or to an extradition offence, as the case may be, committed before the passing of this Act, and to an offence in respect of which a Court of British India has concurrent jurisdiction.

Application of Chapter to offences committed before its commencement.

17. (1) In any proceedings under this Chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof, and official certificates of facts and judicial documents stating facts, may, if duly authenticated, be received as evidence.

Receipt in evidence of exhibits, depositions and other documents.

(2) Warrants, depositions or statements on oath which purport to have been issued, received or taken by any Court of Justice outside British India, or copies thereof, and certificates of, or judicial documents stating the fact of, conviction before any such Court, shall be deemed duly authenticated,—

Authentication of the same.

(a) if the warrant purports to be signed by a Judge, Magistrate, or officer of the State where the same was issued or acting in or for such State :

(b) if the depositions or statements or copies thereof purport to be certified, under the hand of a Judge, Magistrate or officer of the State where the same were taken, or acting in or for such State, to be the original depositions or statements or to be true copies thereof, as the case may require :

(c) if the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a Judge, Magistrate or officer of the State where the conviction took place or acting in or for such State :

(d) if the warrants, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State where the same were respectively issued, taken or given.

(3) For the purposes of this section "warrant" includes any judicial document authorising the arrest of any person accused or convicted of an offence.

Definition of "warrant".

NOTE.

In all cases where inquiries are held by a view to extraditing an accused person, it would be desirable that he should, if possible, be present thereat.¹¹

18. Nothing in this Chapter shall derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any such treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly.

Chapter not to derogate from treaties.

NOTE.

This Act is the law of the land, not, so far as the third chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by treaty, this section provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no municipal Court can interfere on the ground that the Government had undertaken to act otherwise by treaty.¹²

The offence of cheating is an extradition offence so far as British India is concerned in view of

⁸ *Gulli Sahu*, (1913) 41 Cal. 400.

⁹ *Jaipal Bhagat*, (1921) 1 Pat. 57.

¹⁰ *Huseinally*, (1905) 7 Bom. L. R. 463, 2

Cr. L. J. 439.

¹¹ *Ibid.*

¹² *Moonga Lal Keot*, (1933) 12 Pat. 347.

this section, notwithstanding its omission from Article 4 of the treaty between the British Indian Government and the Hyderabad State.¹³

The East Indian Dependencies of France, having been expressly excluded from the Extradition Treaty of 1876, and not being States or parts of a State to which the Extradition Acts of 1870 and 1873 apply, are not "Foreign States" within the meaning of the Indian Extradition Act of 1903. Extradition in the East Indian Possessions of Great Britain and France are governed by Article 9 of the Treaty of March 7, 1815; and that article contemplating summary delivery at the request of any authority of either High Contracting Party and not providing any special procedure for the purpose of extradition, the British Indian Government may, on the statement of the Government of Pondicherry that a British Indian subject has committed the offence of theft within its territory and on its demand, deliver him up to the Government of Pondicherry, without holding an enquiry to satisfy itself that there is a *prima facie* case against the person whose extradition is sought. Where the treaty practically provides for surrender on demand, a more elaborate procedure cannot be super-imposed by the unilateral act of one of the parties.¹⁴

CHAPTER IV.

RENDITION OF FUGITIVE OFFENDERS IN HIS MAJESTY'S DOMINIONS.

19. For the purpose of applying and carrying into effect in British India the provisions of the Fugitive Offenders Act, 1881, the following provisions are hereby made :—

(a) the powers conferred on "Governors" of British possessions shall be powers of the Central Government :

(b) the powers conferred on a "Superior Court" may be exercised by any Judge of a High Court :

(c) the powers conferred on a "Magistrate" may be exercised by any Magistrate of the first class or by any Magistrate empowered by the Central Government in that behalf : and

(d) the offences committed in British India to which the Act applies, are piracy, treason, and any offence punishable under the Indian Penal Code with rigorous imprisonment for a term of twelve months or more or with any greater punishment.

CHAPTER V.

OFFENCES COMMITTED AT SEA.

20. Where the Government of any State outside India makes a requisition for the surrender of a person accused of an offence committed on board any vessel on the high seas which comes into any port of British India, the Central Government and any Magistrate having jurisdiction in such port and authorized by the Central Government in this behalf may exercise the powers conferred by this Act.

CHAPTER VI.

EXECUTION OF COMMISSIONS ISSUED BY CRIMINAL COURTS OUTSIDE BRITISH INDIA.

21. The testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in any country or place outside British India in like manner as it may be obtained in any civil matter under the provisions of the Code of Civil Procedure for the time being in force with respect to commissions, and the provisions of that Code relating thereto shall be construed as if the term "suit" included a criminal proceeding :

Provided that this section shall not apply when the evidence is required for a Court or tribunal in any State outside India other than a British Court and the offence is of a political character.

¹³ *Murlidhar Bhagwandas*, (1918) 20 Bom. L. R. 1009, 43 Bom. 810.

¹⁴ *Muthu Reddi*, (1930) 53 Mad. 1023.

CHAPTER VII.

SUPPLEMENTAL.

Power to make rules. 22. (1) The Central Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the removal of prisoners accused or in custody under this Act, and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them ;

(b) the seizure and disposition of any property which is the subject of, or required for proof of, any alleged offence to which this Act applies ;

(c) the pursuit and arrest in British India, by officers of the Government or other persons authorized in this behalf, of persons accused of offences committed elsewhere ; and

(d) the procedure and practice to be observed in extradition proceedings.

(3) Rules made under this section shall be published in the Official Gazette and shall thereupon have effect as if enacted by this Act.

23. Notwithstanding anything in the Code of Criminal Procedure, 1898, any person arrested without an order from a Magistrate and without a warrant, in pursuance of the provisions of section 54, clause seventhly, of the said Code, may, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made, be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under section 10.

Detention of persons arrested under section 54, clause seventhly, Act V, 1898.

NOTE.

This section refers to cases of persons arrested under s. 54, cl. 7, of the Criminal Procedure Code and is intended to cover those cases where the police officer arrests not only without a warrant but also without an order from a Magistrate and acts on his own responsibility, on suspicion or information as based on facts which the police officer has considered for himself.¹⁵

24. [Repeals.] [Repealed by Act X of 1914, s. 3, Sch. II].

THE FIRST SCHEDULE.

EXTRADITION OFFENCES.

[See section 2, clause (b), and Chapter III (Surrender of Fugitive Criminals in case of States other than Foreign States).]

[The sections referred to are the sections of the Indian Penal Code.]

Frauds upon creditors (section 206).

Resistance to arrest (section 224).

Offences relating to coin and stamps (sections 230 to 263A).

Culpable homicide (sections 299 to 304).

Attempt to murder (section 307).

Thagi (sections 310, 311).

Causing miscarriage, and abandonment of child (sections 312 to 317).

Causing hurt (sections 323 to 333).

Wrongful confinement (sections 347, 348).

Kidnapping and slavery (sections 360 to 373).

Rape and unnatural offences (sections 375 to 377).

Theft, extortion, robbery, etc. (sections 378 to 414).

Cheating (sections 415 to 420).

Fraudulent deeds, etc. (sections 421 to 424).

Mischief (sections 425 to 440).

Lurking house-trespass (sections 443, 444).

Forgery, using forged documents, etc. (sections 463 to 477A).

¹⁵ Santabir Lama, (1934) 62 Cal. 399.

Desertion from any unit of Indian States Forces declared by the Central Government, by notification in the Official Gazette, to be a unit desertion from which is an extradition offence.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assault on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

Any offence against any section of the Indian Penal Code or against any other law which may, from time to time, be specified by the Central Government by notification in the Official Gazette either generally for all States or specially for any one or more States.

THE SECOND SCHEDULE.

[Enactments Repealed].

[Repealed by Act X of 1914, s. 3, Sch. II].

THE INDIAN MERCHANDISE MARKS ACT, 1889.

(ACT NO. IV OF 1889).

AN Act to amend the Law relating to Fraudulent Marks on merchandise.

WHEREAS it is expedient to amend the law relating to fraudulent marks on merchandise; It is hereby enacted as follows :—

Title, extent and commencement. 1. (1) This Act may be called The Indian Merchandise Marks Act, 1889.

(2) It extends to the whole of British India; and

(3) It shall come into force on the first day of April, 1889.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) “mark” has the meaning assigned to that expression in clause (f) of sub-section (1) of section 2 of the Trade Marks Act, 1940;

(1A) “trade mark” means a “registered trade mark” as defined in clause (j) of sub-section (1) of section 2 of the Trade Marks Act, 1940, or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark:

(2) “trade description” means any description, statement or other indication, direct or indirect,—

(a) as to the number, quantity, measure, gauge or weight of any goods, or

(b) as to the place or country in which, or the time at which, any goods were made or produced, or

(c) as to the mode of manufacturing or producing any goods, or

(d) as to the material of which any goods are composed, or

(e) as to any goods being the subject of an existing patent, privilege or copyright;

and the use of any mark which according to the custom of the trade is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act:

(3) “false trade description” means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act:

(4) “goods” means anything which is the subject of trade or manufacture:

(5) “name” includes any abbreviation of a name.

3. [Substitution of new sections for sections 478 to 489 of the Indian Penal Code].
 Repealed by Act I of 1938, s. 2, and Sch.

Trade Descriptions.

4. (1) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any such marks, or arrangement or combination thereof, whether including a trade mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, and to goods having such marks, or arrangement or combination, applied thereto.

(2) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods any name or initials—

(a) not being a trade mark, or part of a trade mark,

(b) being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having authorised the use of such name or initials, and

(c) being the name or initials of a fictitious person or of a person not carrying on business in connection with goods of the same description.

(3) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are contained therein standard yards, standard feet or standard inches is a false trade description.

Application of trade descriptions. 5. (1) A person shall be deemed to apply a trade description to goods who—

(a) applies it to the goods themselves, or

(b) applies it to any covering, label, reel or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture, or

(c) places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade description has been applied, or

(d) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

(2) A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.

(3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.

NOTE.

The improper use of a trade-name may fall under this section and be punishable under s. 6 or s. 7 as a false trade description.¹

6. If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Penalty for applying a false trade description.

NOTE.

Under this section a corporation can be prosecuted and convicted, because a corporation through its agents can entertain an intention to apply a false trade description to goods. A conviction under

¹ *Anath Nath Dey*, (1912) 40 Cal. 281.

the section does not involve the proof of any intention. The offence under the section is made absolute. If a person applies a false trade description to goods, he is liable to be convicted whatever his intention may have been. Intention is material only under the proviso and by way of defence. A person can escape the consequences of his act by proving that he acted without intent to defraud. Generally speaking an intent to defraud involves an intent to cheat in some form or other and to cause loss to some one; but under this section there is a sufficient intention to defraud if there is an intention to deceive the purchaser. It is no intent to defraud where there is a misdescription of goods, without the knowledge that it was a misdescription.²

Penalty for selling goods to which a false trade description is applied.

7. If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or which, being required by notification under section 12A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification; he shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, or that any offence against this section had been committed in respect of the goods, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

7A. If a person tampers with, alters or effaces a mark which has been applied to any goods to which it is required to be applied by notification made under section 12A, he shall, unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, and, in the case of a second or subsequent conviction, with imprisonment which may extend to two years, or with fine, or with both.

Penalty for tampering with, altering or effacing a mark applied in pursuance of section 12A.

Unintentional Contravention of the Law relating to Marks and Descriptions.

8. Where a person is accused under section 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or under section 6 of this Act of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, and proves—

Unintentional contravention of the law relating to marks and descriptions.

(a) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(b) that he took reasonable precautions against committing the offence charged, and

(c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(d) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,

he shall be acquitted.

² *Dhanraj Mills, Ltd.*, (1943) 45 Bom. L.R. 300, 44 Cr. L. J. 574, [1943] AIR (B) 182.

Forfeiture of Goods.

9. (1) When a person is convicted under section 482 of the Indian Penal Code of using a false trade mark, or under section 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or section 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or which, being required by notification under section 12A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification, or is acquitted on proof of the matter or matters specified in section 486 of the Indian Penal Code or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Amendment of the Sea Customs Act, 1878.

10. [Repealed by Act I of 1938, s. 2, and Sch.]

11. [Repealed by Act I of 1938, s. 2, and Sch.]

Stamping of Piece-goods, Cotton Yarn and Thread.

12. (1) Piece-goods, such as are ordinarily sold by length or by the piece, which have been manufactured, bleached, dyed, printed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from the last of such premises in which they underwent any of the said processes without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and, except when the goods are sold from the factory for export from British India, without being conspicuously marked on each piece with the name of the manufacturer, or of the occupier of the premises in which the piece was finally processed or of the wholesale purchaser in India of the piece.

(2) Cotton yarn such as is ordinarily sold in bundles, and cotton sewing or darning thread, which have been manufactured, bleached, dyed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from those premises unless, in accordance with any rules made under section 20 of this Act, in the case of yarn the bundles are conspicuously marked with an indication of the weight of yarn in each bundle and the count of the yarn contained in the bundle and in the case of thread each unit is conspicuously marked with the weight of thread in the unit and the grist number and, except where the goods are sold from the factory for export from British India, unless each bundle or unit is conspicuously marked with the name of the manufacturer or of the wholesale purchaser in India of the goods.

(3) If any person removes or attempts to remove or causes or attempts to cause to be removed for sale from such premises or sells or exposes or has in possession for sale any such piece-goods or any such cotton yarn or any cotton sewing or darning thread which is not marked as required by sub-section (1) and sub-section (2), every such piece and every such bundle of yarn and all such thread, and everything used for the packing thereof, shall be forfeited to His Majesty and such person shall be punished with fine which may extend to one thousand rupees.

Power to require goods to show indication of origin.

12A. (1) The Central Government may, by notification in the Official Gazette, require that goods of any class specified in the notification which are made or produced beyond the limits of British India and imported into British India, or which are made or produced within the limits of British India, shall, from such date as may be appointed by the notification not being less than three months from its issue, have applied to them an indication of the country or place in which they were made or produced.

(2) The notification may specify the manner in which such indication shall be applied, that is to say whether to the goods themselves or in any other manner, and the times or occasions on which the presence of the indication shall be necessary, that is to say whether on importation only, or also at the time of sale, whether by wholesale or retail or both.

(3) No notification under this section shall be issued, unless application is made for its issue by persons or associations substantially representing the interests of dealers in or manufacturers, producers, or users of the goods concerned, or unless the Central Government is otherwise convinced that it is necessary in the public interest to issue the notification, nor without such inquiry as the Central Government may consider necessary.

(4) The provisions of section 23 of the General Clauses Act, 1897, shall apply to the issue of a notification under this section as they apply to the making of a rule or bye-law the making of which is subject to the condition of previous publication.

(5) A notification under this section shall not apply to goods made or produced beyond the limits of British India and imported into British India if in respect of those goods the Chief Customs Officer is satisfied at the time of importation that they are intended for exportation whether after transshipment in or transit through British India or otherwise.

Supplemental Provisions.

13. In the case of goods brought into British India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act or section 18 of the Sea Customs Act, 1878, as amended by this Act, be *prima facie* evidence of the place or country in which the goods were made or produced.

14. (1) On any such prosecution as is mentioned in the last foregoing section or on any prosecution for an offence against any of the sections of the Indian Penal Code, as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the prosecutor or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were a fine.

NOTE.

On any prosecution mentioned in s. 13, or for an offence under the relevant sections of the Penal Code, the Court should award costs under this section and not under s. 546A of the Criminal Procedure Code. These costs include the advocate's fees.³

The appellate Court can award the costs of appeal under this section.⁴

15. No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

NOTE.

'Offence' means the offence charged.⁵ It means the offence in respect of which the prosecution is launched. The limitation prescribed by this section is three years from the date of the commis-

³ *Mohamed Cassim v. Shaik Thumbay Sahib*, (1939) 41 Cr. L. J. 392, [1940] AIR (R) 33.

⁴ *Ganpat*, (1914) 16 Bom. L. R. 78, 15 Cr.

L. J. 522.

⁵ *Nagendranath Shaha*, (1929) 57 Cal. 1153.

sion of the offence charged and one year from the date of discovery by the prosecutor of the offence charged, whichever is less.⁶

The prosecution is within time if launched within three years of the specific offence complained against. The starting-point for limitation is not the termination of three years from the date of the first of a series of offences. There is nothing about a series of offences in this section or in s. 486, Penal Code; section 486 specifically confines the offence to selling a thing, "goods or thing".⁷

Authority of the Central Government to issue instructions as to administration of this Act.

16. (1) The Central Government may, by notification in the Official Gazette, issue instructions for observance by Criminal Courts in giving effect to any of the provisions of this Act.

(2) Instructions under sub-section (1) may provide, among other matters, for the limits of variation, as regards number, quantity, measure, gauge or weight, which are to be recognized by Criminal Courts as permissible in the case of any goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the seller shall be deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to and accepted by the buyer.

Implied warranty on sale of marked goods.

18. (1) Nothing in this Act shall exempt any person from any suit or other proceeding which might, but for anything in this Act, be brought against him.

Savings.

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any suit or other proceeding, but such discovery or answer shall not be admissible in evidence against such person in any such prosecution as is mentioned in s. 14.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in British India who in good faith acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor, has given full information as to his master and as to the instructions which he has received from his master.

19. For the purpose of s. 12 of this Act and clause (f) of s. 18 of the Sea Customs Act, 1878, as amended by this Act, the Central Government may, by notification in the Official Gazette, declare what classes of goods are included in the expression "piece-goods, such as are ordinarily sold by length or by the piece."

Definition of piece-goods.

20. (1) The Central Government may make rules, for the purposes of this Act, to provide, with respect to any goods which purport or are alleged to be of uniform number, quantity, measure, gauge or weight, for the number of samples to be selected and tested and for the selection of the samples.

Determination of character of goods by sampling.

(1A) The Central Government may make rules providing for the manner in which for the purposes of section 12 cotton yarn and cotton sewing or darning thread shall be marked with the particulars required by that section.

(2) With respect to any goods for the selection and testing of samples of which provision is not made in any rules for the time being in force under sub-section (1), the Court or officer of Customs, as the case may be, having occasion to ascertain the number, quantity, measure, gauge or weight of the goods, shall, by order in writing, determine the number of samples to be selected and tested and the manner in which the samples are to be selected.

(3) The average of the results of the testing in pursuance of rules under sub-section (1) or of an order under sub-section (2) shall be *prima facie* evidence of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(4) If a person having any claim to, or in relation to, any goods of which samples have been selected and tested in pursuance of rules under sub-section (1) or of an order

⁶ *Mohamed Cassim v. Shaik Thumby Sahib* [1940] Ran. 244.

⁷ *Muhammad Ahmad v. Venkanna*, [1930]

M. W. N. 1263, 32 Cr. L. J. 809, [1931] AIR (M) 276.

under sub-section (2), desires that any further samples of the goods be selected and tested, they shall, on his written application and on the payment in advance by him to the Court or officer of Customs, as the case may be, of such sums for defraying the cost of the further selection and testing as the Court or officer may from time to time require, be selected and tested to such extent as may be permitted by rules to be made by the Central Government in this behalf or as, in the case of goods with respect to which provision is not made in such rules, the Court or officer of Customs may determine in the circumstances to be reasonable, the samples being selected in manner prescribed under sub-section (1), or in sub-section (2), as the case may be.

(5) The average of the results of the testing referred to in sub-section (3) and of the further testing under sub-section (4) shall be conclusive proof of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(6) Rules under this section shall be made after previous publication.

21. An officer of the Government whose duty it is to take part in the enforcement of this Act shall not be compelled in any Court to say whence he got any information as to the commission of any offence against this Act.

22. If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would, under this Act, or under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted.

THE INDIAN PRESS (EMERGENCY POWERS) ACT.*

(Act No. XXIII of 1931).

AN Act to provide for the better control of the press.

WHEREAS it is expedient to provide for the better control of the press; It is hereby enacted as follows:—

Short title, extent and duration. 1. (1) This Act may be called the Indian Press (Emergency Powers) Act, 1931.

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Santhal Parganas.

(3) [*Repealed by the Criminal Law Amendment Act, 1935, s. 2.*]

NOTE.

The provisions of this Act are of a penal character, and they should be construed strictly and in such a manner as to protect the liberties of the subject.¹

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “book” includes every volume, part or division of a volume, pamphlet and leaflet, in any language, and every sheet of music, map, chart or plan separately printed or lithographed;

(2) “document” includes also any painting, drawing or photograph or other visible representation;

(3) “High Court” means the highest Civil Court of Appeal for any local area except in the case of the province of Coorg where it means the High Court of Judicature at Madras;

(4) “Magistrate” means a District Magistrate or Chief Presidency Magistrate;

* This Act has been supplemented by the Indian States (Protection) Act, 1934 (XI of 1934), s. 3, and amended in Bengal by Ben. Act VII of 1934 and in Assam by Assam Act III of

1934.

¹ *Des Raj*, (1938) 85 Cr. L. J. 1447 (2), [1934] AIR (L) 264.

(5) "newspaper" means any periodical work containing public news or comments on public news;

(6) "news-sheet" means any document other than a newspaper containing public news or comments on public news or any matter described in sub-section (1) of section 4;

(7) "press" includes a printing-press and all machines, implements and plant and parts thereof and all materials used for multiplying documents;

(8) "printing-press" includes all engines, machinery, types, lithographic stones, implements, utensils and other plant or materials used for the purpose of printing;

(9) "unauthorized newspaper" means—

(a) any newspaper in respect of which there are not for the time being valid declarations under section 5 of the Press and Registration of Books Act, 1867, and

(b) any newspaper in respect of which security has been required under this Act, but has not been furnished as required;

(10) "unauthorised news-sheet" means any news-sheet other than a news-sheet published by a person authorised under section 15 to publish it; and

(11) "undeclared press" means any press other than a press in respect of which there is for the time being a valid declaration under section 4 of the Press and Registration of Books Act, 1867.*

NOTE.

Sub-s. 1.—Sub-sections 1 and 6 of this section are not mutually exclusive and pamphlets coming within sub-s. (1) will also come within sub-s. (6) if they contain any matter described in s. 4 (1) of the Act.

The accused, members of the Labour Protection League, were convicted, under s. 18 (1) of the Act, of the offence of having distributed unauthorized news-sheets, namely, two pamphlets which were part of a series issued by the said league. One of the pamphlets was entitled "Deception practised by the rich and the difficulties they bring upon the poor" and the other was a drama. In the pamphlets the administration of justice was depicted as being on the side of the rich, more definitely referred to therein as zemindars, mill-owners and land-owners, and susceptible to bribes; and Government was charged with aiding the rich, and the rich and the Government were depicted as the two enemies of labour and susceptible of taking bribes. The pamphlets were distributed amongst uneducated readers. It was held that the pamphlets in question were documents within sub-s. (6) of this section, and that

* The following sections have been added by the Bengal Criminal Law Amendment Act (Beng. VII of 1934) and are in force in Bengal only.—

Prohibition of publication of certain information.

2A. The Provincial Government may, by notification in the *Official Gazette*, prohibit either absolutely or subject to such conditions and restrictions as may be specified in the notification, the publication in any newspaper, news-sheet, pamphlet, leaflet or other document of any class of information which, in the opinion of the Provincial Government, tends to excite sympathy with, or secure adherents to, the terrorist movement.

2B. Neither the name nor the designation nor any words, signs or visible representations disclosing the identity of any witness in a trial by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, or in a trial by a special Magistrate under the Bengal Suppression of Terrorist Outrages Act, 1932, shall, without the permission of the Commissioners, or of the Special Magistrate, as the case may be, or of the Provincial Government, be published in any newspaper, news-sheet, pamphlet, leaflet or other document.

The following sections have been added by the Assam Criminal Law Amendment Act (Assam III of 1934), s. 30 (1) and are in force in Assam only.—

2A. The Local Government may, by notification in the local official Gazette, prohibit either absolutely or subject to such conditions and restrictions as may be specified in the notification, the publication in any newspaper, book or other document of any class of information which, in the opinion of the Local Government, tends to create an atmosphere favourable to the gaining of adherents to the terrorist movement.

2B. Neither the name nor the designation nor any words, signs or visible representations disclosing the identity of any witness in a trial by Commissioners, appointed under the Assam Criminal Law Amendment Act, 1934, shall, without the permission of the Commissioners, or, after the termination of the trial, without the permission of the Local Government, be published in any newspaper, book or other document.

the pamphlet tended to bring into hatred and contempt (a) the Government established by law in British India, (b) the administration of justice in British India, and (c) a class or section of His Majesty's subjects in British India, within s. 4 (1) of the Act, and they came within the definition of "news-sheet"; and that the distribution of the pamphlets being unauthorised, the accused were rightly convicted.²

Sub-s. 2.—When the word "document" has not been defined in the Act itself except that by saying that it includes also any printing, drawing or photograph or other visible representation, the definition of the word as contained in the Penal Code and the Indian Evidence Act will apply.³

Sub-s. 5.—The expression "public news" means something such as current happenings or alleged current happenings of interest or likely to be of interest to the public or to a portion of the public. Anything new or unknown, when communicated to another, is news, and news which is intended for, or is communicated to the general public, no matter what its nature, is public news. It is only by publication, by becoming public, by being communicated to the general public that news can become public. If a periodical is published for the general public, all news appearing in it is public news, and the paper is a "newspaper" within the meaning of the Act.⁴ An information already in possession of the public can hardly be called news and a document containing it cannot be described either a newspaper or a news-sheet within the meaning of this section and s. 18.⁵

Sub-s. 6.—Painting of the words "Boycott British goods" on a road does not amount to making of an unauthorised news-sheet as defined in this sub-section.⁶

Whether a publication falls within the definition of "news-sheet" should be considered in each individual case, having regard to the ordinary meaning of words; for any matter published or commented on to fall within the definition there must be an element of novelty about it.⁷

Information which concerns a matter of public and topical interest as is contrasted with purely historical interest is public news. Information conveyed by photographs of persons of the Chittagong Armoury Raid though discovered more than two years after the raid, the legal proceedings and emergency measures arising out of it not having terminated, was held to be public news and such photographs were news-sheets within the meaning of this sub-section.⁸

A leaflet, purporting to be an exhortation to the public to strive for freedom or independence, which, while including references to matters of historical interest also contains information and comments on events of topical importance or interest, is a news-sheet.⁹

The handbills or posters containing, *inter alia*, the words "Whither Democracy" "Nearly 1,000 political prisoners detained in India without trial" do not fall within the definitions of "news-sheet" or "news-paper".¹⁰

Control of printing presses and newspapers.

3. (1) Any person keeping a printing press who is required to make a declaration under section 4 of the Press and Registration of Books Act, 1867, may be required by the Magistrate before whom the declaration is made, for reasons to be recorded in writing, to deposit with the Magistrate within ten days from the day on which the declaration is made, security to such an amount, not being more than one thousand rupees, as the Magistrate may in each case think fit to require, in money or the equivalent thereof in securities of the Central Government as the person making the deposit may choose:

Provided that if a deposit has been required under sub-section (3) from any previous keeper of the printing press, the security which may be required under this sub-section may amount to three thousand rupees.

(2) Where security required under sub-section (1) has been deposited in respect of any printing-press, and for a period of three months from the date of the declaration mentioned in sub-section (1) no order is made by the Provincial Government under section 4 in respect of such press, the security shall, on application by the keeper of the press, be refunded.

(3) Whenever it appears to the Provincial Government that any printing press kept in any place in the territories under its administration, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-section (2), is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible re-

² *Ramalingayya*, [1937] Mad. 14.

³ *Satyawan Acharya*, (1934) 36 Cr. L. J. 335.

⁴ "New Sind", [1942] Kar. 127, s.B.

⁵ *Mrs. P. B. Bharucha*, [1942] Lah. 553, 556.

⁶ *Panduranga Mudali*, (1932) 63 M. L. J. 906, [1932] M. W. N. 1357, 34 Cr. L. J. 90,

[1933] ATR (M) 123.

⁷ *Ramakrishnan*, [1946] Mad. 70.

⁸ *Jitendralal Banerji*, (1933) 60 Cal. 1089.

⁹ *Sham Sul Huda*, [1937] 2 Cal. 670.

¹⁰ *Mrs. P. B. Bharucha*, [1942] Lah. 553.

presentations of the nature described in section 4, sub-section (1), the Provincial Government may, by notice in writing to the keeper of the press stating or describing such signs or visible representations, order the keeper to deposit with the Magistrate within whose jurisdiction the press is situated security to such an amount, not being less than five hundred or more than three thousand rupees as the Provincial Government may think fit to require, in money or the equivalent thereof in securities of the Central Government as the person making the deposit may choose.

(4) Such notice shall appoint a date, not being sooner than the tenth day after the date of the issue of the notice, on or before which the deposit shall be made.

NOTE.

An order under sub-s. (3) requiring a deposit of security, need not state what particular clause of s. 4 (1) has been offended. When the passages complained of are set out in the form of an annexure to the order, the provisions of law are complied with.¹¹ An order under sub-s. (3) directing the keeper of a printing press to deposit security cannot be set aside, if the publication, in respect of which security has been demanded, contains words, which express admiration of the conduct of a convict sentenced to death.¹²

Section 3 (3) does not constrain the Provincial Government to do anything more than to state or describe the words, signs or visible representations. It does not require that every word to which objection is taken by Government should be reproduced verbatim in the notice.¹³

Where in a notice issued under sub-s. (3) Government objects to certain passages in a publication as offending against s. 4 (1) (a) (b), it is not open subsequently to Government to justify the notice by resorting to other clauses of the section.¹⁴

A joint keeper of a press on whom a notice has been served under sub-s. (3) cannot by purchasing the share of his partner escape liability to have his press forfeited when he continues to use the press, by pleading that he, the keeper, has not been given notice as required by the Act.¹⁵

Sections 3 and 7 contemplate action against both the keeper of the press and the publisher of the paper, and no distinction is drawn between the case where the keeper of the press and publisher are two different persons or one and the same.¹⁷

4. (1) Whenever it appears to the Provincial Government that any printing press in respect of which any security has been ordered to be deposited under section 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which—

Power to declare
security or press
forfeited in certain
cases.

(a) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, or

(b) directly or indirectly express approval or admiration of any such offence, or of any person, real or fictitious, who has committed or is alleged or represented to have committed any such offence, or which tend, directly or indirectly,—

(c) to seduce any officer, soldier, sailor or airman in the military, naval or air forces of His Majesty or any police officer from his allegiance or his duty, or

(d) to bring into hatred or contempt His Majesty or the Government established by law in British India¹ or the administration of justice in British India or any class or section² of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government, or

(e) to put any person in fear or to cause annoyance to him and thereby induce him to deliver to any person any property or valuable security or to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do, or

(f) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence, or to

¹¹ "Amrita Bazar Patrika", (1932) 37 C. W. N. 166, 56 C. L. J. 157, 33 Cr. L. J. 949, [1932] AIR (C) 738, S.B.

¹² *Bapuji Kunbi v. Local Government*, (1933) 29 N. L. R. 244, F.B.

¹³ *Abid Ali Khan v. The Government of the*

United Provinces, (1944) 20 Luck. 235, F.B.

¹⁴ *Vishnu Gangadhar v. Government of Bombay*, (1944) 47 Bom. L. R. 58.

¹⁵ *Mahbub Ahmad*, (1936) 18 Lah. 65, F.B.

¹⁷ "New Sind," [1942] Kar. 127, S.B.

refuse or defer payment of any land revenue, tax, rate, cess or other due or amount payable to Government or to any local authority, or any rent of agricultural land or anything recoverable as arrears of or along with such rent, or

(g) to induce a public servant or a servant of a local authority to do any act or to forbear or delay to do any act connected with the exercise of his public functions or to resign his office, or

(h) to promote feelings of enmity or hatred between different classes of His Majesty's subjects, or

(i) to prejudice the recruiting of persons to serve in any of His Majesty's forces, or in any police force, or to prejudice the training, discipline or administration of any such force;*

the Provincial Government may, by notice in writing to the keeper of such printing-press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above,—

(i) where security has been deposited, declare such security, or any portion thereof, to be forfeited to His Majesty, or

(ii) where security has not been deposited, declare the press to be forfeited to His Majesty,

and may also declare all copies of such newspaper, book or other document wherever found in British India to be forfeited to His Majesty.†

Explanation 1.—No expression of approval or admiration made in a historical or literary work shall be deemed to be of the nature described in this sub-section unless it has the tendency described in clause (a).

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in clause (d) of this sub-section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in clause (d) of this sub-section.

Explanation 4.—Words pointing out, without malicious intention and with an honest view to their removal, matters which are producing to have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects shall not be deemed to be words of the nature described in clause (h) of this sub-section.

(2) After the expiry of ten days from the date of the issue of a notice under sub-section (1) declaring a security, or any portion thereof, to be forfeited, the declaration made in respect of such press under section 4 of the Press and Registration of Books Act, 1867, shall be deemed to be annulled.

NOTE.

Scope.—A keeper of a printing press or a publisher of a newspaper is liable for acts previously done. The Provincial Government is, therefore, competent to forfeit a deposit made by a keeper of a press for an objectionable article published before the keeper makes the deposit.¹⁸

Sub-sec. (1).—Where a newspaper published as a news item an opinion transmitted to it by a news agency and expressed to a representative of that agency by a person to the effect that suspension of the civil disobedience movement amounted to an acknowledgment of defeat which would not further the cause of national progress and there was no evidence as to the status and standing of the interviewer

¹⁸ *Rewa Prasad Dube v. Provincial Government, Central Provinces and Berar*, [1946]

Nag. 90, S.B.

* The following two clauses have been added by the Bengal Criminal Law Amendment Act (Beng. VII of 1934) and are in force in Bengal only.—
or which

(j) give any information in contravention of a notification published under section 2A, or

(k) disclose the identity of any witness in contravention of the provisions of section 2B,

Similar clauses have been added by the Assam Criminal Law Amendment Act (Assam III of 1934), s. 30 (2), and are in force in Assam only.

† The following proviso was added by the Bengal Criminal Law Amendment Act (Beng. VII of 1934), and is in force in Bengal only.—

Provided that no such declaration shall be made in a case to which clause (j) applies unless the keeper of the printing-press has had an opportunity of showing cause why such declaration should not be made.

nor any other evidence that such opinion would cause any of the effects described in sub-s. (1) of this section. It was held that in the circumstances, and reading the words in their entirety in a free and fair spirit, they did not come within the purview of sub-s. (1) of this section.¹⁹

Clause (a).—Words tending to incite to or to encourage bloody revolution and the destruction of the present social order by bloodshed and force clearly come within cl. (a) of this sub-section. It is unnecessary to show that the words tend to incite to or to encourage the commission of a particular offence or offences. It is sufficient if they tend to incite to or to encourage the commission of cognizable offences of violence in general.²⁰ Where there is nothing in the “announcement” itself which can be said to encourage directly or indirectly the commission of any offence, much less murder or other cognizable offence involving violence, or which makes reference, explicit or covert, to any person who has, or is supposed to have committed crimes of this nature, the mere fact that the head-line of the poster contains words “Long, Long Live Revolution” cannot lead to the conclusion that it was intended to produce literature advocating violence.²¹

The biography of a living person containing a narrative of the Revolutionary Movement in existence about thirty-five years ago which has since passed into history can be a historical work as distinguished from a narrative of current events, though the person has taken a prominent part in such movement. No such historical work can be regarded as objectionable unless it has the present tendency to incite people to do such violent acts as may be punishable under the law. The legislature has drawn a clear distinction between a historical or literary work and newspaper articles, pamphlets and similar publications. In the case of the latter, approval or admiration of an offence of murder or other violent crime is enough to attract the penal provisions of this Act; but in the case of the former, mere approval or admiration of such offence is not enough, but it must be shown that it has a tendency to encourage the offence at the time the work is published.²²

Clause (b).—Before applying this clause it must be shown that a person held up for admiration has committed or is alleged to have committed an offence of murder or any cognizable offence involving violence. The words of this clause are wide enough to include offences involving violence against person as well as property, but the essential element in the appropriate application of the clause is an offence which involves violence.²³

Clause (d).—Where the general tendency of articles published in a newspaper is to assert that the Local Government is deliberately abusing and misusing the powers conferred upon it by Ordinances, and to appeal to it to cease from so doing, the articles tend to bring Government into hatred and contempt under cl. (d). It is immaterial even if the facts stated are true. There is no exception making truth and public good an answer to a charge under this section. If an article charges Special Courts constituted under the Ordinances with acting in co-operation with the executive, it tends to bring into hatred or contempt the administration of justice under the Ordinances.²⁴

In order to determine whether a particular document, book or newspaper falls within the ambit of this clause the Court should consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which may be qualified by the context but endeavouring to gather the general effect to which the whole composition would have on the minds of the public. Expressions which are the stock in trade of political demagogues have no tendency to excite disaffection against the Government established by law in British India, and being of every day use have no sting left in them, may be styled political exaggerations and cannot be said to be seditious and, therefore, do not come within the purview of this clause. The criticism that a certain policy of the Government is so unfortunate that it has created a political deadlock which has led to famine and conditions resulting in a large number of deaths of people by hunger cannot be construed as meaning that the Government that pursued that policy was guilty of murder of the people who died owing to famine conditions in the country.²⁵ In deciding whether the words complained of fall within this sub-section, the Court must have regard to the surrounding circumstances; the context in which the words appear; the persons to whom the words were addressed; the political atmosphere in which the words were delivered, and the place where they were published. Where a Tamil newspaper of small circulation contained an exhortation to its Tamil readers in Rangoon to free India from an alien Raj with the “Sword of Ahimsa” and by a campaign of passive resistance, it was held that in the circumstances obtaining in the case, although the words complained of were seditious, they did not fall within this clause.¹ Intention of the accused is immaterial and the only material question is

¹⁹ *Newspaper “Advance” & Sadhan Press*, (1933) 38 C. W. N. 56, 58 C. L. J. 32, S.B.

²⁰ *Badri Narayan Singh v. Chief Secretary to Government of Bihar*, (1940) 22 P. L. T. 260, 42 Cr. L. J. 548, [1941] AIR (P) 132, S.B.; *In the matter of the Partap (Urdu) Daily, Lahore*, [1947] Lah. 795, F.B.

²¹ *Des Raj*, (1933) 35 Cr. L. J. 1447, [1934], AIR (L) 264.

²² *Vishnu Gangadhar v. Government of Bombay*, (1944) 47 Bom. L. R. 57, S.B.

²³ *Jairam*, [1947] Kar. 69, F.B.

²⁴ *Pothan Joseph*, (1932) 34 Bom. L. R. 917, 56 Bom. 472, S.B.

²⁵ *Harkishan Singh*, (1944) 47 P. L. R. 3, 47 Cr. L. J. 345, [1946] AIR (L) 22, F.B.

¹ *S. N. S. Mudaliar v. The Secretary of State for India*, (1931) 10 Ran. 163, S.B.

the tendency or effect of the words, signs, or visible representations complained of.² The police form part of the Government established by law in British India as do the Magistrates, Judges and Secretaries. Where, therefore, the police as a whole are attacked the words tend directly or indirectly to bring into hatred or contempt the Government established by law in British India.³ Where the article in a newspaper after condemning the acts of the non-Muslim Government said that not taking steps to remove the domination of that Government was irreligiousness and that every effort should be made to free the country from such a domination, it was held that the article came within cl. (d) of sub-s. (1) of this section.⁴ Where a pamphlet purported to deal with the grievances of the poor against the rich and referred on one side to labourers in fields and factories and on the other to rich persons, the zemindars, the bankers and the petty shop-keepers, and the pamphlet called on the labourers to assemble in large numbers at a certain place and it appeared that the feelings of the assembly would be inflamed by this pamphlet against the rich persons and bankers and the zemindars and the petty shop-keepers, it was held that as the action taken by the accused in publishing the pamphlet would promote feelings of enmity or hatred between the different classes of His Majesty's subjects, he was punishable under sub-s. (1) of s. 18.⁵ For a subject nation to pray to Shri-Krishna on "Janmashtami" day for attainment of political freedom is not a thing which can be legitimately condemned. But for an innocent sentiment of such character, expressions such as "uplifted hand of oppression", "oppressed and humiliated India", "India persecuted and under subjection" and "Piteous wail of a suffering people" will have no place and would be wholly inapposite. These expressions assume the presence of an agency which has oppressed and humiliated her, has uplifted its hands for oppressing her further, and has been persecuting her by keeping her under subjection and being heedless of the piteous wails of her suffering people. The only agency for which it is possible to behave in that way is the Government established by law, and the expressions, having been used with reference to it, obviously tend to bring it into hatred or contempt and are calculated to excite disaffection towards it.⁶ The proper standpoint from which an offending article is to be viewed in determining its tendency is to judge how it would be understood by an average reader reading the article as a whole and dispassionately.⁷ Where the question was whether a poster was hit by cls. (d) and (f) of s. 4, sub-s. (1), as bringing into hatred or contempt, or as exciting disaffection towards His Majesty or the Government established by law in British India, or as inciting the commission of an offence, it was held that in dealing with such a poster containing a caricature or cartoon, the common sense interpretation of such a document, namely, the impression it gives to a man of ordinary common sense, must be taken. It was worse than useless to try to extract a meaning out of it by a laboured commentary. Where such a poster gives one the impression of being a mere call to labourers to unity and to struggle to end the exploitation of labour by capital, the poster is not hit by sub-s. (1) of this section even though in this process of exploitation the poor are represented as being crushed or oppressed.⁸

The Nagpur High Court has held that cl. (d) must be construed in the light of the explanations to it and with reference to its historical background because they are terms of art which had already acquired a definite legal meaning before they were incorporated into the Indian Act and Ordinance Cases which construe the expressions "excite disaffection", "to bring or attempt to bring Government into hatred and contempt", "directly or indirectly" in s. 124-A, Indian Penal Code, are relevant in construing similar expressions in s. 4 (1) and (d). The question of intention is material in construing the speech or writing which is said to offend against the provisions of s. 4 (1) (d).

The place, the circumstances and the occasion of publication have to be taken into consideration in finding whether a writing or speech offends against the provisions of s. 4 (1) (d).⁹

1. 'Government established by law in British India'.—No distinction in substance can be drawn between "Government established by law in British India" and the executive Government.¹⁰ This expression is to be interpreted not by reference to definitions of "Government of India" and "Local Government" in the General Clauses Act, but by reference to the definition of 'Government' in s. 17 of the Indian Penal Code as British Rule and its representatives as such.¹¹

The Cabinet of Ministers belonging to a particular party and administering the Government of

² "Anandabazar Patrika", (1932) 60 Cal. 408, S.B.; "Amrita Bazar Patrika", (1932) 37 C. W. N. 166, 56 C. L. J. 157, 33 Cr. L. J. 949, [1932] AIR (C) 738, S.B.

³ "Zamindar" Newspaper, Lahore, (1933) 35 P. L. R. 40, 35 Cr. L. J. 966, [1934] AIR (L) 219, S.B.

⁴ *Mohammad Usman Ghani v. Government of B. & O.*, (1934) 15 P. L. T. 286, S.B.

⁵ *Ram Saran Das Johri*, (1934) 35 Cr. L. J. 1000, [1935] AIR (A) 717.

⁶ *Dainik Nayak & Swadesh Press*, (1932) 34 Cr. L. J. 816, [1933] AIR (C) 278, F.B.

⁷ "The Indian Express", [1935] M. W.

N. 6, F.B.

⁸ *Kamal Sarkar*, [1938] 1 Cal. 455.

⁹ *Bhagwati Charan Shukla v. Provincial Government, Central Provinces and Berar*, [1946] Nag. 865, dissenting from *Pothan Joseph*, (1932) 56 Bom. 472, 34 Bom. L. 46 S.B.; *Gurbaksh Singh*, (1947) 48 Cr. L. J. 897, [1947] AIR (L) 361, S. B.

¹⁰ "Anandabazar Patrika", (1932) 60 Cal. 408, S.B.

¹¹ "Amrita Bazar Patrika", (1932) 37 C. W. N. 166, 56 C. L. J. 157, 33 Cr. L. J. 949, [1932] AIR (C) 738, S.B.

the Province must be held to be Government established by law in British India.¹²

The Union Jack is not the emblem of the Government established by law in British India.¹³

A handful of officers cannot be regarded as Government established by law in British India.¹⁴ Criticism of alleged high-handed actions of police not done at the instance of Government in a newspaper will not come under this clause.¹⁵

2. 'Class or section'.—These words mean a definitely ascertainable body of individuals not an indeterminate body or group having no clearly defined and non-variable characteristic or criteria by which they may be distinguished from any other body or group. Exploiters or capitalists as such do not constitute a class or section within the meaning of this clause.¹⁶ But Rajas and Jagirdars form a section of His Majesty's subjects.¹⁷

A political party like the Indian National Congress is not a class within the meaning of this clause or cl. (h) and the criticism of a political leader in however a bad taste does not bring the writer under cl. (h), unless the article, read as a whole, has the effect of producing or tending to produce one or more of the undesirable results specified in one or other of those two clauses.¹⁸ A political body like the Muslim League is not a "class" or "section" within the meaning of sub-s. (1), cl. (d) or (h) and therefore articles in a newspaper aimed at criticising the Muslim League do not come within the mischief of these clauses.¹⁹

Attacks on individual police officers do not bring into hatred or contempt either the Government established by law in British India or any class or section of His Majesty's subjects. However strong the criticism of police officers as distinct from the whole force may be it cannot come under this clause.²⁰

Clause (e).—The words "tend directly or indirectly" mean something more than "have as a possible result". The 'tendency' required may often be indirect, as the section itself contemplates, and not apparent on the face of the words themselves. For proof not only of the intention of the writer but of what is really material, the effect which the words are likely to produce, it may be necessary to look to evidence other than the words themselves, their context or the general nature of the newspaper. Therefore, when hearing an application made under s. 23 (1), it is open to the High Court to consider evidence other than the words themselves or their context immediate or general.²¹

The words of this clause appear to refer to private individuals and can be applied to protect private persons. They are wide enough to cover what is commonly known as blackmail, and the fact that the person put in fear or annoyance may have another remedy by way of civil or criminal action, by a suit for defamation or a prosecution for extortion, does not exclude the application of this section in appropriate cases.²²

Clause (h).—The words "different classes" refer to religious, racial, social, tribal and possibly economic or functional but not to political classes like the Mahasabha or the Indian National Congress. If the feelings of hatred are endangered or tend to be endangered by the publication in a religious racial or social class as such, the publication would be hit by the clause but not where such feelings are engendered or tend to engender not in any class as a whole but among the admirers or followers of a particular person to whatever religious or social class they might belong.²³ The people comprise a large body of men; they form a separable portion of the population of the country; they consist of a number of persons possessing common attributes and are grouped together under the name "police". They thus form a "section" as well as a "class" of his Majesty's subjects in British India.²⁴

The publication of factual news is not within the ambit of s. 4 (1) (d) (h) even though with bold headlines, if it is not shown these headlines in any way misrepresent or go beyond the actual news. A publication which when written may be perfectly innocuous, but may fall within the ambit of this clause, when re-published at a time when communal tension between two classes is at its highest and the publication tends to promote feelings of enmity and hatred between them.²⁵

Clause (i).—If a book contains passages which tend directly or indirectly to bring into hatred or contempt or to excite disaffection towards the administration established in an Indian State, it will come within the purview of this clause.¹

Explanation 1.—The biography of a living person containing a narrative of the revolutionary movement in existence about thirty-five years ago which has since passed into history can be a historical work as distinguished from a narrative of current events, though the person has taken a prominent part in such movement. No such historical work can be regarded as objectionable unless it has the present

¹² *Rajagopala Rao v. The Province of Madras*, (1948) 61 L. W. 306.

¹³ *Kamal Sarkar*, [1938] 1 Cal. 455.

¹⁴ *Jang-I-Azadi*, (1947) 49 P. L. R. 235. [1948] AIR (L) 6.

¹⁵ *Rajagopala Rao v. The Province of Madras*, (1948) 61 L. W. 306.

¹⁶ *Kamal Sarkar*, [1938] 1 Cal. 455.

¹⁷ *Jang-I-Azadi*, sup.

¹⁸ *M. Akhtar Ali Khan*, (1947) 49 P. L. R. 190, 48 Cr. L. J. 915, F. B., [1947] AIR (L) 340.

¹⁹ *In the matter of the Partap (Urdu) Daily*,

Lahore, [1947] Lah. 795, F. B.

²⁰ *Jang-I-Azadi*, sup.

²¹ "New Sind", [1942] Kar. 127, S. B.

²² *Ibid.*

²³ *Nawai Waqt Daily, Lahore*, [1947] Lah. 497.

²⁴ "Zamindar" Newspaper, *Lahore*, (1938) 35 P. L. R. 40, 35, Cr. L. J. 966, [1934] AIR (L) 219, S. B.

²⁵ *M. Akhtar Ali Khan*, (1947) 49 P. L. R. 190, 48 Cr. L. J. 915, [1947] AIR (L) 340, S. B.; *Nawai Waqt, Daily, Lahore*, [1947] Lah. 497.

¹ *Parkash Chand*, (1937) 18 Lah. 445, F. B.

tendency to incite people to do such violent act as may be punishable under the law of the land.² Where a convict is termed a hero and the author desires the drum of his fame to reverberate in the whole universe, such expressions of admiration are not excluded by this Explanation, as they have a tendency to incite to, or encourage the commission of, the offence of murder, for which penalty of death is ordinarily inflicted.³

Explanation 2.—Disapprobation.—Mere disapprobation, however, strongly and flagrantly expressed, does not imply that the intention was to excite disaffection.⁴

Explanation 4.—In a pamphlet addressed to the Kisans the writer described their grievances in picturesque and expressive language. He described their lot as deplorable in the extreme, and stated that they were frequently the victim of abuse and even of beating at the hands of zemindars and Government officials. He suggested proposals for the amelioration of their condition, and urged them to unite so that those proposals might be lawfully carried out. It was held that taking the pamphlet as a whole it was extremely moderate in tone, and it contained nothing more than words pointing out without malicious intention and with an honest view to their removal, matters which were producing and had a tendency to produce feelings of enmity or hatred between Kisans and zemindars, and, therefore, by reason of this Explanation, the words were not to be deemed to be words which tended directly or indirectly to promote such feelings.⁵

5. (1) Where the security given in respect of any press, or any portion thereof, has been declared forfeited under section 4 or section 6, every person making a fresh declaration in respect of such press under section 4 of the Press and Registration of Books Act, 1867, shall deposit with the Magistrate before whom such declaration is made security to such an amount, not being less than one thousand or more than ten thousand rupees, as the Magistrate may think fit to require, in money or the equivalent thereof in securities of the Central Government as the person making the deposit may choose.

(2) Where a portion only of the security given in respect of such press has been declared forfeited under section 4 or section 6, any unforfeited balance still in deposit shall be taken as part of the amount of security required under sub-section (1).

6. (1) If, after security has been deposited under section 5, the printing press is again used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which, in the opinion of the Provincial Government, are of the nature described in section 4, sub-section (1), the Provincial Government may, by notice in writing to the keeper of such printing press, stating or describing such words, signs or visible representations, declare—

(a) the further security so deposited, or any portion thereof, and
(b) all copies of such newspaper, book or other document wherever found in British India to be forfeited to His Majesty.

(2) After the expiry of ten days from the issue of a notice under sub-section (1), the declaration made in respect of such press under section 4 of the Press and Registration of Books Act, 1867, shall be deemed to be annulled.

7. (1) Any publisher of a newspaper who is required to make a declaration under section 5 of the Press and Registration of Books Act, 1867, may be required by the Magistrate before whom the declaration is made, for reasons to be recorded in writing, to deposit with the Magistrate within ten days from the day on which the declaration is made, security to such an amount, not being more than one thousand rupees, as the Magistrate may in each case think fit to require, in money or the equivalent thereof in securities of the Central Government as the person making the deposit may choose :

Provided that if a deposit has been required under sub-section (3) from any previous publisher of the newspaper, the security which may be required under this sub-section may amount to three thousand rupees.

² *Vishnu Gangadhar v. Government of Bombay*, (1944) 47 Bom. L. R. 57, 46 Cr. L. J. 643, [1945] AIR (B) 207, F.B.

³ *Bapuji Kunbi v. Local Government*, (1933) 29 N. L. R. 244, F.B.

⁴ "*Ananda Bazar Patrika*", (1934) 61 Cal. 827, S.B.

⁵ *Mohan Lal*, [1935] A. L. J. R. 321, 46 Cr. L. J. 1019, [1935] AIR (A) 369.

(2) Where security required under sub-section (1) has been deposited in respect of any newspaper, and for a period of three months from the date of the declaration mentioned in sub-section (1) no order is made by the Provincial Government under section 8 in respect of such newspaper, the security shall, on application by the publisher of the newspaper, be refunded.

(3) Whenever it appears to the Provincial Government that a newspaper published within its territories in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-section (2), contains any words, signs or visible representations of the nature described in section 4, sub-section (1), the Provincial Government may, by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations, require the publisher to deposit with the Magistrate within whose jurisdiction the newspaper is published, security to such an amount, not being less than five hundred or more than three thousand rupees, as the Provincial Government may think fit to require, in money or the equivalent thereof in securities of the Central Government as the person making the deposit may choose.

(4) Such notice shall appoint a date, not being sooner than the tenth day after the date of the issue of the notice, on or before which the deposit shall be made.

NOTE.

Where a proceeding which is questioned purports to be taken under sub-s. (1) of this section under s. 30 the jurisdiction of the High Court is expressly barred unless the application can be brought within s. 23.⁶

An order under sub-s. (3) of this section requiring a deposit of security need not state what particular classes of s. 4 (1) had been offended. When the passages complained of are set out in the form of an annexure to the order, the provisions of law are complied with.⁷

8. (1) If any newspaper in respect of which any security has been ordered to be deposited under section 7 contains any words, signs or visible representations which, in the opinion of the Provincial Government, are of the nature described in section 4, sub-section (1), the Provincial Government may, by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations,—

(a) where the security has been deposited, declare such security, or any portion thereof, to be forfeited to His Majesty, or

(b) where the security has not been deposited, annul the declaration made by the publisher of such newspaper under section 5 of the Press and Registration of Books Act, 1867, and may also declare all copies of such newspaper, wherever found in British India, to be forfeited to His Majesty.

(2) After the expiry of ten days from the date of the issue of a notice under sub-section (1) declaring a security, or any portion thereof, to be forfeited, the declaration made by the publisher of such newspaper under section 5 of the Press and Registration of Books Act, 1867, shall be deemed to be annulled.

9. (1) Where the security given in respect of any newspaper, or any portion thereof, is declared forfeited under section 8 or section 10, any person making a fresh declaration under section 5 of the Press and Registration of Books Act, 1867, as publisher of such newspaper, or any other newspaper which is the same in substance as the said newspaper, shall deposit with the Magistrate before whom the declaration is made security to such an amount, not being less than one thousand or more than ten thousand rupees, as the Magistrate may think fit to require, in money or the equivalent thereof in securities of the Central Government as the person making the deposit may choose.

(2) Where a portion only of the security given in respect of such newspaper has been declared forfeited under section 8 or section 10, any unforfeited balance still in deposit shall be taken as part of the amount of security required under sub-section (1).

⁶ *Vishnu Ghanshyam Deshpande*, [1914] N. L. J. 44, (1940) 42 Cr. L. J. 108, [1941] AIR (N) 97.

⁷ "*Amrita Bazar Patrika*", (1932) 37 C. W. N.

166, 56 C. L. J. 157, 35 Cr. L. J. 949, [1932] AIR (C) 738, S.B.; "*The Daily Siyasal*" case, (1937) 18 Lah. 438, F.B.

10. (1) If, after security has been deposited under section 9, the newspaper again contains any words, signs or visible representations which, in the opinion of the Provincial Government, are of the nature described in section 4, sub-section (1), the Provincial Government may, by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations, declare—

Power to declare further security and newspapers forfeited.

- (a) the further security so deposited, or any portion thereof, and
- (b) all copies of such newspaper wherever found in British India to be forfeited to His Majesty.

(2) After the expiry of ten days from the date of the issue of a notice under sub-section (1), the declaration made by the publisher of such newspaper under section 5 of the Press and Registration of Books Act, 1867, shall be deemed to be annulled and no further declaration in respect of such newspaper shall be made save with the permission of the Provincial Government.

11. (1) Whoever keeps in his possession a press which is used for the printing of books or papers without making a deposit under section 3 or section 5, as required by the Provincial Government or the Magistrate as the case may be, shall on conviction by a Magistrate be liable to the penalty to which he would be liable if he had failed to make the declaration prescribed by section 4 of the Press and Registration of Books Act, 1867.

Penalty for keeping press or publishing newspaper without making deposit.

(2) Whoever publishes any newspaper without making a deposit under section 7 or section 9, as required by the Provincial Government or the Magistrate as the case may be, or publishes such newspaper knowing that such security has not been deposited, shall on conviction by a Magistrate be liable to the penalty to which he would be liable if he had failed to make the declaration prescribed by section 5 of the Press and Registration of Books Act, 1867.

12. (1) Where a deposit is required from the keeper of a printing press under section 3, such press shall not be used for the printing or publishing of any newspaper, book or other document after the expiry of the time allowed to make the deposit until the deposit has been made, and where a deposit is required from the keeper of a printing press under section 5, such press shall not be so used until the deposit has been made.

Consequences of failure to deposit security as required.

(2) Where any printing press is used in contravention of sub-section (1), the Provincial Government may, by notice in writing to the keeper thereof, declare the press to be forfeited to His Majesty.

(3) Where a deposit is required from the publisher of a newspaper under section 7 and the deposit is not made within the time allowed, the declaration made by the publisher under section 5 of the Press and Registration of Books Act, 1867, shall be deemed to be annulled.

13. Where any person has deposited any security under this Act and ceases to keep the press in respect of which such security was deposited, or, being a publisher, makes a declaration under section 8 of the Press and Registration of Books Act, 1867, he may apply to the Magistrate within whose jurisdiction such press is situate for the return of the said security; and thereupon such security shall, upon proof to the satisfaction of the Magistrate and subject to the provisions hereinbefore contained, be returned to such person.

Return of deposited security in certain cases.

14. Where any printing press is, or any copies of any newspaper, book or other document are, declared forfeited to His Majesty under section 4, section 6, section 8, section 10 or section 12, the Provincial Government may direct a Magistrate to issue a warrant empowering any police-officer, not below the rank of Sub-Inspector, to seize and detain any property ordered to be forfeited and to enter upon and search for such property in any premises—

Issue of search-warrant.

- (i) where any such property may be or may be reasonably suspected to be,
- (ii) where any copy of such newspaper, book or other document is kept for

sale, distribution, publication or public exhibition or is reasonably suspected to be so kept.

Unauthorized news-sheets and newspapers.

15. (1) The Magistrate may, by order in writing and subject to such conditions as he may think fit to impose, authorise any person by name to publish a news-sheet, or to publish news-sheets from time to time.

Authorisation of persons to publish news-sheets.

(2) A copy of an order under sub-section (1) shall be furnished to the person thereby authorised.

(3) The Magistrate may at any time revoke an order made by him under sub-section (1).

Power to seize and destroy unauthorized news-sheets and newspapers.

16. (1) Any police-officer, or any other person empowered in this behalf by the Provincial Government, may seize any unauthorized news-sheet or unauthorized newspaper, wherever found.

(2) Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class may by warrant authorise any police-officer not below the rank of Sub-Inspector to enter upon and search any place where any stock of unauthorized news-sheets or unauthorized newspapers may be or may be reasonably suspected to be, and such police-officer may seize any documents found in such place which, in his opinion, are unauthorized news-sheets or unauthorized newspapers.

(3) All documents seized under sub-section (1) shall be produced as soon as may be before a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, and all documents seized under sub-section (2) shall be produced as soon as may be before the Court of the Magistrate who issued the warrant.

(4) If, in the opinion of such Magistrate or Court, any of such documents are unauthorized news-sheets or unauthorized newspapers, the Magistrate or Court may cause them to be destroyed. If, in the opinion of such Magistrate or Court, any of such documents are not unauthorized news-sheets or unauthorized newspapers, such Magistrate or Court shall dispose of them in the manner provided in sections 523, 524 and 525 of the Code of Criminal Procedure, 1898.

17. (1) Where a Presidency Magistrate, District Magistrate or Sub-divisional Magistrate has reason to believe that an unauthorized news-sheet or unauthorized newspaper is being produced from an undeclared press within the limits of his jurisdiction, he may by warrant authorise any police-officer not below the rank of Sub-Inspector to enter upon and search any place wherein such undeclared press may be or may be reasonably suspected to be, and if, in the opinion of such police-officer, any press found in such place is an undeclared press and is used to produce an unauthorized news-sheet or unauthorized newspaper, he may seize such press and any documents found in the place which in his opinion are unauthorized news-sheets or unauthorized newspapers.

Power to seize and forfeit undeclared presses producing unauthorized news-sheets and newspapers.

(2) The police-officer shall make a report of the search to the Court which issued the warrant and shall produce before such Court, as soon as may be, all property seized :

Provided that where any press which has been seized cannot be readily removed, the police-officer may produce before the Court only such parts thereof as he may think fit.

(3) If such Court, after such inquiry as it may deem requisite, is of opinion that a press seized under this section is an undeclared press which is used to produce an unauthorized news-sheet or unauthorized newspaper, it may, by order in writing, declare the press to be forfeited to His Majesty. If, after such inquiry, the Court is not of such opinion, it shall dispose of the press in the manner provided in sections 523, 524 and 525 of the Code of Criminal Procedure, 1898.

(4) The Court shall deal with documents produced before it under this section in the manner provided in sub-section (4) of section 16.

NOTE.

The seizure of an undeclared press producing unauthorised news-sheets without a proper warrant under sub-s. (1) of this section is irregular and illegal. The forfeiture of a press under sub-s. (3) of this section seized without a warrant under sub-s. (1) cannot be sustained.⁸

Penalty for disseminating unauthorised news-sheets and newspapers.

18. (1) Whoever makes, sells, distributes, publishes or publicly exhibits or keeps for sale, distribution or publication, any unauthorised news-sheet or newspaper, shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, any offence punishable under sub-section (1), and any abetment of any such offence, shall be cognizable.

NOTE.

What has to be decided is the effect on the minds of the persons who are supposed to have read the pamphlet distributed. The speech should be considered as a whole, and not by merely picking out objectionable sentences or words here and there, in order to find out the effect of it on the reader or the audience. The circumstances under which the speech is delivered or read, including time and place, should also be taken into consideration in determining the effect of it on the audience or the reader.⁹

1. 'Whoever makes, sells, etc.'—The maker means the creator or author and not the printer. Printing a news-sheet is not of itself an unlawful act. What is unlawful is to publish a news-sheet (as defined) without authority to so publish, and when this offence has been committed the author (or maker), the sellers, the distributors and the publishers are all equally liable to the penalty prescribed in this section, but not the printer. There is no legal obligation on a printer to ask an author whether he has obtained authority to publish a news-sheet. He is not bound to refuse a good customer on any such ground.¹⁰

The printer of a news-sheet is not its maker within the meaning of sub-s. (1) of this section.¹¹

Jurisdiction.—There is no restriction in this Act as to the Court by which offences punishable under this section are triable. Any Magistrate may try the offence.¹²

Punishment.—Persons who merely help in distributing unauthorised news-sheets in public meetings should not be punished as severely as those who actually help in the preparation of the news-sheet, when no connection between them from before is shown.¹³

Special provisions relating to the seizure of certain documents.

19. Where any newspaper, book or other document wherever made appears to the Provincial Government to contain any words, signs or visible representations of the nature described in section 4, sub-section (1), the Provincial Government may, by notification in the Official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper, and every copy of such book or other document to be forfeited to His Majesty, and thereupon any police-officer may seize the same wherever found in British India, and any Magistrate may by warrant authorise any police-officer not below the rank of Sub-Inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

Power to declare certain publications forfeited and to issue search-warrants for same.

NOTE.

All that this section requires the Provincial Government to do is to state the grounds of its opinion and this is sufficiently complied with by mentioning the particular clause of sub-s. (i) of s. 4, which in the opinion of the Provincial Government had been contravened. There is nothing in that section which lays any obligations on the Provincial Government to set out the words or passages in the book which, in its opinion, were of the nature described in s. 4.¹⁴

20. The Chief Customs-officer or other officer authorised by the Provincial Government in this behalf may detain any package brought, whether by land, sea or air, into British India which he suspects to contain any newspapers, books or other documents of the nature described in section 4, sub-section (1), and shall forthwith forward copies

Power to detain packages containing publications when imported into British India.

⁸ *Nrishingchandra Ghosh*, (1938) 60 Cal. 1108.

⁹ *Public Prosecutor v. Subbia Mudaliar*, [1937] M. W. N. 175.

¹⁰ *Kumaran*, [1937] M. W. N. 1067.

¹¹ *Ismail Karimbhai*, (1942) 44 Bom. L. R. 799.

¹² *Sagi Narayana Razu*, [1938] M. W. N. 911.

¹³ *Sham Sul Huda*, [1937] 2 Cal. 670, 674.

¹⁴ *Parkash Chand*, (1937) 18 Lah. 445, F.B.

of any newspapers, books or other documents found therein to such officer as the Provincial Government may appoint in this behalf to be disposed of in such manner as the Provincial Government may direct.

Prohibition of transmission by post of certain documents.

21. No unauthorised news-sheet or unauthorised newspaper shall be transmitted by post.

Power to detain articles being transmitted by post.

22. Any officer in charge of a post-office or authorised by the Post-master General in this behalf may detain any article other than a letter or parcel in course of transmission by post, which he suspects to contain—

(a) any newspaper, book or other document containing words, signs or visible representations of the nature described in section 4, sub-section (1), or

(b) any unauthorised news-sheet or unauthorised newspaper, and shall deliver all such articles to such officer as the Provincial Government may appoint in this behalf to be disposed of in such manner as the Provincial Government may direct.

Powers of High Court.

23. (1) The keeper of a printing press who has been ordered to deposit security under sub-section (3) of section 3, or the publisher of a newspaper who has been ordered to deposit security under sub-section (3) of section 7, or any person having an interest in any property in respect of which an order of forfeiture has been made under section 4, section 6, section 8, section 10 or section 19 may, within two months from the date of such order,¹ apply to the High Court for the local area in which such order was made, to set aside such order, and the High Court shall decide if the newspaper, book or other document in respect of which the order was made did or did not contain any words, signs or visible representations of the nature described in section 4, sub-section (1).

(2) The keeper of a printing press in respect of which an order of forfeiture has been made under sub-section (2) of section 12 on the ground that it has been used in contravention of sub-section (1) of that section may apply to such High Court to set aside the order on the ground that the press was not so used.

NOTE.

In an application under this section the powers of the High Court are of a limited character. The High Court in such proceedings is called upon only to determine whether the words in the publication did or did not tend directly or indirectly to bring into hatred or contempt the Government or any section of the people or to promote feelings of enmity between the subjects within the meaning of s. 4, sub-s. (1), of the Act. The intention of the printer is foreign to such inquiry. Further the words complained of need not necessarily have brought about violence, they might merely be a prelude to a public disorder.¹⁵

This section is not *ultra vires* merely because it contravenes s. 561A, Criminal Procedure Code, or s. 107 of the Government of India Act, 1909, as amended in 1915.¹⁶

In an application under this section by the publisher of a newspaper and the keeper of the printing press for setting aside the order of Government requiring them to deposit securities under the provisions of the Act for the publication of certain writings therein, the High Court is only to find out whether the words used in the said writing tended directly or indirectly to bring the Government into hatred or contempt or to excite disaffection towards it without going into the question of the intention of the writer. The onus of proof in proceedings under this section is on the person applying for relief to the High Court thereunder.¹⁷ In considering the application of a person to set aside an order of the Government forfeiting the security under this section, the Court will not take into account the motive or intention of such person, except in cases which fall within Explan. 4 of s. 4 of the Act. What has to be considered is the effect likely to be produced upon persons who may be expected to read the passages in question, and for that purpose not only ought the article to be read as a whole, but under s. 26 it is permissible for the Court to have regard to what is contained in other issues of the same publication with a view to ascertaining what would be the probable effect of the offending passages

¹⁵ *Abid Ali Khan v. The Government of the United Provinces*, (1944) 20 Luck. 285, F.B.

¹⁶ *Vishnu Ghanshyam Deshpande*, [1941] N. L. J. 44, (1940) 42 Cr. L. J. 108, [1941] AIR

(N) 97.

¹⁷ "*Anandabazar Patrika*", (1932) 60 Cal. 408, S.B.; *Abid Ali Khan v. The Government of the United Provinces*, sup.

upon those persons who normally would see the articles that are published in the newspaper. It makes no difference that the offending passage occurs in a letter published in the newspaper.¹⁸

1. 'Within two months from the date of such order.'—The word order must be read as being the order notified under s. 19 because there can be no forfeiture until the declaration has been notified. The period of limitation runs from the date of the notification of the order in the *Gazette* and not from the date on which the order was passed.¹⁹

24. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges, or, where the High Court consists of less than three Judges, of all the Judges.

Hearing by Special Bench.

25. (1) If it appears to the Special Bench on an application under sub-section (1) of section 23 that the words, signs or visible representations contained in the newspaper, book or other document in respect of which the order in question was made were not of the nature described in section 4, sub-section (1), the Special Bench shall set aside the order.

(2) If it appears to the Special Bench on an application under sub-section (2) of section 23 that the printing-press was not used in contravention of sub-section (1) of section 12, it shall set aside the order of forfeiture.

(3) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority (if any) of those Judges.

(4) Where there is no such majority which concurs in setting aside the order in question, the order shall stand.

26. On the hearing of an application under sub-section (1) of section 23 with reference to any newspaper, any copy of such newspaper published after the commencement of this Act may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the order was made.

Evidence to prove nature or tendency of newspapers.

NOTE.

This section applies where that article in question is to be read in its context with a previous or subsequent article just as different parts of one article or different passages in one book are to be read along with the impugned article in order to ascertain its meaning. It is an enabling section permitting the words to be considered in their general context.²⁰

27. Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed the practice of such Court in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

Procedure in High Court.

Supplemental.

28. Every notice under this Act shall be sent to a Magistrate, who shall cause it to be served in the manner provided for the service of summonses under the Code of Criminal Procedure, 1898 :

Service of notice.

Provided that if service in such manner cannot by the exercise of due diligence be effected, the serving officer shall, where the notice is directed to the keeper of a press, affix a copy thereof to some conspicuous part of the place where the press is situate, as described in the keeper's declaration under section 4 of the Press and Registration of Books Act, 1867, and where the notice is directed to the publisher of a newspaper, to some conspicuous part of the premises where the publication of such newspaper is conducted, as given in the publisher's declaration under section 5 of the said Act; and thereupon the notice shall be deemed to have been duly served.

29. Every warrant issued under this Act shall, so far as it relates to a search, be executed in the manner provided for the execution of search-warrants under the Code of Criminal Procedure, 1898.

Conduct of searches.

30. Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting

Jurisdiction barred.

¹⁸ *Sun Press, Ltd.*, (1984) 13 Ran. 98, S.B.
¹⁹ *Krishnamurthi*, [1942] Mad. 10, S.B.

²⁰ *Karanjia*, (1945) 48 Bom. L. R. 151, 47 Cr. L. J. 744, [1946] AIR (B) 322.

to be taken under this Act shall be called in question by any Court, except the High Court on application under section 23, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act.

NOTE.

This section is not *ultra vires* merely because it contravenes s. 561-A, Criminal Procedure Code, or s. 107 of the Government of India Act, 1909, as amended in 1915.²¹

The District Magistrate, when dealing with this Act, or other similar Acts, is not a Court but an executive officer carrying out the functions on behalf of the executive Government and as such is not subject to the appellate jurisdiction of the High Court. That being so, the High Court has no jurisdiction under s. 107 of the Government of India Act to interfere with the orders of the District Magistrate passed under this Act. The powers of the High Court to interfere with the orders passed under this Act are restricted by s. 23 and this section for the limited purpose of deciding whether the publication or article does or does not come within the purview of sub-s. (1) of s. 4.²²

Operation of other laws not barred. 31. Nothing herein contained shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act.

Declaration under Act XXV of 1867 to be made before certain Magistrates. 32. All declarations required to be made under section 4, section 5, section 8 and section 8A of the Press and Registration of Books Acts 1867, shall be made, in a Presidency-town before the Chief Presidency Magistrate, and elsewhere before the District Magistrate.

RULES FRAMED UNDER s. 27 OF THE INDIAN PRESS ACT.

BOMBAY RULES.

1. Every application to the High Court under section 23 of the Indian Press (Emergency Powers) Act, 1931, shall be made by the presentation of a petition which shall be signed by the applicant and verified at the foot by the affidavit of the applicant.

2. The petition shall be written in the English language on foolscap paper or other paper similar to it in size and quality, and divided into paragraphs, numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

3. The petition shall be headed "In the High Court of Judicature at Bombay, Appellate Jurisdiction," and shall be intitled "In the matter of the (Name or description) book, document, newspaper or printing press", as the case may be.

4. The petition shall state what the interest of the applicant is in the property in respect of which the order of forfeiture has been made and all documents and copies thereof in proof of such interest together with a copy of the order of forfeiture shall be annexed as exhibits to the petition.

5. The petition shall state the ground or grounds on which it is sought to set aside the order of forfeiture.

6. All vernacular documents annexed as exhibits to the petition and all vernacular documents relied on by the applicant and intended to be in evidence, shall be translated into English by an Official Translator or Translators so that no question may arise as to the accuracy of the translations or the admissibility in evidence of the documents and the translations annexed to them by reason of defects in such translations.

7. Printed or typed paper-books containing the petition and all exhibits annexed thereto with translations shall be prepared in the manner prescribed by the Rules for the preparation of paper-books in appeals to the High Court, and on admission, six copies of the paper-books shall be delivered to the Registrar by the applicant.

8. If the petition is admitted by the High Court, notice in writing of the day appointed for the hearing and determination of the application shall be given to the Public Prosecutor, Bombay, and a copy of the petition and exhibits with translations, if any, shall accompany such notice.

9. The costs of any application under section 23 shall be in the discretion of the Court hearing the application.

²¹ *Vishnu Ghanshyam Deshpande*, [1941] N. L. J. 44, (1940) 42 Cr. L. J. 108, [1941] AIR (N) 97.

²² *Murli Manohar Prasad*, (1984) 13 Pat. 547, F.B.

10. The Table of Fees now in force in this Court in its Original Civil Jurisdiction shall be applicable to applications under section 23 of the Indian Press (Emergency Powers) Act, 1931, and proceedings thereon, and costs payable in respect of such applications and proceedings, when costs have been awarded, shall be taxed on that scale unless otherwise ordered.

11. The provisions of the Code of Civil Procedure and the Rules and Forms of this Court relating to execution of decrees and orders, shall be applicable to the execution of orders passed by the High Court on applications under section 23 of the Indian Press (Emergency Powers) Act, 1931.

CALCUTTA RULES.

1. These rules shall apply to all applications made to, and all proceedings taken in, the High Court of Judicature at Fort William in Bengal under the Act.

2. Every application to the High Court under section 23 of the Act to set aside an order for security under sub-section (3) of section 3 or under sub-section (3) of section 7 or an order of forfeiture under section 4, 6, 8, 10 or 19 or under sub-section (2) of section 12 shall be made by the presentation of a petition which shall be signed by the applicant and verified at foot by the affidavit of the applicant.

3. The petition shall be written in the English language on foolscap paper or other paper similar to it in size and quality, bookwise, and divided into paragraphs numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

4. The petition shall be headed—

“In the High Court of Judicature at Fort William in Bengal, Original Jurisdiction.”

“In its Special Bench constituted under Act, XXIII of 1931” and shall be intitled “In the matter of the (name, if any) Printing Press or the (name or description) book, document or newspaper”, as the case may be.

5. In an application to set aside an order for security, the petition shall state whether the applicant is the keeper of the printing press or is the publisher of the newspaper, as the case may be, in respect of which the order for security has been made, and all documents or copies thereof in proof of such statement together with a copy of the order for security under sub-section (3) of section 3, or under sub-section (3) of section 7 of the Act, as the case may be, shall be annexed as exhibits to the petition.

6. In an application to set aside an order for forfeiture the petition shall state what the interest of the applicant is, in the property, in respect of which the order of forfeiture has been made, and all documents or copies thereof, in proof of such interest, together with a copy of the notice of forfeiture, under section 4, 6, 8, 10 or 19 or under sub-section (2) of section 12 of the Act, as the case may be, shall be annexed as exhibits to the petition.

7. The petition shall state the ground or grounds on which it is sought to set aside the order for security or of forfeiture.

8. All vernacular documents, annexed as exhibits to the petition, and all vernacular documents, relied on by the applicant and intended to be tendered in evidence, shall be translated into English, by a competent and duly qualified translator or translators, so that no question may arise, as to the accuracy of the translations, or the admissibility in evidence of the documents and the translations annexed to them, by reason of defects in such translations.

9. The petition, with exhibits annexed thereto, and their translations, if any, together with a copy of such petition and exhibits with translations, shall be presented to the Chief Justice, who will constitute a Special Bench, composed of three Judges, and appoint a day for the hearing and determination of the application.

10. Notice in writing of the day appointed for the hearing and determination of the application shall be given by the Registrar to the Chief Secretary to the Government of Bengal, and a copy of the petition and exhibits with translations, if any, in the last preceding rule mentioned shall accompany such notice.

11. Printed paper-books containing the petition and all exhibits annexed thereto with translations shall be prepared in the manner prescribed by the rules for the preparation of paper-books in appeals from the High Court, Original Jurisdiction, and shall be delivered to the Registrar by the applicant at least one week before the day fixed for the hearing and determination of the application.

12. There shall be ordinarily printed 30 copies of the paper-book, but the Registrar may, where necessary, direct a larger number to be printed.

13. The table of fees now in force in this Court in its Original Civil Jurisdiction shall be applicable to applications under the Act, and proceedings thereon and costs payable in respect of such applications and proceedings shall be taxed, where so directed, by the Taxing Officer.

14. The provisions of the Code and the Rules and Orders of this Court relating to execution of decrees and orders shall be applicable to the execution of orders passed by the High Court, on applications under the Act,

MADRAS RULES.

1. These rules may be cited as “The Rules of Procedure under the Indian Press (Emergency Powers) Act,” 1931. They shall come into operation on the 10th day of May 1932 and shall apply

to all applications made to, and all proceedings taken in, the High Court of Judicature at Madras under the Indian Press (Emergency Powers) Act, 1931, hereinafter referred to as "The Act."

2. Every application to the High Court under section 23 of the Act shall be made by the presentation to the Registrar of a petition signed and verified at the foot by the applicant according to the rules governing the verification of pleadings.

3. The petition shall be written, typewritten, or printed, fairly and legibly, on substantial white foolscap folio paper, with an outer margin about two inches wide and an inner margin about one inch wide and separate sheets shall be stitched together bookwise. The writing or printing shall be on both sides of the paper, and numbers shall be expressed in figures.

4. The petition shall be headed: "In the High Court of Judicature at Madras, Original Jurisdiction," "Its Special Bench constituted under Act XXIII of 1931" and shall be intitled "In the matter of the (name, if any) Printing Press or of the (name or description) book, document or newspaper", as the case may be.

5. The petition shall also set out the date and the nature of the order sought to be set aside and, where the application is to set aside an order of forfeiture under section 4, 6, 8, 10 or 19 of the Act, the interest of the applicant in the property in respect of which the order sought to be vacated has been passed.

6. The petition shall also set out the grounds on which the applicant seeks to set aside the order.

7. A certified copy of the order sought to be set aside and all documents, or copies thereof certified to be correct, on which the applicant relies in support of his application shall be filed along with the petition. If any of the documents or copies thereof are not in the English language, an application for their translation into English shall be filed along with the petition.

8. All documents filed by the applicant along with his petition not in the English language and intended to be relied on during the hearing of the petition shall be translated into English by the Interpreters or the Translators of the High Court or any other competent person whom the Chief Justice may appoint in that behalf.

9. On compliance with the requirements aforesaid and the preparation of the translations of documents, if any, that may be necessary, the petition shall be filed on the Original Side of the High Court and orders of the Chief Justice shall be obtained for constituting a Special Bench and for appointing a day for the hearing of the petition.

10. Notice of the date of the application and of the date of hearing thereof shall be given by the First Assistant Registrar on the Original Side of the High Court to the Chief Secretary to the Government of Madras to whom shall be forwarded also a copy of the petition and copies of the exhibits or their translations as the case may be.

11. The table of fees set out in Appendix II to the High Court Fees Rules, 1925, shall be levied by the Registrar upon the proceedings and documents filed under the Act and the proceedings thereon and the costs payable in respect of such applications and proceedings shall be taxed if the Court so directs, by the Taxing Officer of this Court on the Original Side under the rules for taxation of costs contained in the High Court Fees Rules, 1925.

12. The provisions of the Code of Civil Procedure and the Rules and Orders of this Court relating to the exercise of its Ordinary Original Civil Jurisdiction shall be applied so far as they are applicable to the execution of orders made on applications under the Act.

ALLAHABAD RULES.

1. The rules framed under section 99F of the Code of Criminal Procedure, Act V of 1898, shall, *mutatis mutandis*, be applicable to every application made and to every proceeding taken under sections 23 to 25 of the Indian Press (Emergency Powers) Act, 1931, No. XXIII of 1931.

PATNA RULES.

1. These rules shall apply to all applications made to, and all proceedings taken in, the High Court of Judicature at Patna under the Act.

2. Every application to the High Court under section 23 of the Act to set aside an order for security under sub-section (3) of section 8 or under sub-section (3) of section 7 or an order of forfeiture under section 4, 6, 8 10 or 19, or under sub-section (2) of section 12 shall be made by the presentation of a petition which shall be signed by the applicant and verified at foot by the affidavit of the applicant.

3. The petition shall be written in the English language on foolscap paper or other paper similar to it in size and quality, bookwise, and divided into paragraphs numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

4. The petition shall be headed—

"In the High Court of Judicature at Patna."

"In its Special Bench constituted under Act XXIII of 1931" and shall be intituled "In the matter of the (name, if any) printing press or the (name or description) book, document or newspaper," as the case may be.

5. In an application to set aside an order for security, the petition shall state whether the applicant is the keeper of the printing press or is the publisher of the newspaper, as the case may be, in respect of which the order for security has been made, and all documents or copies thereof in proof of such statement together with a copy of the order for security under sub-section (3) of section 3, or under sub-section (3) of section 7 of the Act, as the case may be, shall be annexed as exhibits to the petition.

6. In an application to set aside an order for forfeiture the petition shall state what the interest of the applicant is in the property in respect of which the order of forfeiture has been made, and all documents or copies thereof, in proof of such interest, together with a copy of the notice of forfeiture under section 4, 6, 8, 10 or 19 or under sub-section (2) of section 12 of the Act, as the case may be, shall be annexed as exhibits to the petition.

7. The petition shall state relevant facts only and conclude with the ground or grounds on which it is sought to set aside the order for security or of forfeiture.

8. All vernacular documents annexed as exhibits to the petition, and all vernacular documents, relied on by the applicant and intended to be tendered in evidence, shall be either translated into English by a competent and duly qualified translator or translators and verified by the affidavit of the translator, or shall be translated by the official translator of the Court at the cost of the applicant.

9. The petition with exhibits annexed thereto, and their translations, if any, together with a copy of such petition and exhibits with translations, shall be presented to the Chief Justice.

10. Notice in writing of the presentation of the petition together with a copy thereof and a copy of any exhibits annexed thereto shall be given by the Registrar to the Chief Secretary to the Government of Bihar and Orissa.

11. Within fourteen days of receipt of such notice the Chief Secretary may send to the Registrar a notice of his intention to oppose such petition and if he does so he shall send to the Registrar such affidavit as he may rely on in answer to the petition.

12. The Registrar on receipt of such notice and/or affidavit or affidavits shall notify the petitioner and on his application shall supply him with a copy of the same.

13. The petitioner shall not file any affidavit in reply without obtaining leave from the Chief Justice and such leave shall be granted if at all on such terms as to time as the Chief Justice may direct. Such application for leave shall be made *ex parte* by the petitioner within one week of receipt by him of the notice provided for in rule 12 above and shall be made in the chamber of the Chief Justice.

14. If the petitioner shall not within one week of the notice provided in rule 12 make application as provided by rule 13 the evidence shall be deemed to be closed and after deposit by the petitioner of the printing cost the Registrar shall cause the paper book to be prepared according to the rules in Chapter IX for the preparation of paper books in appeals from original decrees and not less than 20 copies thereof shall be printed.

15. When the evidence is closed the Registrar shall, so soon as may be, obtain the directions of the Chief Justice as to the appointment of a Bench of three Judges and the fixing of a day for hearing which shall be not less than one week from the day when the paper book is ready. Such directions shall be notified by the Registrar to the petitioner and to the Chief Secretary to the Government.

16. The table of fees now in force in this Court shall be applicable to applications under the Act, and proceedings thereon and costs payable in respect of such applications and proceedings shall be taxed, where so desired, by the Taxing Officer.

17. The provisions of the Code of Civil Procedure and the Rules and Orders of this Court relating to execution of decrees and orders shall be applicable to the execution of orders passed by the High Court, on application under the Act.

LAHORE RULES.

Rules to regulate the procedure in the case of applications to set aside orders for the deposit of security under Section 3 (3) or 7 (3) or of forfeiture under section 4, 6, 8, 10 or 19 of the Indian Press (Emergency Powers) Act, 1931 :—

(1) Every application to the High Court under section 23 of the Indian Press (Emergency Powers) Act, 1931, to set aside an order requiring the keeper of a printing press to deposit security under sub-section (3) of section 3, or requiring the publisher of a newspaper to deposit security under sub-section (3) of section 7, or to set aside an order of forfeiture under section 4, 6, 8, 10 or 19 of the Act, shall be made within two months from the date of such order, by the presentation of a petition which shall be signed by the petitioner and verified at the foot by the affidavit of the petitioner.

(2) The petition shall be written in the English language on a foolscap paper or other paper similar to it in size and quality, and divided into paragraphs, numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

(3) The petition shall be headed—

“In the High Court of Judicature at Lahore”, and shall be intitled, “In the matter of the— (name, if any) Printing Press or the (name or description) News-sheet or Newspaper, Book, or Document,” (as the case may be).

(4) The petition shall state what the interest of the petitioner is in the property in respect of which the order to deposit security or the order of forfeiture has been made, and all documents or copies thereof in proof of such interest together with a copy of the notice, under section 3, 4, 6, 8 or 10 or notification under section 19, as the case may be, of the Indian Press (Emergency Powers) Act, 1931, shall be annexed as exhibits to the petition.

(5) The petition shall state the ground or grounds on which it is sought to set aside the order to deposit security or the order of forfeiture.

(6) The petitioner shall, with his petition, attach a receipt for a deposit of Rs. 100 to cover the cost of translating the vernacular documents into English and of printing the record.

(7) All vernacular documents annexed as exhibits to the petition, and all vernacular documents relied on by the petitioner and intended to be tendered in evidence, shall be translated into English by an official translator or translators.

(8) The petition with exhibits annexed thereto and their translations, if any, together with a copy of such petition and exhibits with translations, shall be presented to the Assistant Registrar, who shall lay the same before the Chief Justice. The Chief Justice shall then constitute a Special Bench and appoint a day for the hearing and determination of the petition.

(9) The Assistant Registrar shall forthwith give notice of the filing of the petition to the Government Advocate and shall ask him to obtain from Government and to furnish to the Court, as soon as possible, a copy of the particular news-sheet, newspaper, book or other document containing the words, signs or visible representations on which the order to deposit security was passed or the declaration of forfeiture was based.

(10) Subject to the provisions of section 26 of the Indian Press (Emergency Powers) Act, evidence in support of or against the petition, shall be in the form of affidavits. The Government Advocate shall within ten days of the receipt of the notice mentioned in rule 9 file affidavits on behalf of the Crown and supply copies thereof to the other side. The petitioner shall, within ten days of the receipt of copies of the affidavits, file his affidavits and likewise supply the Government Advocate with copies.

(11) Notice in writing of the day appointed for hearing and determination of the petition shall be given by the Assistant Registrar to the Chief Secretary to the Government of the Punjab or to the Chief Commissioner of Delhi, as the case may be, and the copy of the petition and exhibits with translations, if any, mentioned in rule 8 shall accompany such notice.

(12) A printed paper book shall be prepared and completed under the order of the Assistant Registrar at least one week before the day fixed for hearing and determination of the petition.

(13) There shall be ordinarily printed 30 copies of the paper book but the Assistant Registrar may, when necessary, direct a larger number to be printed.

(14) In the absence of the special order the printed paper book shall ordinarily contain:—

(a) A copy of the order to deposit security or the declaration of forfeiture, in respect of which the petition is made;

(b) the petition and the affidavit of the petitioner;

(c) the exhibits annexed to the petition and their translation;

(d) the affidavits filed under rule 10 and reprint of such portion of the prescribed publications (translated into English, if in vernacular, in accordance with rule 7) as may be indicated by the parties within ten days of the receipt of the notice which will be issued by the Assistant Registrar to the petitioner or his counsel, if any, and the Government Advocate.

Note.—The cost of printing (a), (b) and (c) shall be met by the applicant out of the deposit made under rule 6, and cost of (d) shall be borne by the party concerned.

(15) If the deposit required under rule 6 proves insufficient to cover the cost of the printed paper book, the Assistant Registrar may, by a notice in writing, require that such further deposit, as seems to him necessary, shall be made within one week.

(16) If such further deposits be not made within the time specified in the notice, the petition shall be placed, without notice to the petitioner, before a Special Bench composed of three Judges which will either dismiss the petition or pass such other orders as may be suitable.

(17) The petitioner and his counsel and the Government Advocate shall be entitled to receive copies of the printed records on application to the Assistant Registrar one week before the date fixed for hearing.

(18) At the foot of every printed book shall be noted the amount of the printing and incidental charges and the person from whom levied, and such amount shall be included in the costs of the proceedings, unless the Court shall otherwise direct.

Should the amount so charged be less than the sum or sums deposited under rules 6 and 15, the Assistant Registrar shall refund the balance to the petitioner.

(19) The table of fees now in force in this Court shall be applicable to all petitions under section 23 of the Indian Press (Emergency Powers) Act, 1931, and proceedings thereon and costs payable in respect of such petitions and proceedings shall be taxed, when so directed, by the Taxing Officer of this Court.

(20) The provisions of the Code of Civil Procedure and Rules and Orders relating to the execution of decrees shall be applicable to the execution of orders passed by the High Court on petitions under section 23 of the Indian Press (Emergency Powers) Act, 1931.

BURMA RULES.

1. These rules may be cited as "The rules under the Indian Press (Emergency Powers) Act, 1931." They shall come into operation immediately, and shall apply to all applications made to, and all proceedings taken in, the High Court of Judicature at Rangoon under the Indian Press (Emergency Powers) Act, 1931, hereinafter referred to as "The Act."

2. Every application to the High Court under section 23 of the Act to set aside an order under section 3, 4, 6, 7, 8, 10, 12 or 19 shall be made by the presentation of a petition which shall be signed by the applicant and verified at the foot by the affidavit of the applicant.

3. The petition shall be written in the English language on one side only of foolscap paper or of other paper similar to it in size and quality, and shall be divided into paragraphs numbered consecutively. Dates and arithmetical calculations occurring in the petition shall be expressed in figures.

4. The petition shall be headed:—

"In the High Court of Judicature at Rangoon, Original Jurisdiction, before the Special Bench constituted under section 24 of the Indian Press (Emergency Powers) Act, 1931", and shall be intitled:—

"In the matter of the (name, if any) Printing Press or the (name or description of the book), document, news-sheet and newspaper, etc., as the case may be."

5. The petition shall state what the interest of the applicant is in the property in respect of which the order has been made; and all documents or copies thereof, in proof of such interest, together with a copy of the order under section 3, 4, 6, 7, 8, 10, 12 or 19 of the Act as the case may be, shall be annexed as exhibits to the petition unless an express order to the contrary is obtained from the Court.

6. The petition shall state the ground or grounds on which it is sought to set aside the order.

7. All vernacular documents annexed as exhibits to the petition, and all vernacular documents relied on by the applicant and intended to be tendered in evidence, shall be translated into English in accordance with the Translation Rules of the High Court.

8. The petition, with exhibits annexed thereto and their translations, if any, together with one spare copy each of the petition and of the exhibits and of their translations, shall be presented to the Registrar, who will obtain the orders of the Chief Justice to constitute a Special Bench and appoint a day for the hearing and determination of the application.

9. Notice in writing of the day appointed for the hearing and determination of the application shall be given to the Chief Secretary to the Government of Burma, and one copy each of the petition and of the exhibits with translations, if any, as mentioned in the last preceding rule, shall accompany such notice.

10. The scale of fees now in force in this Court in its Original Civil Jurisdiction shall be applicable to applications under the Act and proceedings thereon, and costs payable in respect of such applications and proceedings shall be taxed, when so directed, by the Registrar, Original Side, in accordance with the rules for costs in applications made on the Original Side.

11. The provisions of the Code of Civil Procedure and of the Rules and Orders of this Court relating to the exercise of its Ordinary Original Jurisdiction, including execution of decrees and orders, shall be applicable to the procedure in regard to applications under the Act as well as to the execution of orders made on such applications.

ODDH RULES.

Rules of procedure under section 27 of the Indian Press (Emergency Powers) Act, 1931 (XXIII of 1931).

The rules framed under section 99F of the Code of Criminal Procedure (Act V of 1898) and printed in appendix X to the Rules of the Chief Court of Oudh shall, *mutatis mutandis*, be applicable to every application made, and to every proceeding taken, under sections 23 to 25 of the Indian Press (Emergency Powers) Act, 1931 (XXIII of 1931).

Rules under section 99F of the Code of Criminal Procedure (Act V of 1898).

The following rules are framed by the Court under section 99F of the Code of Criminal Procedure (Act V of 1898) :—

1. These rules may be cited as "The Oudh Rules under section 99F of the Code of Criminal Procedure (Act V of 1898)". They shall come into operation on the date of publication thereof, and shall apply to all applications made to, and all proceedings taken in, the Chief Court of Oudh at Lucknow under sections 99A to 99G of the Code of Criminal Procedure (Act V of 1898), hereinafter referred to as "the Code."

2. Every application to the Chief Court, under section 99B of the Code, to set aside an order of forfeiture under sub-section (1) of section 99A, shall be made by the presentation of a petition which shall be signed by the applicant and verified at foot by the affidavit of the applicant, in accordance with the rules prescribed for affidavits in Chapter XI of the Rules of the Chief Court of Oudh.

3. The petition shall be written in the English language on foolscap paper or other paper similar to it in size and quality, bookwise, and divided into paragraphs numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

4. The petition shall be headed:—

"In the Chief Court of Oudh at Lucknow."

"In its Special Bench constituted under section 99C of the Code of Criminal Procedure (Act V of 1898)" and shall be entitled "In the matter of the (name, if any) Printing Press or the (name or description) book, document or newspaper," as the case may be.

5. The petition shall state what the interest of the applicant is in the property in respect of which the order of forfeiture has been made and all documents or copies thereof in proof of such interest, together with a copy of the notice of forfeiture under sub-section (1) of section 99A of the Code, shall be annexed as exhibits to the petition.

6. The petition shall state the ground or grounds on which it is sought to set aside the order of forfeiture.

7. All vernacular documents annexed as exhibits to the petition and all vernacular documents relied on by the applicant and intended to be tendered in evidence shall be translated into English by a competent and duly qualified translator or translators, so that no question may arise as to the accuracy of the translations or the admissibility in evidence of the documents and the translations annexed to them by reason of defects in such translations.

8. The petition with exhibits annexed thereto and their translations, if any, together with a copy of such petition and exhibits with translations, shall be presented to the Judge taking applications. Such Judge will direct that the petition be laid before the Chief Judge who will constitute a Special Bench. Thereafter a day for the hearing and determination of the application shall be appointed.

9. Notice, in writing, of the day appointed for the hearing and determination of the application shall be given by the Registrar to the Chief Secretary to the Government of the United Provinces, and the copies of the petition and exhibits with translations, if any, in the last preceding rule mentioned shall accompany such notice.

10. Printed paper-books containing the petition and all exhibits annexed thereto with translations shall, in the manner prescribed by the rules for the preparation of paper-books in First Appeals in this Court, be prepared and completed under the orders of the Registrar at least one week before the day fixed for the hearing and determination of the application.

11. There shall be ordinarily printed 30 copies of the paper-book, but the Registrar may, when necessary, direct a larger number to be printed.

12. The table of fees now in force in this Court in its original civil jurisdiction shall be applicable to applications under section 99B of the Code and proceedings thereon, and costs payable in respect of such applications and proceedings shall be taxed when so directed by the Court.

13. Every summons and warrant of arrest issued by the Court shall be in writing, in duplicate, signed and sealed by the Registrar of the Court and shall ordinarily be sent to the Magistrate within the local limits of whose jurisdiction the summons is to be served or the warrant executed.

13A. When an application is for the review of a decree or order of a Judge of the Chief Court who has died before the presentation of the application, or has left the Court and is unlikely to return within three months, it shall be presented to the Chief Judge, who shall appoint a Bench to deal with the application.

14. The provisions of the Code of Civil Procedure and the rules and orders of this Court relating to execution of decrees and orders shall be applicable to the execution of orders passed by the Chief Court on applications under section 99B of the Code of Criminal Procedure.

NAGPUR RULES.

1. Every application under section 23 for setting aside an order of deposit of security under sub-section (3) of section 3 or under sub-section (3) of section 7, or an order of forfeiture under section 4, 6, 8, 10, or 19 or sub-section (2) of section 12 shall be made by the presentation of a petition which shall be signed by the applicant and verified by the affidavit of the applicant.

2. The petition shall be written in the English language and shall be divided into paragraphs numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

3. The petition shall be headed—

“In the Court of the Judicial Commissioner, Central Provinces”
and shall be entitled :—

“In the matter of the (name, if any) Printing Press, or the (name or description) newspaper, book or document”, as the case may be.

4. The petition shall state the ground or grounds on which it is sought to set aside the order.

5. When the petition is for setting aside an order of forfeiture under section 4, 6, 8, 10 or 19 it shall state what the interest of the applicant is in the property in respect of which the order of forfeiture has been made, and all documents or copies thereof in proof of such interest, together with a copy of the notice of forfeiture, shall be annexed as exhibits to the petition.

6. When the petition is for setting aside an order of deposit of security under sub-section (3) of section 3 or under sub-section (3) of section 7, or for setting aside an order of forfeiture under sub-section (2) of section 12, a copy of the notice ordering the deposit shall be annexed as exhibit to the petition.

7. All vernacular documents annexed as exhibits to the petition and all vernacular documents relied on by the applicant and intended to be tendered in evidence shall be translated into English by a translator or translators of the Court.

8. The petition with exhibits annexed thereto, together with a copy of such petition and exhibits, shall be presented to the Judicial Commissioner who will constitute a Special Bench and appoint a day for the hearing and determination of the application.

9. Notice in writing of the day appointed for the hearing and determination of the application shall be given to the Chief Secretary to the Government of the Central Provinces, and copies of the petition and exhibits mentioned in rule 7 shall accompany such notice.

10. The Special Bench may award such costs as appear to it reasonable and proper in the circumstances of each case.

11. The provisions of the Code of Civil Procedure and the rules and orders of this Court relating to execution of decrees and orders shall be applicable to the execution of orders passed by the Special Bench.

BENAR RULES.

1. Every application under section 23 for setting aside an order of deposit of security under sub-section (3) of section 3 or under sub-section (3) of section 7, or an order of forfeiture under section 4, 6, 8, 10 or 19 or sub-section (2) of section 12 shall be made by the presentation of a petition which shall be signed by the applicant and verified by the affidavit of the applicant.

2. The petition shall be written in the English language and shall be divided into paragraphs numbered consecutively. Dates and sums occurring in the petition shall be expressed in figures.

3. The petition shall be headed :—

“In the Court of the Judicial Commissioner, Central Provinces”
and shall be entitled :—

“In the matter of the (name, if any) Printing Press, or the (name or description) newspaper, book or document,” as the case may be.

4. The petition shall state the ground or grounds on which it is sought to set aside the order.

5. When the petition is for setting aside an order of forfeiture under section 4, 6, 8, 10 or 19, it shall state what the interest of the applicant is in the property in respect of which the order of forfeiture has been made, and all documents or copies thereof in proof of such interest, together with a copy of the notice of forfeiture, shall be annexed as exhibits to the petition.

6. When the petition is for setting aside an order of deposit of security under sub-section (3) of section 3 or under sub-section (3) of section 7, or for setting aside an order of forfeiture under sub-section (2) of section 12, a copy of the notice ordering the deposit shall be annexed as an exhibit to the petition.

7. All vernacular documents annexed as exhibits to the petition and all vernacular documents relied on by the applicant and intended to be tendered in evidence shall be translated into English by a translator or translators of the Court.

8. The petition with exhibits annexed thereto, together with a copy of such petition and exhibits, shall be presented to the Judicial Commissioner who will constitute a Special Bench and appoint a day for the hearing and determination of the application.

9. Notice in writing of the day appointed for the hearing and determination of the application shall be given to the Chief Secretary to the Government of the Central Provinces, and copies of the petition and exhibits mentioned in rule 7 shall accompany such notice.

10. The Special Bench may award such costs as appear to it reasonable and proper in the circumstances of each case.

11. The provisions of the Code of Civil Procedure and the rules and orders of this Court relating to execution of decrees and orders shall be applicable to the execution of orders passed by the Special Bench.

THE INDIAN STATES (PROTECTION) ACT.

ACT NO. XI OF 1934.

AN Act to protect the Administrations of States in India which are under the suzerainty of His Majesty from activities which tend to subvert, or to excite disaffection towards, or to obstruct such Administrations.

WHEREAS it is expedient to protect the Administrations of States in India which are under the suzerainty of His Majesty from activities which tend to subvert, or to excite disaffection towards, or to obstruct such Administrations; It is hereby enacted as follows :—

Short title, extent
and commencement.

1. (1) This Act may be called the Indian States (Protection) Act, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) This section and sections 2 and 3 shall come into force at once; the remaining sections of this Act shall come into force in any district or area only when and for such time as the Provincial Government, by notification in the Official Gazette, directs.

Conspiracy to
overawe Administra-
tion of a State in India.

2. Whoever, within or without British India, conspires to overawe, by means of criminal force or the show of criminal force, the Administration of any State in India, shall be punished with imprisonment which may extend to seven years, to which fine may be added.

Application of Act
XXIII of 1931.

3. The Indian Press (Emergency Powers) Act, 1931, as amended by the Criminal Law Amendment Act, 1932, shall be interpreted—

(a) as if in sub-section (1) of section 4 of the Act, after clause (i) the following word and clause were inserted, namely :—

“or

(j) to bring into hatred or contempt or to excite disaffection towards the Administration established in any State in India”;

(b) as if in Explanation 2 and Explanation 3 to the said sub-section, after the word “Government” the words “or Administration” and after the letter and brackets “(d)” the words, letter and brackets “or clause (j)” were inserted; and

(c) as if after Explanation 4 to the said sub-section the following Explanation were inserted, namely :—

“Explanation 5.—Statements of fact made without malicious intention and without attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in clause (j) of this sub-section”.

4. (1) When a District Magistrate or in a Presidency-town the Chief Presidency Magistrate is of opinion that within his jurisdiction attempts are being made to promote assemblies of persons for the purpose of proceeding from British India into the territory of a State in India and that the entry of such persons into the said territory or their presence therein is likely or will tend to cause obstruction to the Administration of the said State or danger to human life or safety or a disturbance of the public tranquillity or a riot or an affray within the said territory, he may, by order in writing stating the material facts of the case, prohibit within the area specified in the order the assembly of five or more persons in furtherance of the said purpose.

(2) When an order under sub-section (1) has been made, and for so long as it remains in force, any assembly of five or more persons held in contravention of the order shall be an unlawful assembly within the meaning of section 141 of the Indian Penal Code, and the provisions of Chapter VIII of the Indian Penal Code and of Chapter IX of the Code of Criminal Procedure, 1898, shall apply accordingly.

(3) An order under sub-section (1) shall be notified by proclamation, published in the specified area in such places and in such manner as the Magistrate may think fit, and a copy of such order shall be forwarded to the Provincial Government.

(4) No order under sub-section (1) shall remain in force for more than two months from the making thereof, unless the Provincial Government, by notification in the Official Gazette, otherwise directs.

5. (1) Where, in the opinion of a District Magistrate or in a Presidency-town the Chief Presidency Magistrate, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by written order stating the material facts of the case and served in the manner provided by section 134 of the Code of Criminal Procedure, 1898, direct any person to abstain from a certain act if such Magistrate considers that such direction is likely to prevent or tends to prevent obstruction to the Administration of a State in India or danger to human life or safety or a disturbance of the public tranquillity or a riot or an affray within the said State.

(2) An order under sub-section (1) may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

(3) An order under sub-section (1) may be directed to a particular individual, or to the public generally.

(4) A District Magistrate or Presidency Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under sub-section (1) by himself or by his predecessor in office.

(5) Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

(6) No order under sub-section (1) shall remain in force for more than two months from the making thereof unless the Provincial Government, by notification in the Official Gazette, otherwise directs.

6. (1) Whoever wilfully disobeys or neglects to comply with any direction contained in an order made under sub-section (1) of section 5, or in such order as altered under sub-section (4) of that section, shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(2) An offence under this section shall be an offence for which a police-officer may arrest without warrant.

7. No Court shall take cognizance of any offence punishable under section 2 unless upon complaint made by order of, or under authority from the Central Government, if the offence is committed outside British India, and the Provincial Government in other cases.

THE INDIAN STATES (PROTECTION AGAINST DISAFFECTION) ACT, 1922.

An Act to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Governments or Administrations established in such States.

WHEREAS it is expedient to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Governments or Administrations established in such States; It is hereby, enacted as follows:—

Short title and extent. 1. (1) This Act may be called the Indian States (Protection against Disaffection) Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “book” and “newspaper” have the meanings respectively assigned to them by the Press and Registration of Books Act, 1867;

(b) “disaffection” includes disloyalty and all feelings of enmity; and

(c) “document” includes any painting, drawing, photograph, or other visible representation.

Penalty. 3. (1) Whoever edits, prints or publishes, or is the author of, any book, newspaper or other document which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards, any Prince or Chief of a State in India or the Government or Administration established in any such State, shall be punishable with imprisonment which may extend to five years, or with fine, or with both.

(2) No person shall be deemed to commit an offence under this section in respect of any book, newspaper or other document which, without exciting or being intended to excite hatred, contempt or disaffection, contains comments expressing disapprobation of the measures of any such Prince, Chief, Government or Administration as aforesaid with a view to obtain their alteration by lawful means, or disapprobation of the administrative or other action of any such Prince, Chief, Government or Administration.

NOTE.

Under sub-s. (1) of this section any one or more of the four persons, viz., author, editor, printer and publisher of libellous matter are liable.¹

A person who is accused under this section is entitled to adduce evidence to prove that the allegations made by him are true inasmuch as he has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty which may be imposed on him in the event of his conviction and for making good such a plea it may be necessary for him to show that the allegations are true.²

Power to forfeit certain publications or to detain them in course of transmission through post. 4. The provisions of sections 99A to 99G of the Code of Criminal Procedure, 1898, and of sections 27B to 27D of the Indian Post Office Act, 1898, shall apply in the case of any book, newspaper or other document containing matter in respect of which any person is punishable under section 3 in like manner as they apply in the case of a book, newspaper or document containing seditious matter within the meaning of those sections.

Courts by which and conditions subject to which offence may be tried. 5. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall proceed to the trial of any offence under section 3, and no Court shall proceed to the trial of any such offence except on complaint made by, or under authority from, the Provincial Government.

NOTE.

Where a sanction authorises the complainant to make complaint of an offence under s. 3 and very clearly restricts the prosecution to one of four offences under the section specifically, there is room for the contention that prosecution was sanctioned in regard to all. Where a person is tried in respect of three distinct offences of his being editor, the printer, and the author of the offending article and the sanction is in respect of one offence, the trial is illegal for want of sanction and the whole proceeding is vitiated.³

¹ *Diwan Singh*, (1934) 36 Cr. L. J. 744, [1935] AIR (A) 90.

² *Santa Singh*, (1927) 29 Cr. L. J. 117, [1927]

AIR (L) 710.

³ *Diwan Singh*, (1934) 36 Cr. L. J. 744, [1935] AIR (A) 90.

THE PENAL SERVITUDE ACT.

(ACT NO. XXIV OF 1855).

An Act to substitute penal servitude for the punishment of Transportation in respect of European and American Convicts.

Preamble. WHEREAS, by reason of the difficulty of providing a place to which Europeans or Americans can, with safety to their health, be sent for the purpose of undergoing sentences of transportation or of imprisonment for long terms it has become expedient to substitute other punishments for that of transportation; It is enacted as follows:—

No European or American to be sentenced to transportation.

1. No European or American shall be liable to be sentenced, ordered, by any Court within British India, to be transported.

Terms of penal servitude instead of the present terms of transportation.

2. Any person who, but for the passing of this Act, would, by any law now in force, or which may hereafter be in force, in any part of British India, be liable to be sentenced or ordered, by any such Court, to be transported, shall, if a European or American, be liable to be sentenced or ordered to be kept in penal servitude for such term as hereinafter mentioned.

The terms of penal servitude to be awarded by any sentence or order instead of the term of transportation to which any such offender would, but for the passing of this Act, be liable, shall be as follows: (that is to say)—

Instead of transportation for seven years, or for a term not exceeding seven years, penal servitude for the term of four years.

Instead of any term of transportation exceeding seven years and not exceeding ten years, penal servitude for any term not less than four and not exceeding six years.

Instead of any term of transportation exceeding ten years and not exceeding fifteen years, penal servitude for any term not less than six and not exceeding eight years.

Instead of any term of transportation exceeding fifteen years, penal servitude for any term not less than six and not exceeding ten years.

Instead of transportation for the term of life, penal servitude for the term of life.

And in every case where, at the discretion of the Court, one of any two or more of the terms of transportation hereinbefore mentioned might have been awarded, the Court shall have the like discretion to award one of the two or more terms of penal servitude hereinbefore mentioned, in relation to such terms of transportation.

Discretion of Courts as to alternative punishments. 3. Provided always that nothing herein contained shall interfere with or affect the authority or discretion of any Court in respect of any punishment which such Court may now award or pass on any offender other than transportation; but, where such other punishment may be awarded at the discretion of the Court instead of transportation or in addition thereto, the same may be awarded instead of, or (as the case may be) in addition to, the punishment substituted for transportation by this Act.

Effect of pardon granted upon condition of penal servitude. 4. If any offender sentenced by any Court within British India to the punishment of death shall have mercy extended to him, upon condition of his being kept in penal servitude for life, or for any term of years, all the provisions of this Act shall be applicable to such offender in the same manner as if he had been lawfully sentenced under this Act to the term of penal servitude specified in the condition.

5. [Power to substitute penal servitude for transportation.] Repealed by the Prisoners Act, 1871 (V of 1871).

6. [Mode of dealing with person under sentence of penal servitude.] Repealed by the Prisoners Act, 1871 (V of 1871).

7. [Application of enactments respecting transportation and imprisonment with hard labour.] Repealed by the Prisoners Act, 1871 (V of 1871).

8. [Removal of convicts under sentence of imprisonment from one prison to another.] Repealed by the *Presidency Jails Act, 1867 (XII of 1867)*, and the *Repealing and Amending Act, 1914 (X of 1914)*.

9, 10, 11 and 12. [Licenses to convicts under sentence of penal servitude to be at large.] Repealed by the *Prisoners Act, 1871 (V of 1871)*.

13. Nothing in this Act is intended to alter or affect the provisions of the 12 & 13 Victoria, Chapter 43, or any Act of Parliament passed in the United Kingdom of Great Britain and Ireland since the 28th of August, 1888, or which may hereafter be passed.

Act not to affect the provisions of certain English statutes.

14. Any sentence or order upon any person describing him as a European or American shall be deemed, for the purposes of this Act, to be conclusive of the fact that such person is a European or American within the meaning of this Act.

Sentence when proof that a person is European or American.

15. The word "European", as used in this Act, shall be understood to include any person usually designated a European British subject.

Interpretation clause.

16. [Commencement of Act.] Repealed by the *Repealing Act, 1870 (XIV of 1870)*.

THE POLICE (INCITEMENT TO DISAFFECTION) ACT.

(ACT NO. XXII OF 1922).

AN Act to provide a penalty for spreading disaffection among the police and for kindred offences.

WHEREAS it is expedient to penalize the spreading of disaffection among the police and other kindred offences; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Police (Incitement to Disaffection) Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force in any province or part of a province on such date as the Provincial Government may, by notification in the Official Gazette, direct.*

2. In this Act, the expression "member of a police-force" means any person appointed or enrolled for the performance of police duties under any enactment specified in the Schedule.

Definition.

3. Whoever intentionally causes or attempts to cause, or does any act which he knows is likely to cause, disaffection towards His Majesty or the Government established by law in British India or British Burma amongst the members of a police-force, or induces or attempts to induce, or does any act which he knows is likely to induce, any member of a police-force to withhold his services or to commit a breach of discipline shall be punished with imprisonment which may extend to six months, or with fine which may extend to two hundred rupees, or with both.

Penalty for causing disaffection, etc.

Explanation.—Expressions of disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, or of disapprobation of the administrative or other action of the Government, do not constitute an offence under this section unless they cause or are made for the purpose of causing or are likely to cause disaffection.

NOTE.

When the whole of a speech is not taken down by the reporter but only portions, and there is nothing to show that such portions as are taken down were taken down incorrectly or that the excerpts of the speech are not a fair representation of the general drift of the speech, a conviction under this section could be based on the speech taken down in parts. It is not necessary that the speech should be addressed directly to the members of the police.¹

* See *Bombay Government Gazette*, 1930, Part I, 1930, p. 1394, dated June 5, 1930.

¹ *Gopalan Nambiar*, [1947] M. W. N. 765.

Saving of acts done by police associations and other persons for certain purposes.

4. Nothing shall be deemed to be an offence under this Act which is done in good faith—

(a) for the purpose of promoting the welfare or interests of any member of a police-force by inducing him to withhold his services in any manner authorised by law; or

(b) by or on behalf of any association formed for the purpose of furthering the interests of members of a police-force as such, where the association has been authorized or recognized by the Government and the act done is done under any rules or articles of the association which have been approved by the Government.

5. No Court shall proceed to the trial of any offence under this Act except with the previous sanction, or on the complaint, of the District Magistrate or, in the case of a Presidency-town of the Commissioner of Police.

Sanction to trial of offences by subordinate Courts.

6. (1) No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under this Act.

Trial of cases.

(2) Notwithstanding anything contained in Chapter XXII of the Code of Criminal Procedure, 1898, no offence under this Act shall be triable summarily.

THE SCHEDULE. (See Section 2)

Year	No.	Short title.
		<i>Acts of the Governor-General in Council.</i>
1859	XXIV	The Madras District Police Act, 1859.
1861	V	The Police Act, 1861.
1887	XV	The Burma Military Police Act, 1887.
1888	III	The Police Act, 1888.
1892	V	The Bengal Military Police Act, 1892.
		<i>Madras Act.</i>
1888	III	The Madras City Police Act, 1888.
		<i>Bombay Acts.</i>
1890	IV	The Bombay District Police Act, 1890.
1902	IV	The City of Bombay Police Act, 1902.
		<i>Bengal Acts.</i>
1866	II	The Calcutta Suburban Police Act, 1866.
"	IV	The Calcutta Police Act, 1866.
1890	III	The Calcutta Port Act, 1890.
1920	II	The Eastern Frontier Rifles (Bengal Battalion) Act, 1920.
		<i>Burma Act.</i>
1899	IV	The Rangoon Police Act, 1899.
		<i>Assam Act.</i>
1920	I	The Assam Rifles Act, 1920.
		<i>Regulation by the Governor-General in Council.</i>
1888	II	The Andaman and Nicobar Islands Military Police Regulation, 1888.

THE PREVENTION OF CORRUPTION ACT.

(Act No. 11 of 1947).

WHEREAS it is expedient to make more effective provision for the prevention of bribery and corruption;

It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called the Prevention of Corruption Act, 1947.

(2) It extends to the whole of British India and it applies also to all British subjects and servants of the Crown in any part of India and to British subjects who are domiciled in any part of India wherever they may be.

(3) Section 5 shall remain in force for a period of three years from the commencement of this Act.

2. For the purposes of this Act "public servant" means a public servant as defined in section 21 of the Indian Penal Code (XLV of 1860).

3. An offence punishable under section 161 or section 165 of the Indian Penal Code (XLV of 1860) shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898 (V of 1898), notwithstanding anything to the contrary contained therein:

Provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class or make any arrest therefor without a warrant.

4. Where in any trial of an offence punishable under section 161 or section 165 of the Indian Penal Code (XLV of 1860) it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate:

Provided that the Court may decline to draw such presumption if the gratification or thing aforesaid is in its opinion so trivial that no inference of corruption may fairly be drawn.

5. (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code (XLV of 1860), or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), a police officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under sub-section (2) without the order of a Magistrate of the first class or make any arrest therefor without a warrant.

6. No Court shall take cognizance of an offence punishable under section 161 or section 165 of the Indian Penal Code (XLV of 1860) or under sub-section (2) of section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,—

(a) in the case of a person who is employed in connection with the affairs of the Federation and is not removable from his office save by or with the sanction of the Central Government or some higher authority, Central Government ;

(b) in the case of a person who is employed in connection with the affairs of a Province and is not removable from his office save by or with the sanction of the Provincial Government or some higher authority, Provincial Government ;

(c) in the case of any other person, of the authority competent to remove him from his office.

7. Any person charged with an offence punishable under section 161 or section 165 of the Indian Penal Code (XLV of 1860) or under sub-section (2) of section 5 of this Act shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial :

Provided that—

(a) he shall not be called as a witness except on his own request ;

(b) his failure to give evidence shall not be made the subject of any comment by the prosecution or give rise to any presumption against himself or any person charged together with him at the same trial,

(c) he shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such offence is admissible evidence to show that he is guilty of the offence with which he is charged, or

(ii) he has personally or by his pleader asked questions of any witness for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution, or

(iii) he has given evidence against any other person charged with the same offence."

THE PREVENTION OF SEDITIOUS MEETINGS ACT.

(Act No. X of 1911).

An Act to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity.

WHEREAS it is expedient to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity ; It is hereby enacted as follows :—

1. (1) This Act may be called the Prevention of Seditious Meetings Act, 1911.

(2) It extends to the whole of British India, but shall have operation only in such Provinces or Parts of Provinces as the Provincial Government may from time to time notify in the Official Gazette.

2. (1) The Provincial Government may by notification in the Official Gazette, declare the whole or any part of a Province, in which this Act is for the time being in operation, to be a proclaimed area.

(2) A notification made under sub-section (1) shall not remain in force for more than six months, but nothing in this sub-section shall be deemed to prevent the Provincial Government from making any further notifications in respect of the same area from time to time as it may think fit.

3. (1) In this Act, the expression "public meeting" means a meeting which is open to the public or any class or portion of the public.

(2) A meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission there to may have been restricted by ticket or otherwise.

4. (1) No public meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement, or for the exhibition or distribution of any writing or printed matter relating to any such subject, shall be held in any proclaimed area—
Notice to be given of public meetings.

(a) unless written notice of the intention to hold such meeting and of the time and place of such meeting has been given to the District Magistrate or the Commissioner of Police, as the case may be, at least three days previously; or

(b) unless permission to hold such meeting has been obtained in writing from the District Magistrate or the Commissioner of Police, as the case may be.

(2) The District Magistrate or any Magistrate of the first class authorised by the District Magistrate in this behalf may, by order in writing, depute one or more Police-officers, not being below the rank of Head Constable, or other persons, to attend any such meeting for the purpose of causing a report to be taken of the proceedings.
Power of Magistrate to cause report to be taken.

(3) Nothing in this section shall apply to any public meeting held under any statutory or other express legal authority, or to public meetings convened by a Sheriff, or to any public meetings or class of public meetings exempted for that purpose by the Provincial Government by general or special order.
Exception.

5. The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area, if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity.
Power to prohibit public meetings.

6. (1) Any person concerned in the promotion or conduct of a public meeting held in a proclaimed area contrary to the provisions of section 4 shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.
Penalties.

(2) Any public meeting which has been prohibited under section 5 shall be deemed to be an unlawful assembly within the meaning of Chapter VIII of the Indian Penal Code and of Chapter IX of the Code of Criminal Procedure, 1898.

7. Whoever, in a proclaimed area, in a public place or a place of public resort, otherwise than at a public meeting held in accordance with, or exempted from, the provisions of section 4, without the permission in writing of the Magistrate of the District or of the Commissioner of Police, as the case may be, previously obtained, delivers any lecture, address or speech on any subject likely to cause disturbance or public excitement to persons then present, may be arrested without warrant, and shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.
Penalty for delivery of speeches in public places.

8. No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class or Sub-divisional Magistrate shall try any offence against this Act.
Cognizance of offences.

9. [Repealed by Act XII of 1927, s. 2, and sch.]

THE SLAVE TRADE ACT.

(39 & 40 Vic., c. 46.)

[As amended by the Government of India (Adaptation of Indian Laws) Order, 1937.]

An Act for more effectually punishing Offences against the Laws relating to the Slave Trade.

WHEREAS under an Act passed in the Session holden in the thirty-second and thirty-third years of the reign of Her present Majesty, the Governor General of India in Council is empowered to make laws for Native Indian subjects of Her Majesty without and beyond British India :

And whereas under an Act passed in the Session holden in the twenty-eighth and twenty-ninth years of the reign of Her present Majesty, the Governor General of India in Council is empowered to make laws for all British subjects of Her Majesty

within the dominions of Princes and States in India in alliance with Her Majesty whether in the service of the Government of India or otherwise :

And whereas the several Princes and States in India in alliance with Her Majesty have no connexions, engagements, or communications with Foreign Powers, and the subjects of such Princes and States are, when residing or being in the places hereinafter referred to, entitled to the protection of the British Government, and receive such protection equally with the subjects of Her Majesty :

And whereas it is expedient to make provision for more effectually punishing offences against the laws relating to the slave trade by British subjects and other persons protected by the British Government in such places :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. If any person, being a subject of Her Majesty or of any Prince or State in India in alliance with Her Majesty, shall, upon the High Seas or in any part of Asia or Africa which Her Majesty may from time to time think fit to specify by any Order in Council in this behalf, commit any of the offences defined in ss. 367, 370, and 371 (in the schedule to this Act respectively recited) of Act XLV of 1860, passed by the Governor General of India in Council and called "The Indian Penal Code", or abet within the meaning of the fifth chapter of the said Penal Code the commission of any such offence, such person shall be dealt with, in respect of such offence or abetment, as if the same had been committed in any place within British India in which he may be or may be found.

2. If the Legislature of India shall amend the provisions of the said sections 367, 370, and 371 of the said Penal Code, or any of them, or the said fifth chapter thereof so far as relates to the abetment of any of the offences forbidden by such sections, or make any further provision for preventing or suppressing the making, buying, or selling of slaves or any of the offences comprised in the said three sections, the Secretary of State shall, unless Her Majesty has disallowed such amendment or further provision, lay a copy of the amending Act before each House of Parliament, and after the same shall have lain on the table of both Houses of Parliament for the space of forty days, it shall be lawful for Her Majesty, unless either House of Parliament shall present an address to Her Majesty to the contrary, to direct by Order in Council that the provisions of the first section of this Act shall apply to the law so amended or enlarged, and the same shall be applicable accordingly.

3. For the purpose of obtaining evidence of the commission of the offences made punishable by this Act or any Act of Parliament relating to slavery or the slave trade, every High Court in India shall have, as respects the persons in the first section of this Act referred to, and as respects any British colony, settlement, plantation, or territory, wherein any witness may be, the same powers as are conferred on the Court of Queen's Bench by the fourth section of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-eight, with respect to such British Colonies, settlements, plantations, and territories as are therein referred to.

And every High Court may, if it thinks fit, issue such commission as is mentioned in Chapter XL of the Indian Act V of 1898 called, "The Code of Criminal Procedure", to any consular officer of Her Majesty in the parts of Asia or Africa specified in any Order of Her Majesty in Council under section 1 of this Act, or to any political officer or agent of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States or of the Governor-General in the said parts or in the dominions of any Prince or State in India in alliance with Her Majesty, or to any Magistrate in British India, British Burma or Aden.

And the depositions taken by virtue of the said powers or under such commission shall be deemed by every court of original or appellate jurisdiction in India in any trial or proceeding under this Act or any Act of Parliament relating to slavery or the slave trade to be as good and competent evidence as if the witnesses deposing had been present and examined viva voce and had made oath or affirmation as required by law.

Application of Act
to Burma.

3A. (1) The provisions of this Act shall apply to Burma subject to the modifications specified in this section.

(2) In section one, for the words "of any Prince or State in India in alliance with Her Majesty" there shall be substituted the words "a native of any part of Burma not forming part of British Burma"; and for the words "British India", there shall be substituted the words "British Burma".

(3) In section two, for the words "the Legislature of India" there shall be substituted the words "the Burma Legislature".

(4) In section three, for the words "every High Court in India" there shall be substituted the words "the High Court at Rangoon"; for the words "And every High Court" there shall be substituted the words "And the High Court"; for the words from "agent of" to the words "alliance with her Majesty" there shall be substituted the words "agent of the Governor in the said parts"; and for the words "jurisdiction in India" there shall be substituted the words "jurisdiction in Burma".

(5) For any reference to the Indian Penal Code and for the reference to Chapter XL of the Code of Criminal Procedure there shall be substituted a reference to the Code or Chapter in question as adapted or modified under the Government of Burma Act, 1935, and in force as part of the law of Burma immediately after the commencement of that Act:

Provided that, if the Code of Criminal Procedure is repealed and re-enacted in Burma, either with or without modifications, the reference to the said Chapter XL shall be construed as a reference to the corresponding provisions of the re-enacted Code as for the time being in force in Burma.

Application of Act
to Aden.

3B. (1) The provisions of this Act shall apply to Aden subject to the modifications prescribed in the section.

(2) In section one, the words "or of any Prince or State in India in alliance with Her Majesty" shall be omitted and for the words "British India" there shall be substituted the word "Aden".

(3) In section two, for the words "the Legislature of India," there shall be substituted the words "any authority competent to make laws for Aden" after the word "unless", where it first occurs, there shall be inserted the words "(in the case of a law not made by Order in Council)" and for the words "amending Act" there shall be substituted the words "amending law."

(4) In section three, for the words "every High Court in India" there shall be substituted the words "the Supreme Court of Aden," for the words "And every High Court" there shall be substituted the words "And the Supreme Court"; for the words from "agent of" to the words "alliance with Her Majesty" there shall be substituted the words "agent of the Governor in such parts," and for the words "jurisdiction in India" there shall be substituted the words "jurisdiction in or for Aden".

(5) Any reference to the Indian Penal Code shall be construed as a reference to that Code as in force in Aden immediately after the commencement of the Aden Colony Order, 1936, and the reference to Chapter XL of the Code of Criminal Procedure shall be construed as a reference to that Chapter as for the time being in force in Aden, or, if the said Code is repealed and re-enacted in Aden, either with or without modifications, as a reference to the corresponding provisions of the re-enacted Code as for the time being in force in Aden.

4. And whereas by certain Orders of Her Majesty in Council made by virtue of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-four, which Orders are dated respectively the ninth August one thousand eight hundred and sixty-six and the fourth November one thousand eight hundred and sixty-seven, it is ordered that the provisions of such Orders relating to British subjects, shall extend and apply to all subjects of Her Majesty, whether by birth or by naturalisation, and also to all persons enjoying Her Majesty's protection in the several dominions mentioned in such Orders respectively.

Subjects of certain
Indian Princes made
amenable to certain
Orders in Council.

It is hereby declared and enacted that for the purposes of the said Orders in Council, and of any Orders in Council which Her Majesty may hereafter think fit to make by virtue of the said Act of the sixth and seventh years of Her Majesty's reign, chapter ninety-four, all subjects of the several Princes and States in India in alliance

with Her Majesty, residing and being in the several dominions comprised in such Orders respectively, are and shall be deemed to be persons enjoying Her Majesty's protection therein.

NOTE.

By an Order in Council, dated April 30, 1877,¹ this statute is extended to the following parts of Asia and Africa :—

- (a) The territories of the Khan of Khelat and of the Sultan of Muscat in Mekran and Arabia.
- (b) The coasts of Baluchistan and of the Bunder Abbas Districts and the shores of the Persian Gulf.
- (c) The coasts of Arabia from Ras Mussendom to Cape Bal-el-Mandeb.
- (d) The territories of the following tribes near Aden, viz. :—

The Abdali	The Howshahi	The Subahi
The Foodli	The Alawi	The Gafai
The Akrahi	The Amir	The Oulaki
- (e) The Coast of Africa from Ras Sejarne to Delabon Bay.
- (f) The territories of the Sultan of Zanzibar.
- (g) The sea and islands within ten degrees of latitude and longitude from such coast and shores respectively.

By the Slave Trade Offences (India) Order in Council, dated 14th October 1913, this Act is made applicable to the territories of the Kaiti, Wahidi, Behan, Audali and Beda tribes near Aden, and to the territories of the Mahri tribe of Kishin and Socotra.²

S. 5. [*Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.*]

6. Save as aforesaid, nothing in this Act shall be deemed to affect any Order made or to be made by Her Majesty in Council by virtue of the said Act of the sixth and seventh years of Her Majesty, chapter ninety-four.

Not to affect Orders made under 6 and 7 Vict., c. 94.

SCHEDULE.

[Sections 367, 370 and 371, of the Indian Penal Code, reproduced.]

THE TERRITORIAL WATERS JURISDICTION ACT, 1878.

(41 & 42 Vic., c. 73.)

[As adapted and modified by the Government of India (Adaptation of Indian Laws) Order, 1937.]

AN Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions :

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coast of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

¹ Published in the *London Gazette*, No. 24466, p. 3447, on June 1, 1877.

² *Gazette of India*, 1913, Part I, p. 1112.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreignship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Amendment of the law as to the jurisdiction of the Admiral.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence is as declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any Court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

Restriction on institution of proceedings for punishment of offence.

4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Provisions as to procedure.

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

Saving as to jurisdiction.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

Saving as to piracy.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them: that is to say,

Definitions.

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

"Jurisdiction of the Admiral":

"United Kingdom": "United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands :

"Territorial waters of Her Majesty's dominions": "The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions :

"Governor": "Governor," as respects India, means the Governor General; and as respects a British possession which consists of several constituent colonies, means the Governor General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the Government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor" :

"Offence": "Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force :

"Ship": "Ship" includes every description of ship, boat, or other floating craft :

"Foreign ship": "Foreign ship" means any ship which is not a British ship.

THE WHIPPING ACT.

(Act No. IV of 1909).

An Act to consolidate and amend the law relating to the punishment of whipping.
WHEREAS it is expedient to consolidate and amend the law relating to the punishment of whipping; It is hereby enacted as follows :—

Short title and extent. 1. (1) This Act may be called the Whipping Act, 1909 ; and

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Santhal Pargans.

Whipping added to punishments described in Act XLV. 1860. 2. In addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to the punishment of whipping.

NOTE.

The Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment.¹

Offences punishable with whipping in lieu of other punishment.

3. Whoever commits any of the following offences, namely :—
(a) theft, as defined in s. 378 of the Indian Penal Code other than theft by a clerk or servant of property in possession of his master ;

(b) theft in a building, tent or vessel, as defined in s. 380 of the said Code ;

(c) theft after preparation for causing death or hurt, as defined in s. 382 of the said Code ;

(d) lurking house-trespass, or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section ;

¹ *Maniruddin v. Gaur Chandra Shamadar*, (1871) 7 Beng. L. R. 163, 15 W. R. (Cr.) 89,

P.B.; (1870) 5 M. H. C. (Appx.) 18.

(e) lurking house-trespass by night, or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section; may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code.

NOTE.

Under this section the offender in lieu of punishment provided by the Penal Code may be punished with whipping. The punishment under the Penal Code cannot be inflicted in addition to whipping.² Under the next section the offender may be punished with whipping in lieu of or in addition to any other punishment to which he may be liable.

Double sentences of whipping are not contemplated by this Act. Concurrent sentences of whipping on conviction for two offences at one trial are also illegal.³ The word 'concurrent' properly applies only to sentences of imprisonment. If it were applied to sentences of whipping, the literal meaning would be that the accused was to be flogged by two operators simultaneously.⁴

There is no age limit for whipping for an offence of theft. The limit of age is prescribed generally by the Criminal Procedure Code under s. 393, which in the case of males is over forty-five years of age, while in the Whipping Act itself s. 5 refers to juvenile offenders who, according to the Explanation to that section, are offenders under sixteen years of age. These sections should be read together along with the provisions of the Criminal Procedure Code which relate to whipping.⁵

Clause (b).—Sentence of whipping cannot be inflicted in the case of an attempt to commit an offence under this clause.⁶

Charge.—When punishment is inflicted under this Act, the charge must state the liability and the judgment should set out the grounds thereof.⁷

Offences punishable with whipping in lieu of or in addition to other punishment.

4. Whoever—

(a) abets, commits or attempts to commit, rape, as defined in s. 375 of the Indian Penal Code;

(b) compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in s. 377 of the said Code;

(c) voluntarily causes hurt in committing or attempting to commit robbery, as defined in s. 390 of the said Code;

(d) commits dacoity as defined in s. 391 of the said Code;

may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence, abetment or attempt be liable under the said Code.

NOTE.

This section must be read subject to ss. 391 and 393 of the Code of Criminal Procedure. Under the former section no accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months. Under the latter section certain exemptions are specified.

Juvenile offenders when punishable with whipping.

5. Any juvenile offender who abets, commits or attempts to commit—

(a) any offence punishable under the Indian Penal Code, except offences specified in Chapter VI and in sections 153A and 505 of that Code and offences punishable with death, or

(b) any offence punishable under any other law with imprisonment which the Provincial Government may, by notification in the Official Gazette, specify in this behalf,

may be punished with whipping in lieu of any other punishment to which he may for such offence, abetment or attempt be liable.

Explanation.—In this section the expression "juvenile offender" means an offender whom the Court, after making such enquiry (if any) as may be deemed necessary, shall find to be under sixteen years of age, the finding of the Court in all cases being final and conclusive.

² *Dagadu*, (1891) 16 Bom. 357.

³ *Venkataswamy*, [1937] Ran. 386.

⁴ *Veerappa*, (1937) 88 Cr. L. J. 1013, [1937] AIR (R) 310.

⁵ *Achar*, [1940] Kar. 477.

⁶ *Munshi Ram*, [1937] A. L. J. R. 944, 39

Cr. L. J. 283, [1938] AIR (A) 16.

⁷ *Badiya*, (1882) 5 Mad. 158.

NOTE.

This section is not intended to override the provisions of ss. 3 and 4 which apply to juvenile offenders and which specify certain offences only for which whipping may be inflicted; but under this section a juvenile offender may be punished with whipping for an offence mentioned in clauses (a) and (b).

The sentence of whipping under this section may be passed in lieu of and not in addition to any other punishment to which the accused may be liable.

The following notification has been issued by the Governor General in Council in pursuance of clause (b)—

No. 1008.—In exercise of the powers conferred by s. 5, clause (b), of the Whipping Act, 1909 (IV of 1909), and in supersession of the Home Department Notification No. 1650, dated September 27, 1920, the Governor General in Council is pleased to specify the offences under the enactments and rules mentioned in the schedule hereto annexed, being offences punishable under the said enactments and rules with imprisonment, as offences for the abetment or commission of, or attempt to commit which, juvenile offenders may be punished with whipping in accordance with the provisions of the said section.*

SCHEDULE.

GENERAL ACTS.

1. The Police Act, 1861, (V of 1861), section 34.
2. The Public Gambling Act, 1867 (III of 1867), sections 4, 18 and 15.
3. The Cattle Trespass Act, 1871 (I of 1871), section 24.
4. The Northern India Canal and Drainage Act, 1878 (VIII of 1873), section 70, clauses (f) and (g).
5. The Opium Act, 1878 (I of 1878), section 9.
6. The Indian Forest Act, 1878 (VII of 1878), sections 25, 32 and 32 and rules made under section 41, for the infringement of which imprisonment is prescribed as a penalty.
7. The Indian Arms Act, 1878 (XI of 1878), sections 19, 20, 22 and 23.
8. The Indian Salt Act, 1882 (XII of 1882), sections 9 and 10.
9. The Indian Telegraph Act, 1885 (XIII of 1885), sections 24 and 25.
10. The Indian Railways Act, 1890 (IX of 1890), sections 126, 127, 128 and 129.
11. The Prevention of Cruelty to Animals Act, 1890 (XI of 1890), sections 3, 4 and 5.
12. The Prisons Act, 1894 (IX of 1894), section 42.
13. The Excise Act, 1896 (XII of 1896), sections 45, 46, 49 and 51.
14. The Indian Fisheries Act, 1897 (IV of 1897), sections 4 and 5.
15. The Reformatory Schools Act, 1897 (VIII of 1897), sections 27 and 28.
16. The Indian Post Office Act, 1898 (VI of 1898), sections 61, 62 and 68.
17. The Ancient Monuments Preservation Act, 1904 (VII of 1904) section 16.
18. The Indian Electricity Act, 1910 (IX of 1910), section 40.
19. The Criminal Tribes Act, 1911 (III of 1911), sections 21, 22 and 24.
20. The Cantonment Code, 1912, s. 67 (i).

LOCAL ACTS.

Madras.

1. The Madras District Police Act, 1859 (XXIV of 1859), section 47.
2. The Madras Forest Act, 1882 (Madras Act V of 1882), sections 21, 28 and 50 and rules

made under sections 26 and 35, for the infringement of which imprisonment is prescribed as a penalty.

3. The Madras Abkari Act, 1886 (Madras Act I of 1886), sections 53 and 58.
4. The Madras City Police Act, 1888 (Madras Act III of 1888), sections 46, 53, 64, 65, 67, 68, 71, 72 and 75.
5. The Towns Nuisances Act, 1889 (Madras Act III of 1889), sections 3, 5 and 7.
6. The Madras Salt Act, 1889 (Madras Act IV of 1889), section 74.

Bombay.

1. The Bombay Abkari Act, 1878 (Bombay Act V of 1878), sections 43 and 48.
2. The Bombay Prevention of Gambling Act, 1887 (Bombay Act IV of 1887), sections 5 and 12.
3. The Bombay District Police Act, 1890 (Bombay Act IV of 1890), sections 62, 70 and 71.
4. The City of Bombay Police Act, 1902 (Bombay Act IV of 1902), section 122.

Bengal.

1. The Howrah Offences Act, 1857 (XXI of 1857), section 20.
2. The Calcutta Suburban Police Act, 1886 (Bengal Act II of 1886), section 41.
3. The Calcutta Police Act, 1866 (Bengal Act IV of 1866), section 68.
4. The Bengal Public Gambling Act, 1867 (Bengal Act II of 1867), sections 4, 11 and 18.
5. The Bengal Irrigation Act, 1876 (Bengal Act III of 1876), section 98.
6. The Bengal Embankment Act, 1882 (Bengal Act II of 1882), section 77.
7. The Bengal Excise Act, 1909 (Bengal Act V of 1909), sections 46 and 52.

United Provinces.

1. The United Provinces Excise Act, 1910 (United Provinces Act IV of 1910), sections 60, clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), and 63.

Punjab.

1. The Punjab Land Preservation (Chos) Act, 1900 (Punjab Act II of 1900), section 19.

June 18, 1921, Part I, p. 872.

* Notification No. 1008, Home Department, Judicial, dated June 8, 1921, *Gazette of India*,

2. The Punjab Excise Act, 1914 (Punjab Act I of 1914), section 61, sub-section (1), clauses (a) and (c), and sub-section (2), clauses (a), (b) and (c).

Burma.

1. The Burma Gambling Act, 1899 (Burma Act I of 1899), sections 10, 11 12 and 13.

2. The Rangoon Police Act, 1899 (Burma Act IV of 1899), sections 30, 31 and 42.

3. The Burma Forest Act, 1902 (Burma Act IV of 1902), section 55, clause (b).

4. The Burma Salt Act, 1917 (Burma Act II of 1917), sections 9, 10, 13 and 15.

5. The Burma Excise Act, 1917 (Burma Act V of 1917), sections 30, 31, 32, 33 and 34.

Bihar and Orissa.

1. The Bengal Embankment Act, 1855 (XXXII of 1855), sections 10 and 17.

6. Whenever any Provincial Government has, by notification in the Official Gazette, declared the provisions of this section to be in force in any frontier district or any wild tract of country within the jurisdiction of such Provincial Government, any person who in such district or tract of country after such notification as aforesaid commits any offence punishable under the Indian Penal Code with imprisonment for three years or upwards, may be punished with whipping in lieu of any other punishment to which he may be liable under the said Code.

Special provision as to punishment with whipping in frontier districts.

7. [Repealed by Act I of 1938, s. 2 and Sch.]

8. [Repealed by Act XVII of 1914, s. 3 and Sch. II].

THE SCHEDULE.

[Repealed by Act XVII of 1914, s. 3 and Sch. II.]

THE BOMBAY (EMERGENCY POWERS) WHIPPING ACT.

(Bom. Act. No. XXVII of 1947).

WHEREAS in view of the provisions of sub-section (4) of section 93 of the Government of India Act, 1935, it is expedient to re-enact the provisions of the Bombay (Emergency Powers) Whipping Act, 1941;

AND WHEREAS it is expedient to amend further the law relating to the punishment of whipping in the Province of Bombay; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Bombay (Emergency Powers) Whipping Act, 1947.

(2) It extends to the whole of the Province of Bombay.

(3) This section and section 4 shall come into force at once. The Provincial Government may, by notification in the *Official Gazette*, direct that section 2 or section 3 shall come into force in such area and from such date as may be specified in such notification.

2. In addition to the persons who may be punished with whipping under section 4 of the Whipping Act, 1909, whoever commits or abets the commission of any offence punishable under sections 147, 148, 324, 325, 326, 435 or 436 of the Indian Penal Code may be punished with whipping in addition to any punishment to which he may be liable for such offence or for abetment of such offence under the said Code.

Punishment of whipping for certain offences.

Punishment for certain offences punishable under Bom. IV of 1902 and Bom. IV of 1890.

3. (1) Whoever—

2. The Bengal Embankment Act, 1882 (Bengal Act II of 1882), section 77.

3. The Bihar and Orissa Excise Act, 1915 (Bihar and Orissa Act II of 1915), sections 47 and 55.

Central Provinces.

1. The Central Provinces Excise Act, 1915 (Central Provinces Act II of 1915), sections 34, clauses (a), (b), (c), (d), (f), (g), (h) and 36.

Delhi.

1. Section 61, sub-section (1), clauses (a) and (c) and sub-section (2), clauses (a), (b) and (c) of the Punjab Excise Act, 1914 (Punjab Act I of 1914), as applied to the Delhi Province by Government of India notifications No. 3246-39 dated May 2, 1914, and No. 16272, dated October 30, 1915.

(a) commits an offence punishable under clause (a) of section 112 of the City of Bombay Police Act, 1902 (hereinafter called the said Act) or

(b) is punishable under clause (b) or clause (c) of section 122 of the said Act—

(i) for behaving in a riotous manner, or

(ii) for using any threatening words or gestures whereby a breach of the peace or public nuisance may be occasioned,
may be punished with whipping in lieu of any punishment to which he may be liable for such offence under the said Act.

(2) Whoever commits an offence punishable under clause (a) of section 61D of the Bombay District Police Act, 1890, may be punished with whipping in lieu of any punishment to which he may be liable for such offence under the said Act.

Repeal of Bom. XI
of 1941.

4. The Bombay (Emergency Powers) Whipping Act, 1941,
is hereby repealed.

TITLE BENGAL WHIPPING ACT.

(BENGAL ACT NO. X OF 1936.)

An Act to make certain offences against women punishable with whipping.

WHEREAS it is expedient to make certain offences against women punishable with whipping;

And whereas the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of this Act:

It is hereby enacted as follows:—

Short title and
extent.

1. (1) This Act may be called The Bengal Whipping Act,
1936.

(2) It extends to the whole of Bengal.

2. Whoever—

Offences punishable
with whipping in lieu
of or in addition to
other punishment.

(a) being a member of an assembly of two or more persons the common object of which is to commit an offence punishable under section 366 of the Indian Penal Code, abets, commits or attempts to commit such offence, or

(b) abets, commits or attempts to commit in respect of any female person any offence punishable under section 366A, 366B, 367, 372, or 373 of the said Code; may be punished with whipping in lieu of or in addition to any other punishment to which he may for such abetment, offence or attempt be liable under the said Code.

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